No. 19-454

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

v.

COMMONWEALTH OF PENNSYLVANIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR NICHOLAS BAGLEY AND SAMUEL L. BRAY AS AMICI CURIAE SUPPORTING PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici curiae are professors of law who have expertise that bears directly on one of the questions before this Court: Whether the court of appeals erred in affirming a nationwide preliminary injunction barring implementation of the final rules challenged by respondents.

[1] All parties have consented to the filing of this brief, and copies of their letters of consent are on file with the Clerk's Office. No counsel for a party has written this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than amici curiae or their counsel, has made a monetary contribution to this brief's preparation or submission.

Amici curiae are:

Nicholas Bagley, Professor of Law, University of Michigan Law School.[2]

Samuel L. Bray, Professor of Law, Notre Dame Law School.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case squarely raises the propriety of an accelerating trend in the lower federal courts—issuing injunctions that extend beyond the parties to bar enforcement of a challenged federal law or policy across the Nation. These injunctions are variously called "national," "universal," or "nationwide." They are inconsistent with the proper role of the federal courts in our constitutional structure and they have no basis in traditional equity practice. They also lead to adverse practical consequences, both for the judicial system and for the federal government's ability to do its work.

Amici take no position on the merits of the rules challenged by respondents in this case. If this Court reaches the question of remedy, however, it should reverse the court of appeals' affirmance of the national injunction.

ARGUMENT

I. FEDERAL COURTS LACK AUTHORITY TO ISSUE NATIONAL INJUNCTIONS

A. National Injunctions Are Legally Unsound

By granting relief beyond what is necessary to remedy "the inadequacy that produced the injury in fact that [a] plaintiff has established," *Gill* v.

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[2] Institutional affiliations are provided for identification purposes only.

Whitford, 138 S. Ct. 1916, 1931 (2018) (citation omitted), national injunctions stray beyond the federal courts' proper role in our constitutional system. They also transgress the principle that a court of equity will not "go beyond the case before it." *Conway* v. *Taylor's Ex'r*, 66 U.S. (1 Black) 603, 632 (1861). From a historical perspective, moreover, national injunctions are novel. That conclusion underscores the absence of authority to issue them: Article III authorizes federal courts to resolve "cases and controversies of the sort *traditionally* amenable to, and resolved by, the judicial process," *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 102 (1998) (emphasis added), and the federal courts' statutory authority to grant equitable relief generally encompasses only relief "traditionally accorded by courts of equity," *Grupo Mexicano de Desarrollo, S. A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 (1999).

1. National injunctions lack any basis in the equity tradition

a. National injunctions are novel

National injunctions are new. There were no national injunctions in English equity. Nor were there any for at least the first century of the United States. The first clear instance of a national injunction—at least the first one that was not reversed by this Court—came in 1963. See *Wirtz* v. *Baldor Elec. Co.*, 337 F.2d 518, 534-535 (D.C. Cir. 1963).

The national injunction's novelty is underscored by its absence in the New Deal era. Even as the federal courts issued thousands of injunctions and other writs prohibiting enforcement of New Deal statutes and agency actions, no national injunctions were granted or even sought. See, *e.g.*, Samuel L. Bray, *Multiple*

Chancellors: Reforming the National Injunction, 131 Harv. L. Rev. 417, 433-435 (2017) (Bray, *Multiple Chancellors*); Barry Cushman, *The Judicial Reforms of 1937*, 61 Wm. & Mary L. Rev. (forthcoming 2020); cf. Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 Harv. L. Rev. 920, 1002 n.531 (2020) (Sohoni, *Lost History*) (offering explanations for the absence of national injunctions in the New Deal era). Thousands of successful plaintiffs would not have overlooked this remedial nuclear bomb if they believed it to be available. Cf. Robert H. Jackson, *The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics* (1941) (offering a comprehensive critique of the use of injunctions against federal officers enforcing New Deal statutes, without ever mentioning a national injunction).

Beginning in 1963, however, there was a halting and seemingly accidental development of the national injunction. See Bray, *Multiple Chancellors* 437-444. Some judicial attention was drawn to the subject in the 1980s and 1990s, with opinions either more or less supportive of the national injunction. *E.g.*, *Bresgal* v. *Brock*, 843 F.2d 1163, 1168-1172 (9th Cir. 1987) (more supportive); *Virginia Soc'y for Human Life, Inc.* v. *Federal Election Comm'n*, 263 F.3d 379, 392-394 (4th Cir. 2001) (less supportive). In the D.C. Circuit, as preenforcement challenges became routine, there was growing acceptance of national injunctions in successful suits challenging agency rulemaking. See, *e.g.*, *Harmon* v. *Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989). Even there, however, the court recognized that federal agencies did not need to acquiesce across all the circuits when they were defeated in one. See, *e.g.*, *Independent Petroleum Ass'n of Am.* v. *Babbitt*, 92 F.3d 1248, 1261 (D.C. Cir. 1996) (Rogers,

J., dissenting) ("[I]ntercircuit nonacquiescence is permissible, especially when the law is unsettled."); Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679 (1989) (Estreicher & Revesz, *Nonacquiescence*) (documenting and defending the practice).

Outside the D.C. Circuit, national injunctions remained marginal and rare. When lower courts held that federal statutes and rules were unconstitutional, they often gave relief only to the plaintiff. *E.g.*, *Meinhold* v. *United States Dep't of Def.*, 34 F.3d 1469, 1480 (9th Cir. 1994). But the proper scope of injunctive relief was of sufficient interest to this Court that it granted certiorari on the question in *Summers* v. *Earth Island Institute*, 555 U.S. 488 (2009), only to dismiss the case for want of standing. *Id.* at 500-501.

National injunctions took on a life of their own in the final two years of President Obama's Administration. In a number of cases, state attorneys general sought and obtained national injunctions from federal district courts in Texas to halt major policy initiatives of President Obama. Precisely the same has now occurred under President Trump, though the injunctions more often come from California. The routine that this Court has become all too familiar with—a major executive order or rule, followed immediately by a preliminary national injunction, which then generates emergency appeals and stay requests all the way to this Court—is only five years old.

Other scholars have contested only one part of this narrative. It has been argued that there were in fact two national injunctions prior to 1963. See Sohoni, *Lost History* 943-946, 982-987. Even if that were

correct, it would not offer a secure basis for national injunctions today. And it is not correct.[3]

In the first case, *Journal of Commerce & Commercial Bulletin* v. *Burleson*, 229 U.S. 600 (1913) (per curiam), this Court, without explanation, granted a temporary restraining order protecting non-party newspapers around the country. There, however, the government had committed not to enforce the statute against any newspaper until the conclusion of the test case. Appellant's Mtn. for Restraining Order at 1-6, *Journal of Commerce & Commercial Bulletin*, *supra* (No. 818). The restraining order was based on, and did not exceed the scope of, the government's contractual commitment.

In the second, *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 (1940), the D.C. Circuit had granted an injunction prohibiting Department of Labor officials from applying a wage rule—not only against the plaintiff but also against all of its competitors. See *id.* at 116-117.[4] This Court *reversed* the injunction and bluntly disapproved of its extreme breadth:

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[3] The argument has also been made that equity routinely gave "universal injunctions" at the state level. See Sohoni, *Lost History* 973-979. The cases adduced are almost all run-of-the-mill equity representative suits, and thus correspond to the modern class action. See pp. 9-11, *infra*. *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), is an outlier in this respect, as in others. In *Pierce* the challenged law never went into effect. In the guise of a request for an injunction, the suit was effectively a declaratory judgment action (which at the time the federal courts were not authorized to entertain).

[4] The wage rule in question was a determination of the prevailing minimum wage in a "locality" that covered thirteen States, part of another State, and the District of Columbia. *Lukens Steel Co.* v. *Perkins*, 107 F.2d 627, 630 (D.C. Cir. 1939).

> We must, therefore, decide whether a Federal court, upon complaint of individual iron and steel manufacturers, may restrain the Secretary and officials who do the Government's purchasing from carrying out an administrative wage determination by the Secretary, not merely as applied to parties before the Court, but as to all other manufacturers in this entire nation-wide industry.
>
> * * *
>
> In our judgment the action of the Court of Appeals for the District of Columbia goes beyond any controversy that might have existed between the complaining companies and the Government officials. The benefits of its injunction, and of that ordered by it, were not limited to the potential bidders in the 'locality', however construed, in which the respondents do business. All Government officials with duties to perform under the Public Contracts Act have been restrained from applying the wage determination of the Secretary to bidders throughout the Nation who were not parties to any proceeding, who were not before the court and who had sought no relief.

Id. at 117, 123. An injunction that this Court rejected as overbroad cannot serve as a legitimating foundation for the national injunction.

* * *

However far national injunctions depart from the traditional understanding of the judicial role, they align with certain familiar ways of thinking about judicial decision-making. Consider, for example, the "law declaration" model of the judicial power, which posits that the federal courts "have a special function

of enforcing the rule of law, independent of the task of resolving concrete disputes over individual rights." Richard H. Fallon, Jr. et al., *Hart & Wechsler's The Federal Courts and the Federal System* 74 (7th ed. 2015). From this perspective, it is less important that a "plaintiff have a personal stake in the outcome of a lawsuit" than it is for the federal courts to "declare and explicate norms that transcend individual controversies," *ibid.*, and it is correspondingly easier to justify relief that vindicates the rights of absent parties.

This Court, however, has never adopted that expansive conception of the judicial power. To the contrary, it has hewed to the traditional view of the judicial power as limited to resolving actual "Cases" and "Controversies" between adverse parties. U.S. Const. Art. III, § 2; see, *e.g.*, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 559-562 (1992); *Steel Co.*, 523 U.S. at 102; *Summers*, 555 U.S. at 492.

National injunctions also accord with the modern tendency to say that courts "strike down" statutes that violate the Constitution. When judges view a statute as the object of their decision, they more naturally perceive that the remedy must extend to all applications of that statute. See Bray, *Multiple Chancellors* 451-452.

But a "court has no power to remove a law from the statute books." Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1339 (2000) (Fallon, *Facial Challenges*). Exercising the power of judicial review, which follows from the obligation to "ascertain[] and declar[e] the law applicable to [a] controversy," a court will instead "disregard an unconstitutional enactment." *Massachusetts* v. *Mellon*, 262 U.S. 447, 488 (1923); see also *Marbury* v. *Madison*, 5 U.S. (1 Cranch)

137, 178 (1803); *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 296-297 (1936) (courts "must *apply the supreme law* and *reject the inferior statute* whenever the two conflict" (emphasis added)). And when an injunction is warranted, "the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding." *Mellon*, 262 U.S. at 488; see also *Trump* v. *Hawaii*, 138 S. Ct. 2392, 2428 (2018) (Thomas, J., concurring). Imprecise references to "striking down" statutes offer no support for national injunctions.

Finally, national injunctions might be seen as consistent with courts' practice of entertaining "facial" constitutional challenges, which generally assert that a statute is unconstitutional in all of its applications. See, *e.g.*, *United States* v. *Salerno*, 481 U.S. 739, 745 (1987); but cf. *City of Chicago* v. *Morales*, 527 U.S. 41, 74 (1999) (Scalia, J., dissenting) ("The rationale for our power to review federal legislation for constitutionality * * * only extends so far as to require us to determine that the statute is unconstitutional as applied to *this* party, in the circumstances of *this* case."). Even in such a case, however, the court's judgment does not have the effect of literally invalidating the statute with respect to parties who are not before the court. See Fallon, *Facial Challenges* 1339-1340. As a matter of *precedent*, the court's reasoning may lead to a conclusion of invalidity in future cases. The binding effect of the court's *judgment*, however, does not extend to non-parties. *Ibid.*

b. National injunctions are not supported by equity's tradition of group litigation

Although equity did not have national injunctions, it did have a robust history of group litigation. "Bills

of peace" allowed members of a cohesive and pre-existing social group to sue on behalf of all the members of that group. See Bray, *Multiple Chancellors* 426-427. In time, the practice developed into a broader notion of the equity representative suit. It traveled under various names—including "the bill of peace," "the representative suit," and "the class action." It was discussed in learned treatises. See, *e.g.*, Joseph Story, *Commentaries on Equity Pleadings* §§ 72, 77-135 (4th ed. 1848); Frederic Calvert, *A Treatise upon the Law Respecting Parties to Suits in Equity* (1837). It was expressly authorized by the federal equity rules. Fed. Eq. R. 48 (1842); Fed. Eq. R. 38 (1912); see also James Love Hopkins & Byron F. Babbitt, *The New Federal Equity Rules* 240 (8th ed. 1933) (calling the 1912 version of the rule "[a] new rule, in affirmance of an old principle of equity").

For two decisive and reinforcing reasons, however, bills of peace do not support the national injunction. First, the critical element of an equity representative suit was *representation*. See *Smith* v. *Swormstedt*, 57 U.S. (16 How.) 288, 303 (1853). If the plaintiff won, those represented by the plaintiff won; if the plaintiff lost, they lost. As this Court said in the nineteenth century and reiterated in the twentieth, "a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court." *Supreme Tribe of Ben Hur* v. *Cauble*, 255 U.S. 356, 363 (1921) (quoting *Smith*, 57 U.S. (16 How.) at 30); see also 1 Thomas Atkins Street, *Federal Equity Practice*, §§ 549-552, at 343-345 (1909) (discussing relationship between *Smith* and the Federal Equity Rules). This symmetry in the conclusive determination of rights was matched by the remedy: the equity

representative suit offered remedies for the plaintiffs and those represented by the plaintiffs, not for the world at large. Indeed, this Court said that equity would not allow such sweeping relief. *Mellon*, 262 U.S. at 487-489; see also Bray, *Multiple Chancellors* 430-433. There was thus no conflict with the basic principle that a court of equity would not "go beyond the case before it." *Conway*, 66 U.S. (1 Black) at 632.

Second, the equity representative suit is carried on in our legal system by the class action, and particularly by the Rule 23(b)(2) class action. See 7A Charles Alan Wright et al., *Federal Practice and Procedure* § 1751, at 11 (3d ed. 2005) ("It was the English bill of peace that developed into what is now known as the class action."); Fed. R. Civ. P. 23 advisory committee's notes (1937) (describing Rule 23(a) as "a substantial restatement of [former] Equity Rule 38 (Representatives of Class) as that rule has been construed"); see also *Hansberry* v. *Lee*, 311 U.S. 32, 41 (1940) ("The class suit was an invention of equity * * * ."). As this Court has held when rejecting claims of "virtual representation," the entire waterfront is taken up by the Rule 23 class action; there is no such thing as a "common-law kind of class action" available to plaintiffs in federal court. *Taylor* v. *Sturgell*, 553 U.S. 880, 901 (2008) (internal quotation marks and citation omitted). Rule 23's channeling effect means that equity's historical practice of group litigation cannot be used to justify other, novel forms of non-party relief—such as the national injunction.

2. The Administrative Procedure Act left the traditional equity practice undisturbed

In seeking a legal basis for the national injunction, the lower courts, including the court of appeals in this case, have sometimes relied on the instruction of the

Administrative Procedure Act (APA) to "hold unlawful and set aside" invalid agency action. Pet. App. 44a (quoting 5 U.S.C. § 706(2)); see also *National Mining Ass'n* v. *United States Army Corps of Engineers*, 145 F.3d 1399, 1410 (D.C. Cir. 1998). That reliance is misplaced. The courts have assumed that invalid rules must be "set aside" in their entirety—not only as to the parties to the case but also as to non-parties. "Nothing in the language of the APA," however, requires that an unlawful regulation be "set[] aside * * * *for the entire country*." *Virginia Soc'y for Human Life, Inc.*, 263 F.3d at 394 (emphasis added). And the historical background against which the APA was adopted in 1946 strongly suggests that it left the federal courts' traditional equity practice undisturbed.

a. The APA's "set aside" language "reflected a consensus that judicial review of agency action should be modeled on appellate review of trial court judgments." Nicholas Bagley, *Remedial Restraint in Administrative Law,* 117 Colum. L. Rev. 253, 258 (2017). It thus signals an *adherence* to pre-existing judicial norms—including the understanding that equity is confined to remedying the injury of the particular plaintiff before the court, see pp. 3-9, *supra*—rather than any departure from them.

When the APA was enacted, courts routinely spoke of "setting aside" defective court judgments, agency orders, or legal transactions. See, *e.g.*, *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 245 (1944) (describing "the historic power of equity to *set aside* fraudulently begotten judgments" (emphasis added)); *Porter* v. *Investors' Syndicate*, 286 U.S. 461, 468 (1932) ("The duty is laid on the court to examine the evidence presented and either to *set aside* or to

modify or to affirm the commissioner's order * * * ." (emphasis added)); *Gelfert* v. *National City Bank of N.Y.*, 313 U.S. 221, 232 (1941) ("[W]hile equity will not *set aside* a sale for mere inadequacy of price, it will do so if the inadequacy is so great as to shock the conscience." (emphasis added; footnote omitted)).

Courts used that terminology when ordering conventional, party-focused relief that did not "set aside" anything as to non-parties. And they did so even in settings in which the focus of a party's challenge was a legal determination that could affect the rights of others. An appellate court might, for example, speak of "setting aside" an erroneous judgment. But the effect of vacating the judgment would extend only to those parties who had taken the successful appeal; other parties who had lost in the trial court but failed to appeal would not benefit. By the same token, the APA's directive to "set aside" broadly applicable agency action, including rules, does not suggest that relief should extend to non-parties.

The "set aside" language's connection to conventional judicial review is confirmed by the phrase's other objects. See 5 U.S.C. § 706(2) (directing courts to "set aside agency action, *findings*, and *conclusions*" (emphasis added)). By pairing the review of "agency action" with the review of "findings" and "conclusions," Congress signaled that "setting aside" is a conventional judicial task.

Other APA provisions reinforce that point. For instance, the APA provides that "due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706. As the Attorney General explained soon after the APA's adoption, that provision "sums up in succinct fashion the 'harmless error' rule applied by the courts

in the review of lower court decisions as well as of administrative bodies." United States Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 110 (1947) (*Attorney General's Manual*). This Court has often found the *Attorney General's Manual* "persuasive," *Norton* v. *Southern Utah Wilderness All.*, 542 U.S. 55, 63 (2004), "since the Justice Department was heavily involved in the legislative process that resulted in the [APA's] enactment in 1946," *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 n.31 (1979).

The APA also restricts judicial review to a "person" who is "adversely affected or aggrieved" by agency action, not to anyone and everyone in the nation. 5 U.S.C. § 702. Again, that limitation tracks the conventional, party-focused conception of judicial review.[5]

When viewed in this context, the APA's "set aside" language is most naturally understood as requiring that defective agency action—including agency rules—be set aside *as to the plaintiffs who brought suit*, rather than as to the Nation as a whole. At a minimum, the APA lacks the "unequivocal statement of * * * purpose" required to justify a conclusion that "Congress * * * intended" the "drastic departure from the traditions of equity practice" that would be occasioned by extending injunctive relief to non-parties. *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944);

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[5] While Congress considered the APA, the Senate Judiciary Committee pointed to this Court's decision in *Perkins* v. *Lukens Steel Co.*, *supra*, as having "an important bearing on [the] subject" of "persons entitled to judicial review." S. Rep. No. 752, 79th Cong., 1st Sess. 44 (1945). As we have explained, in *Perkins*, this Court vacated an injunction that extended to non-parties. See pp. 6-7, *supra*.

see also *Nken* v. *Holder*, 556 U.S. 418, 433 (2009) (presuming that a congressional statute would conform to longstanding remedial principles).

b. The historical context in which the APA was enacted confirms what is apparent from the APA's text. For example, the Congress that enacted the APA would have understood that challenges to agency action would generally arise in the context of traditional, bilateral litigation. "Before the 1960s[,] agencies acted mainly through case-by-case adjudications." Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960's and 1970's*, 53 Admin. L. Rev. 1139, 1145 (2001). In that context, a reviewing court sits to "set aside" an unlawful order entered in such an adjudication—a remedy that logically extends only to the regulated party.

The same was true of agency rules. At the time of the APA's adoption, agency rules were generally subject to judicial review only in enforcement proceedings, see *Attorney General's Manual* 93, a setting in which the court's remedy for invalid agency action extended only to the target of the proceeding. Not until this Court's 1967 decision in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, did preenforcement review of agency rules become the norm. See Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 Admin. L. Rev. 59, 89 (1995) ("Before *Abbott*, most rules could be reviewed only in the context of an enforcement action."). Indeed, as the Attorney General observed, the APA was not even understood "to provide for judicial review in the abstract of all rules," *Attorney General's Manual* 102, much less to arm the courts with the authority to enjoin them as to everyone. There is accordingly little basis to conclude

that Congress authorized courts to "set aside" agency rulemaking with nationwide effect.[6]

More broadly, as Congress was considering the APA, the Senate Judiciary Committee explained that the statute would "declare[] the existing law concerning the scope of judicial review." S. Rep. No. 752, 79th Cong., 1st Sess. 43 (1945). The Attorney General reiterated the same point, explaining that the APA "constitute[s] a general restatement of the principles of judicial review embodied in many statutes and judicial decisions." *Attorney General's Manual* 93.

The APA's limited remit was no accident. Congress had in fact provided for preenforcement review in the 1940 Walter-Logan Bill, a predecessor to the APA that would have conferred on the D.C. Circuit the authority to hear "petition[s] filed by any person substantially interested in the effects of any administrative rule." H.R. 6324, 76th Cong., 3d Sess., § 3. If the court concluded that the rule conflicted with the Constitution or the law under which it issued, the court would order that "the rule thereafter shall not have any force or effect." *Ibid.*

Even then, however, the Walter-Logan Bill was careful to say that the court "shall have no power in

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[6] Were "set aside" read to authorize the nationwide suspension of agency rules, it could effectively end the federal government's unbroken practice—one stretching back to the time of the APA's adoption—of continuing to apply rules that a court of appeals has deemed invalid in proceedings that arise outside the jurisdiction of that court. See Estreicher & Revesz, *Nonacquiescence* 681 ("Over the past sixty years, many agencies have insisted, in varying degrees, on the authority to pursue their policies, despite conflicting court decisions, until the Supreme Court is prepared to issue a nationally binding resolution."). Reading the APA to *require* courts to enter national injunctions would only exacerbate the concern.

the proceedings *except to render a declaratory judgment*." H.R. 6324, § 3 (emphasis added). Yet President Roosevelt *still* vetoed the law for "throw[ing] overboard the most time-honored and universally accepted of all principles governing judicial review in the Federal courts: the principle that those courts sit only to decide actual litigations and not to weigh abstract legal questions." H.R. Doc. No. 986, 76th Cong., 3d Sess. 7 (1940); cf. *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 241 (1937) (upholding the Declaratory Judgment Act only because the statute tied the remedy to "an immediate and definitive determination *of the legal rights of the parties in an adversary proceeding*" (emphasis added)).

Tellingly, the APA contains nothing like the Walter-Logan Bill's "force and effect" language. Instead, in the subsection of the law immediately preceding the "set aside" language, the APA authorized courts to "postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings"—but *only* "to the extent necessary to prevent irreparable injury." See APA § 10(d) (codified as amended at 5 U.S.C. § 705)).

The Attorney General flagged the stay provision's link to equity: "irreparable injury, *the historic condition of equity jurisdiction*, is the indispensable condition to the exercise of the [stay] power conferred * * * upon reviewing courts." *Attorney General's Manual* 106 (emphasis added). Neither he nor anyone else said anything about the APA vesting in the courts a sweeping new equity power. It is most unlikely that Congress, even as it carefully circumscribed a reviewing court's stay powers, hid a national injunction elephant in a "set aside" mousehole.

* * *

The national injunction has no basis in the tradition of equity and it cannot be squared with the role of the federal courts in our constitutional system, at least where an injunction of this breadth has not been clearly authorized by Congress. The APA does not provide any such authorization.

B. National Injunctions Have Adverse Practical Consequences

National injunctions "take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch." *Hawaii*, 138 S. Ct. at 2425 (Thomas, J., concurring); cf. *Wolf* v. *Cook County, Ill.*, 140 S. Ct. 681, 681 (2020) (Sotomayor, J., dissenting) (noting "a now-familiar pattern" in which "[t]he Government seeks emergency relief from this Court"). National injunctions are also irreconcilable with a number of rules and doctrines that have been adopted in related contexts to address those policy concerns.

1. a. This Court has long recognized the "wisdom of allowing difficult issues to mature through full consideration by the courts of appeals" before being taken up and resolved definitively by this Court. *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 135 n.26 (1977). When a new legal issue arises, "the experience of * * * thoughtful colleagues on the district and circuit benches" can "yield insights (or reveal pitfalls)" that the Court could not "muster guided only by [its] own lights." *Maslenjak* v. *United States*, 137 S. Ct. 1918, 1931 (2017) (Gorsuch, J., concurring in part and concurring in the judgment). Those important benefits inform this Court's general "practice of

waiting for a conflict to develop" among appellate decisions before granting certiorari to resolve an issue. *United States* v. *Mendoza*, 464 U.S. 154, 160 (1984); see also, *e.g.*, Sup. Ct. R. 10(a), (b).

National injunctions, however, frequently frustrate the "thorough development of legal doctrine" that stems from "allowing litigation in multiple forums." *Mendoza*, 464 U.S. at 163. If the first challengers to a federal statute or policy succeed in obtaining a national injunction that "halt[s] federal enforcement everywhere," there may be no further challenges brought. Bray, *Multiple Chancellors* 461. Even if multiple additional suits continue after the first national injunction is issued, the first affirmance on appeal of a national injunction will force this Court either to grant immediate review or risk losing the chance to review the issue altogether. At that point, plaintiffs in other suits face strong incentives to drop their cases: with a national injunction in place, they have already won, and there may be no reason to perpetuate litigation that might yield a conflicting decision.

National injunctions also create inexorable pressure to address important legal issues on an expedited basis. The vast majority of the national injunctions since 2015 are preliminary injunctions, and thus were entered without a developed factual record and a decision on the merits. Those factors are likely to systematically undermine the quality of appellate decision-making. See Dan B. Dobbs, *Should Security Be Required as a Pre-Condition to Provisional Injunctive Relief?*, 52 N.C. L. Rev. 1091, 1111 (1974). And an injunction's national scope may convert what would otherwise be a tolerable limitation on the

Executive Branch into a significant burden on its authority to enforce the law. That, in turn, creates pressure for this Court to intervene at an early stage, forcing the premature resolution of major constitutional questions.

b. National injunctions are inconsistent with other features of our legal system that promote percolation of legal issues. For example, "[a] decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *Camreta* v. *Greene*, 563 U.S. 692, 709 n.7 (2011) (quoting 18 James W. Moore et al., *Moore's Federal Practice* § 134.02[1][d], at 134-26 (3d ed. 2011)). If district courts lack authority to announce legal rules that bind non-parties under the more flexible standards of stare decisis, they should not be permitted to reach the same result—but with *more* dramatic effect—by issuing national injunctions that run in favor of non-parties.

National injunctions also circumvent the rule that offensive nonmutual collateral estoppel does not apply against the federal government. See *Mendoza*, 464 U.S. at 162. As this Court has stressed, estopping the government "would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue," thereby "depriv[ing] this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari." *Id.* at 160.

2. National injunctions are asymmetric: A loss by the government leads to a national injunction barring enforcement everywhere—against both the plaintiffs and non-parties—but a win by the government is not

binding on non-parties. See Bray, *Multiple Chancellors* 460. Thus, even if the government prevails in one case, nothing prevents additional challengers from "run[ning] off to the 93 other districts for more bites at the apple." *City of Chicago* v. *Sessions*, 888 F.3d 272, 298 (7th Cir. 2018) (Manion, J., concurring in the judgment in part and dissenting in part), reh'g en banc granted, 2018 WL 4268817 (June 4, 2018), reh'g en banc vacated as moot, 2018 WL 4268814 (Aug. 10, 2018). Those challenging a federal policy need only prevail once in order to block enforcement, whereas the government must run the table in order to keep enforcing the policy. See *Department of Homeland Sec.* v. *New York*, 140 S. Ct. 599, 600-601 (2020) (Gorsuch, J., concurring).

Relatedly, national injunctions permit litigants to bypass Rule 23(b)(2), which authorizes a court to certify a class action when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Rule 23(b)(2) thus directly addresses the type of cases in which national injunctions are likely to issue—*viz.*, those in which a government policy uniformly affects many people. And it provides a mechanism for courts to enter a judgment in such a case that binds not only the named plaintiffs, but also all members of the class. See Fed. R. Civ. P. 23(c)(3); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974).

Class-action certification thus puts the parties on an even playing field: While a judgment entered in favor of a broad class may effectively curtail the government's enforcement of a challenged policy, the government obtains a corresponding benefit from class

certification because a *victory* by the government will lead to definitive resolution as to the entire plaintiff class. The issuance of a national injunction, by contrast, presents the government with all of the disadvantages of a class action without any of the offsetting benefits. Simultaneously, national injunctions allow plaintiffs to obtain the benefits of a class action without satisfying the prerequisites for maintaining one.[7]

3. Unlike private defendants, who are often subject to suit only in limited potential venues, the federal government can be sued in any district in which a defendant or plaintiff resides. 28 U.S.C. § 1391(e)(1). Plaintiffs challenging action by the federal government—the setting in which national injunctions are generally sought—thus have "a nearly boundless opportunity to shop for a friendly forum to secure a win nationwide." *New York*, 140 S. Ct. at 601 (Gorsuch, J., concurring).

By magnifying the gains derived from a litigation victory, national injunctions increase the incentives for plaintiffs to select a forum that they perceive as particularly favorable. See Bray, *Multiple Chancellors* 457-461. It is no surprise, then, that plaintiffs seek and obtain national injunctions in jurisdictions perceived to be less hospitable to the current Administration's policies, only for the preferred jurisdictions

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[7] Of course, an injunction entered in favor of a nationwide class can frustrate percolation in the same way as a national injunction. For that reason, a court addressing a request for certification of a nationwide class must "take care to ensure that nationwide relief is indeed appropriate in the case before it, and that certification of such a class would not improperly interfere with the litigation of similar issues in other judicial districts." *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979).

to shift abruptly upon a transition from one Administration to the next.

Indeed, nearly every national injunction of the last five years has been issued by a judge who was appointed by a President from a different party than the incumbent. The party affiliation of the appointing President likewise closely tracks the votes of judges on the courts of appeals to affirm or vacate national injunctions. Though the pattern does not demonstrate partisan bias, the public could be forgiven for believing that a litigant can influence the result of a case by selecting his or her own judge. Under the best of circumstances, that pattern would pose a threat to public confidence in the Judiciary's impartiality. But permitting plaintiffs to make their preferred adjudicator's decision conclusive across the nation breeds outright cynicism about the law.

4. National injunctions also heighten the risk that courts in separate cases will issue conflicting injunctions. A national injunction commands the defendant to take action with respect to non-parties who are not before the court, and if those non-parties' rights are re-litigated before a different court in a subsequent proceeding, the second court may reach a different result. The defendant may then be faced with contradictory directives, both backed by the courts' contempt power. See Bray, *Multiple Chancellors* 462-463.

That is more than a theoretical possibility. One month before the court of appeals sustained the national injunction in this case—an injunction prohibiting the enforcement of rules that established exemptions to the so-called contraception mandate—a federal district court in Texas entered a separate broad injunction against enforcement of the mandate itself. See *DeOtte* v. *Azar*, 393 F. Supp. 3d 490, 512-

514 (N.D. Tex. 2019). The two injunctions simultaneously prohibited the Trump Administration from enforcing the contraception mandate as to employers with religious objections and exempting those very employers.

5. Finally, national injunctions throw government policy into turmoil, risking the health and safety of the American people, harming the environment, and interfering with the smooth operation of essential government programs. Any controversial policy is met nowadays with a pell-mell of lawsuits, and national injunctions blink on and off as district courts rule on motions for preliminary relief, as the Administration amends or changes its policy, and as appellate courts hear expedited appeals and requests for stays.

Consider one example: In 2015, in response to decisions from this Court rebuking the Environmental Protection Agency and the Army Corps of Engineers for reading the Clean Water Act too expansively, see, *e.g., Rapanos* v. *United States*, 547 U.S. 715 (2006), the agencies narrowed their definition of a key statutory term, "waters of the United States." Eighteen States immediately challenged the rule, and the Sixth Circuit—in a preliminary posture and over a dissent—stayed the rule "nationwide." *In re EPA*, 803 F.3d 804, 809 (6th Cir. 2015). For two years, the rule was paused—until this Court unanimously held that the appeals court lacked jurisdiction to hear the case in the first place. See *National Ass'n of Mfrs.* v. *Department of Def.*, 138 S. Ct. 617, 634 (2018).

In the meantime, President Trump was sworn in. His Administration promptly suspended the Obama-era rule to make way for its rescission. See 83 Fed. Reg. 5200 (2018). In 2018, however, two federal district courts—one in South Carolina and the other in

Washington—entered new national injunctions against the suspension order itself. See *South Carolina Coastal Conservation League* v. *Pruitt*, 318 F. Supp. 3d 959, 969-970 (D.S.C. 2018); *Puget Soundkeeper All.* v. *Wheeler*, No. C15-1342-JCC, 2018 WL 6169196, at *7 (W.D. Wash. Nov. 26, 2018).

The Obama-era rule thus sprang back into force. So too, however, did a prior injunction entered by a federal court in North Dakota prohibiting enforcement of that Obama-era rule in thirteen States. *North Dakota* v. *EPA*, 127 F. Supp. 3d 1047, 1060 (D.N.D. 2015). Federal courts in Texas and Georgia swiftly enjoined the rule in an additional fourteen. See *Georgia* v. *Pruitt*, 326 F. Supp. 3d 1356, 1370 (S.D. Ga. 2018) (eleven States); *Texas* v. *EPA*, No. 3:15-CV-00162, 2018 WL 4518230, at *1 (S.D. Tex. Sept. 12, 2018) (three States). As a result of the competing injunctions, roughly half the States in 2019 were subject to the Obama-era rule and the other half to older rules of dubious legality.

A new Trump Administration rule redefining "waters of the United States" has just taken effect. See 84 Fed. Reg. 56626 (2019). That rule will also be challenged, and another national injunction may be coming down the pike. If so, national injunctions will have blocked both the Obama Administration and the Trump Administration from putting into effect rules to address this Court's decisions.

This is no way to run a government. And there is an overlooked cost of national injunctions: with an injunction in place, a change in Administration provides an opportune moment to drop any appeals that might lead to the reinstatement of a rule that the new Administration dislikes. The federal government can thus spike agency rules without adhering to the

notice-and-comment processes that normally attend agency rulemaking. For example, on the last day of 2016, a federal district court in Texas entered a national injunction against portions of a rule promulgated by the Department of Health and Human Services prohibiting insurance companies and healthcare providers from discriminating against pregnant women and transgender patients. See *Franciscan All., Inc.* v. *Burwell*, 227 F. Supp. 3d 660, 695 (N.D. Tex. 2016). Upon taking office, the Trump Administration declined to appeal. It then waited two years to propose changes to its nondiscrimination rule; those changes are still not finalized. See 84 Fed. Reg. 27846 (2019). A similar pattern played out with the Obama Administration's rules governing overtime pay, see *Nevada* v. *United States Dep't of Labor*, 218 F. Supp. 3d 520, 534 (E.D. Tex. 2016) (issuing national injunction), appeal dismissed, No. 16-41606 (5th Cir. Sept. 6, 2017), and is all-but certain to recur the next time there is a change in the party of the President.

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National injunctions are thus objectionable not only because they exceed courts' equitable powers. They are also bad policy—so bad, in fact, that it should constitute an abuse of discretion for a court to enter an injunction extending beyond the prevention of irreparable injury to the parties before it.

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE NATIONAL INJUNCTION IN THIS CASE

The court of appeals' decision affirming the national scope of the district court's preliminary injunction cannot be squared with the limitations on the federal courts' remedial authority discussed above.

A. As we have explained, the court of appeals relied in part on the APA's directive to "set aside" invalid agency action. Pet. App. 44a (quoting 5 U.S.C. § 706(2)). In doing so, the court of appeals directly invoked the (misguided) logic of the national injunction: It treated the challenged rules—rather than their effect on the parties to the case—as the proper subject of a court's remedy. That departure from the conventional party-specific conception of remedies is inconsistent with the federal courts' role in our constitutional structure and with traditional equity practice. See pp. 3-11, *supra*.

B. The court of appeals also concluded that a national injunction was warranted to "provide [respondents] complete relief." Pet. App. 44a. The court of appeals identified various harms to respondents that it concluded could not be remedied without barring implementation of the challenged rules across the Nation. And although federal courts exercise the judicial power to give relief to parties, see pp. 1, 7-9, *supra*, nothing precludes them from entering plaintiff-protective relief that has the incidental effect of benefitting non-parties.

As a practical matter, however, accepting the court of appeals' rationale would eviscerate the distinction between conventional party-specific remedies and the national injunction. This case was brought by two States, Pennsylvania and New Jersey, that are not directly affected by the rules they challenged. The court of appeals nonetheless upheld the plaintiff States' standing on the theory that they would incur additional costs because residents of the plaintiff States would lose contraception coverage as a result of the challenged rules and then would turn to state-funded services for contraception or unintended

pregnancies. Pet. App. 15a-21a. In concluding that nationwide relief was appropriate, the court of appeals reasoned that an injunction limited to the plaintiff States would not have fully addressed their asserted harms, because some of the States' residents work out of state and might turn to the States' services if their out-of-state employers invoked the exemptions. *Id.* at 44a-45a.

The attenuated chain of reasoning that underlies respondents' challenge to the rules raises serious questions about their standing to pursue this suit. Even if standing were established, however, it is also questionable whether the "extraordinary remedy" of a preliminary injunction, *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008), was warranted at all. Among the primary offices of the preliminary injunction is the preservation of a court's ability to decide a case. See *Benisek* v. *Lamone*, 138 S. Ct. 1942, 1945 (2018) (per curiam) ("[T]he 'purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held * * * .'" (quoting *University of Texas* v. *Camenisch*, 451 U.S. 390, 395 (1981)); see also *Alaska Pac. Ry. & Terminal Co.* v. *Copper River & N.W. Ry. Co.*, 160 F. 862, 865 (9th Cir. 1908) ("The office of a preliminary injunction is to preserve the subject of the controversy in its present condition, in order to prevent the perpetration of a wrong, or the doing of an act whereby the subject of the controversy may be materially injured or endangered, until a full investigation of the case may be had."). Preliminary relief was not required to fulfill that purpose here, even if denial of an injunction might have led respondents to incur costs during the pendency of their challenge.

At a minimum, the court of appeals' reasoning cannot justify the nationwide scope of the preliminary injunction it affirmed. As a logical matter, the possibility that application of the challenged rules to *some* out-of-state employers might harm respondents does not demonstrate that respondents would be harmed by *every* application of the challenged rules across the country. Indeed, even as it issued an injunction barring implementation of the rules nationwide, the district court acknowledged that respondents had offered no evidence that application of the rules in New Mexico and "a host of other states" would impose any additional costs on them. Pet. App. 182a.

Equity does not demand that every plaintiff who can demonstrate irreparable harm be given an injunction to remedy it. See, *e.g.*, *Winter*, 555 U.S. at 23-26 (finding harm outweighed by public interest). And it does not authorize relief that is untethered to any concrete irreparable harm of the plaintiffs before the court. In this case, however, the court of appeals affirmed just such a remedy. That decision was error, and it should be reversed.

CONCLUSION

If the Court reaches the question of remedy, the judgment of the court of appeals should be reversed insofar as it affirmed the national scope of the injunction entered by the district court.

Respectfully submitted.

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