Nos. 24A884, 24A885, 24A886

In the Supreme Court of the United States

DONALD J. TRUMP ET AL., Applicants,
v.
CASA, INC., ET AL., Respondents.

DONALD J. TRUMP ET AL., Applicants,
v.
WASHINGTON, ET AL., Respondents.

DONALD J. TRUMP ET AL., Applicants,
v.
NEW JERSEY ET AL., Respondents.

ON APPLICATION FOR PARTIAL STAYS OF THE INJUNCTIONS ISSUED BY THE UNITED STATES DISTRICT COURTS FOR THE DISTRICT OF MARYLAND, THE WESTERN DISTRICT OF WASHINGTON, AND THE DISTRICT OF MASSACHUSETTS

BRIEF AMICUS CURIAE OF THE NATIONAL IMMIGRANT JUSTICE CENTER IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE

The ***National Immigrant Justice Center*** (NIJC) is a nonprofit legal services organization. NIJC's legal staff and its network of approximately 2000 pro bono attorneys represent noncitizens and U.S. citizen relatives of noncitizens in naturalization proceedings, removal proceedings and other immigration-related matters.[1]

SUMMARY OF THE AMICUS ARGUMENT

The Government has told the Court that this case is an ideal vehicle for addressing federal court authority to enter injunctions which apply beyond the parties, because the case does not involve the Administrative Procedure Act (APA) and because the Government is not challenging the substantive merits of the decisions below. Reply in Support 11. It is true that those factors tend to isolate the legal issue raised by the Government, to render it an abstract legal question. However, that combination of factors also creates a uniquely large downside. Granting the Government's application would tie the hands of the judicial branch in the face of unlawful executive action.

First, the Government argues that this case is a particularly good vehicle because it involves an injunction against the President, rather than an agency case which would implicate the APA. Boiled down to its essence, the argument is that as long as the President himself takes unconstitutional action, the executive may not be broadly restrained. To state the question should suffice to illustrate the stakes involved. The Government is proposing a sweeping rule that courts can never enjoin unconstitutional acts of the President except by a narrow injunction aimed at the specific litigants. Such a context is hardly optimal as a vehicle to resolve the sweeping procedural claims of the Government. It is so suboptimal as to suggest that the

Government sought review of these procedural questions in this case for reasons other than the supposedly perfection of the case as a vehicle. The substantive legal issue implicated presents no circuit split, and there is no particular reason why the Court would take up this issue now; other than the desire of the President. By seeking the Court's review over the procedural issue, the Government sought to bring the substantive issue in through the back door. The Court should decline to allow itself to be used thusly. This case is a suboptimal vehicle for addressing the procedural issue; the Court may wish to vacate the oral argument order, and to deny the application without argument.

Second, the Government asks the Court to entertain its procedural argument without raising a substantive legal challenge to the lower court findings that the challenged actions were unlawful and unconstitutional. Stated another way, the Court is asked to assume *arguendo* the unconstitutionality of these executive actions, and to hold that *even if* they were unconstitutional, the courts may not enjoin them in ways that reach beyond the parties to the litigation. Again, this assumption may produce clear legal questions, but it does so at the risk of turning the case into a weapon against the republic.

The Court need not overlook the context in which the plethora of injunctions entered against recent executive and agency actions were entered. This is not merely, or principally, a question of whether one approves of the energetic activity of the current administration. The Founders expected these sorts of major changes and governmental restructuring to have at least the imprimatur of Congress. In the face of legislative inaction, recent presidents of both parties have sought to reinterpret (or ignore, or violate) longstanding rules and statutes in order to

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[1] Pursuant to Rule 37.6, Amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than Amicus and its counsel made a monetary contribution to its preparation or submission.

achieve various policy ends. The impetus may be understandable, but agency rulemaking lacks the checks and balances established by the Founders for legislation, and requires none of the broad consensus required for laws to pass both houses and be signed into law. The Government posits a crisis when courts delay or enjoin executive action. To the contrary, the true crisis would be if courts were barred from restraining such action when it is unlawful or unconstitutional. Insulating executive actions from judicial oversight would all but remove the legislative power from Congress, at the same time allowing this and future administrations a free hand to say what the law is and to put its diktats into effect.

The Court need not assume bad faith to recognize that adopting the Government's suggestion would leave a chink in the armor of this democratic republic. Even if many executive actors would find themselves constrained by their oath to protect and defend the constitution, the recognized ability to take unlawful or unconstitutional action, knowing it cannot be broadly restrained, would in time certainly lead to executive actions which approach, and trespass, the line of legality, until that line becomes erased or unimportant.

ARGUMENT

I. Unconstitutional Presidential Action is an Improvident Context to Address Injunctions Affecting Nonparties.

This case involves a challenge to Exec. Order No. 14,160, 90 Fed. Reg. 8449 (Jan. 29, 2025) (hereinafter EO or Order). The Government argues that since the President is not an "agency," and his actions cannot be reviewed under the APA, these cases are "particularly good vehicles for considering whether universal relief comports with Article III and traditional principles of equity." Application for a Partial Stay 20 n.2. This is deeply wrong.

A head-on confrontation between a Presidential order and the federal courts is a fraught context for addressing federal court injunctive authority. The Court has indeed passed on the constitutionality of presidential actions, when such review was unavoidable. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579 (1952); *Panama Refining Co. v. Ryan*, 293 U. S. 388 (1935). But weighty considerations unique to that context would impact the abstract legal question. On the one hand, separation of power principles "counsel caution when judges consider an order that directly requires the President properly to carry out his official duties," *Clinton v. Jones*, 520 U.S. 681, 718 (1997) (Breyer, J., dissenting). On the other hand, to find the President wholly or partly immune from judicial review would undercut the rule of law; some review must presumably be available. *Marbury v. Madison*, 1 Cranch 137, 163 (1803) ("[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws."). It has been suggested that the Court may need to pass on these matters at some point, *United States v. Texas*, 599 U.S. 670, 701-02 (2023) (Gorsuch, J., joined by Thomas and Barrett, J.J., concurring in the judgment), but the argument that these matters are a "particularly good vehicle[]" to decide such a recurring procedural question is at best dubious.

The Government's claim that this presents a uniquely good vehicle must be understood in the context of its zealous substantive defense of the President's birthright citizenship EO. Given the lack of a split of authority on the merits question, there was no natural route to seek this Court's review. Further, the Government could offer no particular reason for the Court to revisit these long-settled questions about birthright citizenship now. The Solicitor General's office is highly expert in addressing vehicle considerations before this Court. Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. Rev. 1323, 1336 (2010). It appears that the Government realized that it

could leverage the Court's interest in resolving the procedural issue as a way to bring the substantive matter before the Court through the "back door."

Amicus respectfully suggests that the Court may wish to vacate its order setting this case for oral argument, as improvidently granted. Resolving these significant questions without full briefing, at the end of the term, certainly increases the risk of error. *Dep't of Educ. v. California*, 145 S. Ct. 966, 969 (2025) (Kagan, J., dissenting). The Court should find its oral argument order improvidently entered, and deny the Government's application for relief for the reasons previously offered by Respondents.

II. Energetic Executive Action By Its Nature Requires No Consensus, Does Not Proceed Gradually, and Thus May Undermine Settled Expectations.

In the area of immigration, American public opinion is divided, as are the political parties.[2] Immigration legislation has frequently been proposed, but only rarely have statutory changes been enacted into law. *See*, *e.g.*, REAL ID Act of 2005, §§ 101-106, 119 Stat. 310. As has been observed elsewhere, "[m]ustering the broad social consensus required to pass new legislation is a deliberately hard business under our Constitution." *McGirt v. Oklahoma*, 591 U.S. 894, 903 (2020).

By contrast, the Presidency is designed for "energetic" action, not slowed by a "diversity of views and opinions." The Federalist No. 70, at 476 (A. Hamilton) (Clinton Rossiter ed., 1961) (quoted at *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 223-24 (2020)). The President need muster no "broad social consensus" to issue Executive Orders nor to direct his subordinates to promulgate rules. *Cf. McGirt*, 591 U.S. at 903. In the immigration area, as in

other areas, changes of administration have frequently been accompanied by changes in priority and approach. *See*, *e.g.*, *Biden v. Texas*, 597 U.S. 785, 793 (2022).

The diversity of approach between the legislative and executive was designed by the Framers. But in recent years, it appears that increased partisan polarization inside and outside of Congress has deepened legislative gridlock. See Matthew H. Graham & Milan W. Svolik, *Democracy in America? Partisanship, Polarization and the Robustness of Support for Democracy in the United States*, 114 AM. POL. SCI. REV. 392, 393 (2020); Sarah A. Binder, *Stalemate: Causes and Consequences of Legislative Gridlock* 11-18 (2003). The result: without a societal consensus, embodied in legislation, the only new government actions are executive decisions that swing back and forth every four to eight years.

More, as time passes since the last date when Congress enacted statutory law, the executive branch has repeatedly proposed interpretations of statutes that run the gamut from interesting to flawed to plainly incorrect to nearly frivolous. *See infra* at 8-9. It is the nature of the executive branch to seek to solve the problems that it perceives. Its very energy is directed toward such goals. The effect of those efforts, if combined with legislative inaction, is to transfer authority from the legislative branch to the executive, leaving this Court to decide whether the executive's rules are permissible. The more leeway that the courts give to novel executive actions, the more power shifts toward the executive.

As executive actions take more liberties with the statutory text, becoming more legislative in nature, they also matter more for the citizenry. Rather than nibbling around the edges of statutes written by Congress, the executive actions come to dwarf all else; they matter

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[2] Compare Democratic National Committee, *'24 Democratic Party Platform* 65-70,https://democrats.org/wp-content/uploads/2024/08/FINAL-MASTER-PLATFORM.pdf, with

more than old statutes whose relevance may have partly faded. Executive changes frequently affect settled expectations and reliance interests. *See Dep't of Homeland Sec. v. Regents of the Univ. of California*, 591 U.S. 1, 30 (2020). Amicus does not suggest that the mere fact that some people find themselves harmed by government changes is a reason to preclude such change. The point is simply that the importance of executive interpretations and actions explains why litigants so frequently call upon courts to opine on the legality of those actions.

III. Limiting Authority to Enjoin Unconstitutional Presidential Actions Would Create a Democratic Vulnerability.

The Government expresses frustration that federal court injunctions may limit its activity outside of the federal court district in which they were entered. Application for a Partial Stay 3 (claiming that universal injunctions have "reached epidemic proportions"). But the Government does not now request the Court's review of the merits issue. Amicus recognizes that the Government is not conceding the lack of merit in its novel reading of the statute and constitution; yet the upshot is to ask the Court to assume *arguendo* the unconstitutionality of the EO at issue, while asking the Court to adopt forward- and backward-looking rules limiting injunctive relief.

Injunctive relief may be appropriate even in close cases. For instance, the prior administration was enjoined by the lower court from implementing a loan forgiveness program which this Court later found unlawful. *Biden v. Nebraska*, 600 U.S. 477, 507 (2023). Several members of the Court dissented, reading the statute to permit the administration's sweeping plan; so there were arguments on both sides of the question. *See id*. at 521-49. Had the lower courts not enjoined the forgiveness plan, the government would have forgiven billions of dollars in loans, with "irreversible impact." *Nebraska v. Biden*, 52 F.4th 1044, 1047 (8th Cir. 2022).

The American Presidency Project, *2024 GOP Platform Make America Great Again!*,

But the Government does not merely contend that courts ought not issue injunctions in close cases, or that issuance in such cases would be an abuse of discretion. *Compare. Arizona v. Biden*, 40 F.4th 375, 396 (6th Cir. 2022) (Sutton, C. J., concurring) (suggesting that district court considering nationwide injunctive relief should "think twice—and perhaps twice again—before granting" such relief). To the contrary, the Government advances the sweeping claim that courts may not enjoin executive actions, even if they appear clearly or concededly unconstitutional.

To the extent that federal courts disclaim the ability to enjoin illegal executive action broadly, that could create perverse incentives for the Executive. For instance, if the Court found a presidential action unlawful, but did not impose injunctive relief beyond the individual parties, a president who disagreed with the Court's judgment would not violate any Court order were he to repeatedly and continuously apply his unlawful directive to other individuals. In that scenario, as months passed, affected individual would have to sue to vindicate their rights, while the President and his subordinates would continue registering his disagreement with the Court's decision. The courts would be forced to repeatedly reject (possibly popular) executive actions. While efforts to restrict nationwide injunctions may appear to have a modest goal of avoiding inter-branch conflict, they could instead lead to a longrunning game of constitutional chicken.

The Court need not ignore the large number of enjoined executive acts found to be illegal in recent years. Looking only to very recent matters, the White House punished the Associated Press for refusing to refer to the Gulf of Mexico as the "Gulf of America,"[3] and has punished

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https://www.presidency.ucsb.edu/documents/2024-republican-party-platform.

[3] *Associated Press v. Budowich*, __ F.Supp.3d __, 2025 WL 1039572, at *10 (D.D.C. Apr. 8, 2025) ("the Government has been brazen about [viewpoint discrimination]. Several high-ranking officials have repeatedly said that they are restricting the AP's access precisely because of the organization's viewpoint.").

multiple law firms for having disfavored clients or attorneys.[4] If the Court declares in advance that it can afford no broad remedy to address illegal executive action, it may find that such an approach, far from avoiding conflict with the Executive, invites executive actions that get closer to the edge, or even cross over into conceded illegality or matters already found to be unconstitutional.

The Court may wish to consider, in a future case, the appropriate standards for granting broad relief. For instance, the Court may wish to consider whether to adopt a presumption against broad relief, or to provide direction for lower courts attempting to discern whether such relief is necessary to provide effective relief for the litigants. In this case, the Government has argued for a sweeping rule, and there is little briefing addressing any of these other possibilities. The Court should decline the Government's invitation and save the procedural questions for another case.

CONCLUSION

The Court should reject the Government's invitation to adopt a sweeping prohibition on relief that applies more broadly than the Petitioners seeking the injunction.

Respectfully Submitted: Date: April 29, 2025

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[4] *Wilmer Cutler Pickering Hale & Dorr LLP v. Exec. Off. of the President*, No. 25-CV-917 (RJL), 2025 WL 946979, at *1 (D.D.C. Mar. 28, 2025) ("retaliatory actions based on perceived viewpoint" are barred by the First Amendment, and "[t]he retaliatory nature of the Executive Order at issue here is clear from its face");