No. 19-454

IN THE

Supreme Court of the United States

DONALD J. TRUMP, ET AL.,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICI CURIAE* NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

This *amicus* brief only addresses part of the third question presented in *Trump v. Pennsylvania*: whether federal courts have the authority to issue nationwide injunctions.

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STATEMENT OF INTEREST[1]

The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with 49 state municipal leagues, NLC is the voice of more than 19,000 American cities, towns, and villages, representing collectively more than 200 million people. NLC works to strengthen local leadership, influence federal policy, and drive innovative solutions.

The U.S. Conference of Mayors (USCM) is the official nonpartisan organization of all U.S. cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 12,000 appointed chief executives and assistants, serving cities, counties, towns, and regional entities. ICMA's mission is to advance professional local government through leadership, management, innovation, and ethics.

The International Municipal Lawyers Association (IMLA) is a nonprofit, nonpartisan, professional organization consisting of more than 2,500 members. Membership is composed of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA's mission is to advance the responsible development of munic-

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici* made a monetary contribution intended to fund the preparation or submission of this brief. All parties have filed a blanket consent to *amicus* briefs.

ipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before state and federal appellate courts.

Amici speak for local governments, most of which are very small and lack the resources to sue the United States when it oversteps the bounds of federalism. They rely on a handful of big cities to obtain injunctions barring federal encroachment. The federal government's deeply mistaken view of federal courts' remedial power advanced in section III of the United States' brief would cause great harm to local governments throughout the country.

SUMMARY OF ARGUMENT

Where a factory unlawfully pollutes the air, may a district court enjoin the pollution? Or must the court's injunction be limited to only those particles of pollution that affect the plaintiff personally?

Where a state operates unlawfully segregated schools, may a district court require the schools to be integrated? Or is the court limited to ordering the schools to admit only the individual students named as plaintiffs?

Where the federal government exceeds its constitutional authority, may a district court order the government to stop? Or is the court constrained to order the government to stop only with respect to the plaintiffs, so that every state, city, and individual affected by the federal government's overreach must bring its own separate lawsuit and obtain its own separate injunction?

The conventional answer to each of these questions is, of course, that federal courts have the authority to

provide injunctive relief that benefits nonparties as well as the plaintiff. Provided that the plaintiff has standing, the court may require the defendant to cease its unlawful activity, even if the plaintiff will not be the only one who benefits. The court certainly need not do so in every case—injunctions often benefit the plaintiff and no one else—but in an appropriate case, the court has the authority to issue an injunction that benefits nonparties in addition to the plaintiff.

The government spends numerous pages of its brief criticizing nationwide injunctions generally, (U.S. Br. 42-46), and the nationwide injunction in this case in particular, (U.S. Br. 46-50). This brief expresses no view on the merits of the injunction in this case. The government's position is that injunctions may not "extend[] relief beyond the harms to 'any plaintiff in th[e] lawsuit.'" (U.S. Br. 43).

The government is mistaken. District courts have the authority to provide injunctive relief that benefits non-parties as well as the plaintiff. These injunctions are extremely common. In fact, they have figured in many of this Court's cases. This is why the courts of appeals have unanimously held that injunctions may benefit non-parties. Contrary to the government's view, neither constitutional nor equitable principles require the benefit of injunctions to be confined to plaintiffs. Some of the government's arguments against these injunctions, in any event, bear on their appropriateness in any given case, not on the court's authority to issue them.

ARGUMENT

DISTRICT COURTS HAVE AUTHORITY TO PROVIDE INJUNCTIVE RELIEF THAT BENEFITS NON-PARTIES AS WELL AS THE PLAINTIFF.

A. Injunctions routinely benefit non-parties.

The United States' main objection to nationwide injunctions is that they often benefit non-parties as well as the plaintiff. But this is so common in the case of non-nationwide injunctions that we often don't even notice it.

For example:

- When a court finds that a religious display violates the Establishment Clause, the court often orders the display to be taken down. The court does not redress only the plaintiff's injury—for instance, by ordering the display to be covered up whenever the plaintiff is within viewing distance. Rather, the court simply forbids the unlawful display, in a way that benefits everyone who may see the display, not just the plaintiff.

- When a court finds that the drawing of electoral districts violates the Equal Protection Clause or the Voting Rights Act, the court often orders the districts to be redrawn in a lawful manner. The court does not redress only the plaintiff's injury—for instance, by boosting the power of the plaintiff's own vote but no one else's. Rather, the court simply forbids use of the unlawful districts, in a way that benefits

everyone whose vote is affected, not just the plaintiff.

- When a court finds that prison conditions violate the Eighth Amendment, the court often orders the prison to correct those conditions. The court does not redress only the plaintiff's injury—for instance, by requiring that the plaintiff, but no other prisoner, be given minimally adequate food and shelter. Rather, the court simply prohibits the unlawful prison conditions, in a way that benefits all prisoners, not just the plaintiff.

We could fill this brief with hundreds of similar examples, but the point should already be clear. Injunctions—especially injunctions against the government—routinely benefit everyone affected by the government's conduct. In such cases, relief is not limited to the plaintiff. As the Wright & Miller treatise explains,

> In most civil-rights cases plaintiff seeks injunctive or declaratory relief that will halt a discriminatory employment practice or that will strike down a statute, rule, or ordinance on the ground that it is constitutionally offensive. Whether plaintiff proceeds as an individual or on a class-suit basis, the requested relief generally will benefit not only the claimant but all other persons subject to the practice or the rule under attack.

7A Charles Alan Wright et al., *Federal Practice & Procedure* § 1771 (3d ed. Westlaw).

In its *Principles of the Law of Aggregate Litigation*, the American Law Institute recognizes the same truth:

> When a claimant seeks a prohibitory injunction or a declaratory judgment with respect to a generally applicable policy or practice maintained by a defendant, those remedies—if afforded—generally stand to benefit or otherwise affect all persons subject to the disputed policy or practice, even if relief is nominally granted only as to the named claimant. Even in litigation against governmental entities, to which limitations on preclusion may apply as a formal matter, the generally applicable nature of the policy or practice typically means that the defendant government will be in a position, as a practical matter, either to maintain or to discontinue the disputed policy or practice as a whole, not to afford relief therefrom only to the named claimant.

American Law Institute, *Principles of the Law of Aggregate Litigation* § 2.04 comment a (2010).

In short, injunctions routinely benefit non-parties whether they are called "nationwide" or otherwise.

B. Many of this Court's cases have involved injunctions that benefitted non-parties.

Injunctions that benefit non-parties have figured in many of this Court's cases. Such injunctions are so commonplace that the governmental defendants in these cases did not even argue in this Court that the lower court had exceeded its authority by extending the benefit of the injunction to non-parties.

For example:

- In *Hollingsworth v. Perry*, 570 U.S. 693, 702 (2013), the district court enjoined California officials from enforcing a state law barring gay marriage—not just against the plaintiffs but against everyone.
- In *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011), the district court enjoined the enforcement of a state law imposing restrictions on violent video games—not just against the plaintiffs but against everyone. (For the text of the injunction, see *Video Software Dealers Ass'n v. Schwarzenegger*, No. C-05-04188 RMW, 2007 WL 2261546, at *12 (N.D. Cal. Aug. 6, 2007)).
- In *Ashcroft v. ACLU*, 542 U.S. 656, 663 (2004), the district court enjoined the Attorney General from enforcing a statute restricting explicit materials on the Internet—not just against the plaintiffs but against everyone. (For the text of the injunction, see *ACLU v. Reno*, 31 F. Supp. 2d 473, 498-99 (E.D. Pa. 1999)).
- In *Printz v. United States*, 521 U.S. 898, 904 (1997), the district court enjoined the United States from enforcing a statute requiring state and local law enforcement officers to conduct background checks of prospective handgun purchasers—not just against the plaintiff but against everyone. (For the text of the injunction, see *Printz*

v. United States, 854 F. Supp. 1503, 1519-20 (D. Mont. 1994)).

- In *Sable Commc'ns. of Calif., Inc. v. FCC*, 492 U.S. 115, 119 (1989), the district court enjoined the FCC from enforcing a statute banning indecent telephone messages—not just against the plaintiff but against everyone. (For the text of the injunction, see *Sable Commc'ns. of Calif., Inc. v. FCC*, 692 F. Supp. 1208, 1210 (C.D. Cal. 1988)).
- In *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 316 (1985), the district court enjoined the Veterans Administration from enforcing a statute limiting attorneys' fees in proceedings before the VA—not just against the plaintiffs but against everyone. *See also id*. at 336 (O'Connor, J., concurring) (describing the district court's order as "a nationwide injunction").
- In *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 846 (1984), the district court entered a "nationwide injunction" barring the federal government from enforcing a statute denying education funds to students who failed to register for the draft—not just against the plaintiffs but against everyone.
- In *Kleppe v. New Mexico*, 426 U.S. 529, 534 (1976), the district court enjoined the Secretary of the Interior from enforcing the Wild Free-Roaming Horses and Burros Act—not just against the plaintiffs but against everyone. (For the text of the

injunction, see *New Mexico v. Morton*, 406 F. Supp. 1237, 1239 (D.N.M. 1975)).

This is just a partial list. We could have provided many more examples.

When the government is found to be acting unlawfully, the district courts routinely enjoin the government from doing so, without limiting the injunction to benefit only the plaintiffs.

C. The courts of appeals have unanimously held that injunctions may benefit non-parties.

Every court of appeals in which the question has arisen has concluded that federal courts have the authority to issue an injunction that benefits nonparties.

In two opinions by Judge Friendly, the Second Circuit held that a plaintiff need not file a class action to obtain relief for similarly-situated people in suits alleging unconstitutional government action, because an injunction could prohibit the government from acting unconstitutionally with respect to people other than the plaintiff. In *Vulcan Soc'y v. Civil Serv. Comm'n*, 490 F.2d 387, 391 (2d Cir. 1973), the Second Circuit affirmed an injunction barring the New York City Fire Department from using a discriminatory employment examination. The district judge "was entirely right in thinking it unnecessary, from the plaintiffs' standpoint, for him to decide on class action designation in order to pass upon the issues raised," the Second Circuit explained, because "[i]f the examination procedures were found unconstitutional as regards the named plaintiffs, they were equally so as regards all eligible blacks and Hispanics." *Id*. at 399.

Judge Friendly returned to the issue in a second case later the same year. "[I]nsofar as the relief sought is prohibitory, an action seeking declaratory or injunctive relief against state officials on the ground of unconstitutionality of a statute or administrative practice is the archetype of one where class action designation is largely a formality," he wrote for the court. *Galvan v. Levine*, 490 F.2d 1255, 1261 (2d Cir. 1973). "[W]hat is important in such a case … is that the *judgment* run to the benefit not only of the named plaintiffs but of all others similarly situated." *Id*.

The Fourth Circuit similarly affirmed a "nationwide" injunction prohibiting the federal government from unconstitutionally using a summary process to evict tenants from public housing, in a suit brought by tenants and tenant organizations in Richmond and Baltimore. *Richmond Tenants Org., Inc. v. Kemp*, 956 F.2d 1300, 1302 (4th Cir. 1992). The government challenged "the nationwide scope of the permanent injunction issued by the district court," *id*. at 1308, but the Fourth Circuit rejected the government's challenge on the ground that the benefit of an injunction need not be limited only to the plaintiffs before the court. "[A] federal district court has wide discretion to fashion appropriate injunctive relief," the Fourth Circuit held. *Id*. "When required by the circumstances of the case, district courts have issued injunctions which apply to conduct by the Attorney General of litigation in other federal courts." *Id*. *See also Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001) (noting that "[n]ationwide injunctions are appropriate if necessary to afford relief to the prevailing party"); *Evans v. Harnett Cty. Bd. of Educ*., 684 F.2d 304, 306 (4th Cir. 1982) ("An injunction warranted by a finding of unlawful discrimination is not prohibited merely because it confers benefits upon

individuals who were not plaintiffs or members of a formally certified class.").

The Fifth Circuit takes the same view. In *Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016), the Fifth Circuit affirmed an injunction prohibiting the federal government from implementing the Deferred Action for Parental Accountability (DAPA) immigration program anywhere in the country, not merely in the states that filed suit. The federal government argued "that the nationwide scope of the injunction is an abuse of discretion and request[ed] that it be confined to Texas or the plaintiff states." *Id*. at 187. But the Fifth Circuit rejected the government's argument. "Congress has instructed that the immigration laws of the United States should be enforced vigorously and *uniformly*," the Fifth Circuit pointed out, "and the Supreme Court has described immigration policy as a comprehensive and unified system." *Id*. at 187-88 (footnotes and internal quotation marks omitted). The Fifth Circuit concluded: "Partial implementation of DAPA would detract from the integrated scheme of regulation created by Congress, and there is a substantial likelihood that a geographically-limited injunction would be ineffective because DAPA beneficiaries would be free to move among states." *Id*. at 188 (footnotes, brackets, and internal quotation marks omitted). The Fifth Circuit held: "It is not beyond the power of a court, in appropriate circumstances, to issue a nationwide injunction." *Id*. *See also Meyer v. Brown & Root Constr. Co*., 661 F.2d 369, 374 (5th Cir. 1981) ("Injunctive relief which benefits non-parties may sometimes be proper even where the suit is not brought as a Rule 23 class action.").

While the government has been routinely challenging nationwide injunctions in the last two years, a good indication of the novelty of the government's position is the fact that in *Texas v. United States*, just four years ago, the government did not even argue that district courts lack the authority to issue injunctions that benefit non-parties. In the Fifth Circuit, the government merely argued that such an injunction was unwarranted on the facts of the case. Brief for Respondent, *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) (No. 15-674). In this Court, the government did not challenge the scope of the injunction at all. Brief for Petitioner, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674).

The Sixth Circuit has also approved of injunctions that benefit non-parties as well as the plaintiff. In *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994), the government challenged as overly broad an injunction barring the use of certain funds for prison expenditures throughout the federal prison system. When the injunction was granted, the plaintiffs were not a nationwide class, but were individual inmates incarcerated in a single prison. *Id*. The Sixth Circuit nevertheless held that "it cannot be successfully argued that a nationwide injunction was improper." *Id*. The court explained: "Because relief for the named plaintiffs in the case would also necessarily extend to all federal inmates, the district court did not err in granting wide-ranging injunctive relief prior to certifying a nationwide class of plaintiffs." *Id*. at 1104.

The Seventh Circuit likewise affirmed an injunction benefitting non-parties, in a suit filed by three individual residents of Milwaukee. *Decker v. O'Donnell*, 661 F.2d 598, 604 (7th Cir. 1981). The Seventh Circuit rejected the government's contention that "the district

court erred in entering a nationwide injunction," on the ground that the plaintiffs challenged "the facial constitutionality of the statute," not merely the statute's constitutionality as applied to them. *Id*. at 618. *See also Sprogis v. United Air Lines, Inc.,* 444 F.2d 1194, 1202 (7th Cir. 1971) ("affirming the district court's power to consider extending [injunctive] relief beyond the named plaintiff").

The Ninth Circuit has also approved of injunctions that benefit non-parties in appropriate cases. In *Earth Island Inst. v. Ruthenbeck*, 490 F. 3d 687, 699 (9th Cir. 2007), *aff'd in part, rev'd in part on other grounds*, 555 U.S. 488 (2009), the Ninth Circuit affirmed a district court order prohibiting the Forest Service from enforcing regulations the court found contrary to the statute. The Ninth Circuit rejected the Forest Service's contention that the injunction should be limited to the Eastern District of California, where the suit was filed. *Id*. In *Bresgal v. Brock*, 843 F.2d 1163, 1169-71 (9th Cir. 1988), the Ninth Circuit affirmed an injunction barring the Department of Labor from enforcing a certain statute against forestry workers. The Labor Department argued that "the injunction can cover only the named plaintiffs," *id*. at 1169, but the court disagreed. The court held: "There is no general requirement that an injunction affect only the parties in the suit." *Id*.

The Tenth Circuit itself enjoined the Federal Reserve Board from enforcing a regulation that exceeded its statutory authority, in a case that came to the court directly from the Board. *Dimension Fin. Corp. v. Bd. of Governors of the Fed. Reserve Sys.*, 744 F.2d 1402 (10th Cir. 1984), *aff'd*, 474 U.S. 361 (1986). The Tenth Circuit did not limit the injunction to the plaintiffs. Rather, the court simply "set aside" the

offending regulation, and ordered the Board not to "attempt to enforce or implement" it against anyone. *Id*. at 1411.

Finally, the D.C. Circuit has also rejected the government's challenge to "the district court's issuance of a nationwide injunction." *National Mining Ass'n v. U.S. Army Corps of Eng'rs*., 145 F.3d 1399, 1408 (D.C. Cir. 1998). Observing that "the district courts enjoy broad discretion in awarding injunctive relief," *id*., the D.C. Circuit held that "when a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Id*. at 1409 (citation, brackets, and internal quotation marks omitted).

In summary, eight of the circuits have considered whether district courts have the authority to issue injunctions that benefit non-parties as well as the plaintiffs. Every single one has held that they do. No circuit has agreed with the government's argument that injunctions may only benefit the plaintiffs.[2]

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[2] Since *Trump v. Hawaii*, 138 S. Ct. 2393 (2018), some federal courts of appeals have narrowed nationwide injunctions, including in a case related to this one, *California v. Azar*, 911 F.3d 558, 582-85 (9th Cir. 2018), sometimes discussing *when* they are and aren't appropriate. *See, e.g., Cty. of San Francisco v. Trump,* 897 F.3d 1225, 1244-45 (9th Cir. 2018); *East Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1028-29 (9th Cir. 2019); Order Staying Preliminary Injunction in Part, *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018) (No. 17-2991); Order Granting Petition for Rehearing En Banc at 1, *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018) (No. 17-2991).

D. Neither constitutional nor equitable principles require the benefit of injunctions to be confined to plaintiffs.

The government suggests (U.S. Br. 43-45) that principles of standing and principles of equity prohibit district courts from enjoining the government's conduct with respect to anyone other than the plaintiff. The government errs in both respects.

1. A plaintiff obviously must have standing to obtain relief. *Town of Chester v. Laroe Estates, Inc.,* 137 S. Ct. 1645, 1650 (2017). And remedies should of course be tailored "to the inadequacy that produced the injury in fact that the plaintiff has established." *Lewis v. Casey*, 518 U.S. 343, 357 (1996). But when both of these requirements are satisfied, there is no constitutional impediment to an injunction from which non-parties may also benefit.

In a school desegregation case, for example, the plaintiffs are often individual schoolchildren who desire to attend integrated schools. They have standing, because they are injured by the existing system of segregation. An injunction ordering the schools to integrate would be appropriately tailored to redress this injury. Such an injunction would also provide the identical benefit to thousands of other schoolchildren who are not plaintiffs. They too would now be able to attend integrated schools. The law of standing does not require a court to exclude these other schoolchildren from receiving the benefit of the injunction.

The government describes the benefits of school desegregation to non-plaintiffs as "incidental," (U.S. Br. 44), but that is a gross understatement. Likewise, the government states that in class actions and desegregation cases "courts are adjudicating only the rights

of the parties before them, not passing on laws or issues as a general matter." (U.S. Br. 44). But courts never "pass[] on laws or issues as a general matter." And regardless, non-parties may and have benefited in class actions and desegregation cases.

Likewise, suppose the President were to issue an executive order purporting to bar left-handed people from voting. A left-handed citizen would clearly have standing to challenge the executive order. An injunction setting aside the executive order would be appropriately tailored to redress the injury. Such an injunction would also provide the identical benefit to millions of left-handed citizens who are not plaintiffs. There is nothing in the law of standing that makes this result unconstitutional.

2. The government is equally mistaken in asserting (U.S. Br. 44) that equitable principles limit the benefits of injunctive relief to the plaintiff. This assertion rests entirely on the historical claim that in 18th-century England, an injunction could not provide benefits to non-parties. There is good reason to doubt the accuracy of this claim. Blackstone observed that in nuisance cases, a prevailing individual plaintiff was entitled "[t]o have the nu[i]sance abated," 3 William Blackstone, *Commentaries on the Laws of England* 221 (1768), in several factual settings where the plaintiff was clearly not the only person who would benefit, such as where a ditch has been "dug across a public way," *id*. at 220, or where a person "exercises any offensive trade" too close to an inhabited area, *id*. at 217. The government cites no evidence that in such cases equity required excluding non-parties from the benefits of an injunction—for instance, by allowing only the plaintiff to cross the ditch, or by enjoining only the noxious odors that reached the plaintiff.

In fact, one legal scholar argues that the bill of peace process used by the English Court of Chancery provided the modern equivalent of a nationwide injunction. Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. Rev. 1065, 1080-81 (2018). Frost cites to *Federal Practice and Procedure* "describing how the English Court of Chancery developed the bill of peace to enable an equity court to hear an action by or against representatives of a group if the plaintiff could show that the number of people was so large as to make joinder impracticable, that all members of the group possessed a joint interest in the question, and that the named parties were adequate representatives of the group." *Id*. at 1081 n.77.

In any event, the question in this case—whether a court may prohibit the *government* from exceeding its authority by issuing an injunction that benefits nonparties—could not have arisen in 18th-century England, for two reasons. First, England did not have our concept of judicial review. Courts had no power to invalidate an Act of Parliament on the ground that Parliament had exceeded its authority. Philip Hamburger, *Law and Judicial Duty* 237 (2008). Second, because Chancery was understood as an emanation of the Crown, there could be no injunctions against the Crown or its servants. Bernard Schwartz, *Forms of Review Action in English Administrative Law*, 56 Colum. L. Rev. 203, 214 (1956). English courts lacked the power to enjoin the other two branches of government from acting unlawfully.

Thus even if 250-year-old English practice is a reliable guide to the equitable remedies modern litigants may obtain against *private* parties, *see Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc*., 527 U.S. 308, 318-19 (1999), English practice

offers scant guidance when it comes to enjoining the government. When English monarchs exceeded their constitutional authority, they could be constrained only by military force, not by the courts. *See* Steve Pincus, *1688: The First Modern Revolution* (2011). By contrast, much of our system of government was framed as an antidote to the English experience of the previous century. American courts can enjoin the government in ways that their English predecessors could not.

Finally, while some have claimed that nationwide injunctions are a relatively new phenomenon, at least one legal scholar has recently disagreed. Mila Sohoni traces the "lost history" of nationwide injunctions noting that "the Supreme Court in the 1890s endorsed an expansive view of the powers of federal courts to control the rights of nonparties through injunctive decrees." Mila Sohoni, *The Lost History of the Universal Injunction*, 133 Harv. L. Rev. 920, 929 (2020). She also points to two Supreme Court cases from 1913 where this Court issued nationwide injunctions. *Id.* at 924-25. Significantly, after surveying the relevant history Sohoni also concludes that "[t]he universal injunction against federal agency action, which is so often in the news today, has a longer pedigree than is generally known." *Id*. at 982. She points to *Lukens Steel Co. v. Perkins*, 107 F.2d 627 (D.C. Cir. 1939) (per curiam), *rev'd*, 310 U.S. 113 (1940), where the D.C. Circuit enjoined a Secretary of Labor determination from being applied to anyone. "Although the Supreme Court reversed this decision for lack of standing, its reasoning in that case—along with its contemporaneous decisions concerning state and local laws—reveals that the Court was not rejecting the propriety of injunctions reaching beyond the plaintiffs

in cases where the plaintiffs did have standing." Sohoni, *supra*, at 982.

E. The APA presumes that courts may issue injunctions that benefit non-parties.

In the Administrative Procedure Act, Congress required the courts to "hold unlawful *and set aside agency action*" under various conditions. 5 U.S.C. § 706(2) (emphasis added). The government argues that this language disallows nationwide injunctions. But the text of the APA says where a court finds that an agency has exceeded its authority, the court must "set aside" the agency action. Not "set aside only with respect to the plaintiff." Just "set aside."

When a court sets aside an unlawful regulation, the plaintiff is often not the only beneficiary. The court orders the agency not to enforce the regulation, and everyone who would otherwise be subject to the regulation receives the same benefit. For instance, in *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990), the Court observed that if the Bureau of Land Management program at issue had been an "agency action," it could have been "challenged under the APA by a person adversely affected—and the entire 'land withdrawal review program,' insofar as the content of that particular action is concerned, would thereby be affected." *Id*. at 890 n.2.

Justice Blackmun discussed this point further in his dissenting opinion, in a passage with which the Court's majority did not disagree.

> In some cases the "agency action" will consist of a rule of broad applicability; and if the plaintiff prevails, the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual.

> Under these circumstances a single plaintiff, so long as he is injured by the rule, may obtain "programmatic" relief that affects the rights of parties not before the court.

Id. at 913 (Blackmun, J., dissenting).

Congress thus presumed in the APA that courts could grant injunctive relief that conferred benefits on non-parties as well as on the plaintiffs. Under "[t]raditional administrative law principles," when courts set aside unlawful agency actions in suits brought under the APA, "the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989). *See also Earth Island Inst*., 490 F.3d at 699 (noting that where a court sets aside an unlawful regulation, a "nationwide injunction" is "compelled by the text of the Administrative Procedure Act").

The government also argues that "[t]he court of appeals' reliance on the APA to support the nationwide injunction is misplaced" first because this case "does not involve a final decision under Section 706(2) . . . but rather a preliminary injunction. And Section 705 of the APA itself adopts the general rule that preliminary injunctive relief should be limited as 'necessary to prevent irreparable injury'—i.e., the injury to the parties who brought the suit." However, the APA doesn't allow preliminary injunctive relief "necessary to prevent irreparable injury to the plaintiff." It just says "necessary to prevent irreparable injury."

F. Some of the government's arguments against nationwide injunctions bear on their appropriateness in any particular case, not on the court's authority to issue them.

A district court has the authority to grant an injunction that benefits non-parties as well as the plaintiff, but that does not mean such an injunction is always appropriate. In any particular case there may be good arguments for granting an injunction that only benefits the plaintiff. The government lists some of them in its brief (U.S. Br. 45-46). Contrary to the government's view, however, these arguments bear only on the appropriate scope of an injunction in any particular case, not on the court's authority to issue an injunction that benefits non-parties.

The district court has broad discretion in fashioning injunctive relief. *United States v. Oakland Cannabis Buyers' Coop*., 532 U.S. 483, 496 (2001). In exercising this discretion, the court may find good reasons for limiting the benefit of the injunction to the plaintiff. In any given case, there may well be considerations counseling in favor of a limited injunction that allows the defendant to continue its unlawful conduct with respect to people other than the plaintiff.

On the other hand, in any given case there may also be sound prudential reasons for enjoining the defendant from acting unlawfully, full stop. The scope of an appropriate remedy depends on the scope of the defendant's violation. *Missouri v. Jenkins*, 515 U.S. 70, 88-89 (1995). Where the defendant's violation harms a great number of people in addition to the plaintiff, there will be cases in which the most sensible way to secure relief for the plaintiff will be an injunction targeted broadly at the scope of the defendant's

violation rather than narrowly at the scope of the plaintiff's own personal harm. This case is a good example. An injunction applying only to New Jersey and Pennsylvania would have had a limited impact on both states as a total of 800,000 workers in these states are employed out of state. *Pennsylvania v. President U.S.,* 930 F.3d 543, 576 (3d. Cir. 2019). Similarly, in *Texas v. United States*, the Fifth Circuit affirmed a nationwide injunction barring the government from enforcing the DAPA immigration program, even in states that were not plaintiffs. The Fifth Circuit found that "a geographically-limited injunction would be ineffective because DAPA beneficiaries would be free to move among states." 809 F.3d at 188.

Moreover, in considering the proper scope of an injunction the court might take into account the wastefulness of requiring every person affected to file his or her own separate suit. For example, if the President were to take a patently unconstitutional action, one that no reasonable jurist could find lawful, a court might find that there is an interest in avoiding enormous amounts of duplicative and pointless litigation.

Such considerations, on both sides, should inform the court's discretion to choose the appropriate scope of an injunction in any particular case. But the key point is that these considerations have no bearing on the court's authority to grant an injunction that benefits non-parties in addition to the plaintiff. Rather, they are matters the court should consider in exercising that authority.

G. These injunctions are especially important where federalism is at stake.

As discussed in the last subsection, nationwide injunctions have many advantages including judicial efficiency, uniformity, and providing complete relief to the plaintiff. Getzel Berger, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. Law R. 1068, 1082-84 (Oct. 2017). As Gregg Costa asks, do we really want to live in a world where "1600 injunctions had to issue against a single provision of a New Deal statute?" Gregg Costa, *An Old Solution to the Nationwide Injunction Problem*, Harvard Law Review Blog (Jan. 25, 2018).[3] Local governments in particular benefit from nationwide injunctions.

When the federal government oversteps its constitutional bounds, it is often at the expense of local governments. But most local governments are very small. They lack the budgets and the legal staffs to litigate against the United States. More specifically, there are more than 90,000 local governments in the United States. U.S. Census Bureau, *Government Organization Summary Report: 2012* at 1.[4] Most are tiny. Eighty-five percent of municipalities have fewer than 10,000 residents. U.S. Census Bureau, *2012 Census of Governments* table 7 (2012).[5]

In principle, we have a federalist system that protects local governments against encroachment, but

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[3] https://blog.harvardlawreview.org/an-old-solution-to-the-nationwide-injunction-problem/.

[4] (Released Sept. 26, 2013), *available at* https://www2.census.gov/govs/cog/g12_org.pdf.

[5] https://www.census.gov/data/tables/2012/econ/gus/2012-governments.html, table 7 (Last Revised: March 31, 2020).

federalism does not enforce itself. In practice, when federalism is at stake, there are often no private parties with standing to challenge the federal government. Only a handful of big cities have the resources to file suit. When the federal government unlawfully harms local governments, therefore, most local governments have to rely on one of the big cities to get the injunction that forces the federal government to stop.

A good example has been unfolding recently. Congress created Byrne JAG, a formula grant, in 2006 to provide funds for a wide variety of state and local law enforcement programs. 34 U.S. Code § 10152. In 2017 the Attorney General added three conditions to receive Byrne JAG funds, which many local governments believe are unlawful. Then in 2018, the Attorney General imposed the same three conditions and added additional conditions that many local governments also considered unlawful. All local governments may apply to receive Byrne JAG funds allocated to the states. Many small local governments only receive a limited amount of Byrne JAG funds and can't justify the cost of litigation.[6] Unsurprisingly, mostly larger jurisdictions sued—Philadelphia, Chicago, New York City, Los Angeles, San Francisco, and

[6] For example, in 2009 the Green Bay, Wisconsin, Police Department was awarded $477,188 to spend over four years. *See* U.S. Department of Justice, Office of the Inspector General Audit Division, *Audit of the Office of Justice Programs Bureau of Justice Assistance Edward Byrne Memorial Justice Assistance Grant Awarded to the Green Bay Police Department, Green Bay, Wisconsin* (Oct. 2012). In 2010 Green Bay's population was about 100,000 people, making it the third largest city in the state. U.S. Census Bureau, *QuickFacts, Green Bay city, Wisconsin*, https://www.census.gov/quickfacts/greenbaycitywisconsin (last visited Mar. 17, 2020).

Providence and Central Falls, Rhode Island (which are bigger regionally speaking).

In all cases except one, *New York v. United States Dep't of Justice,* 951 F.3d 84 (2d. Cir. 2020), the federal government has lost. *City of Philadelphia v. Att'y Gen. of U.S.,* 916 F.3d 276, 293 (3d Cir. 2019); *City of Chicago v. Sessions*, 888 F.3d 272, 293 (7th Cir. 2018); *City of Los Angeles v. Barr*, 941 F.3d 931, 934 (9th Cir. 2019); *City of Providence and City of Central Falls v. Barr*, No. 19-1802, 2020 WL 1429579, at *1 (1st Cir. 2020, Mar. 24, 2020); *City and County of San Francisco, California v. Sessions*, 349 F. Supp. 3d 92, 934 (N.D. Cal. 2018); *City of Evanston v. Barr*, 412 F. Supp. 3d 873 (N.D. Ill. 2019). But relief has been limited and confusing because no court has issued a nationwide injunction that is currently in effect.[7]

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[7] The district court in the Chicago case issued a nationwide preliminary injunction, which a panel of the Seventh Circuit affirmed, but the full court subsequently vacated the nationwide effect upon the grant of en banc rehearing. Before the preliminary injunction could be considered en banc, the district court issued a nationwide permanent injunction but stayed the nationwide effect pending appeal from the permanent injunction. *See* Order Staying Preliminary Injunction in Part, *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018) (No. 17-2991); Order Granting Petition for Rehearing En Banc at 1, *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018) (No. 17-2991). The district court in *City and County of San Francisco, California v. Sessions*, 349 F. Supp. 3d at 934, issued a nationwide injunction but stayed it pending a Ninth Circuit ruling on the issue which is still forthcoming. In *City of Los Angeles v. Barr*, 941 F.3d 931, 945 (9th Cir. 2019), the Ninth Circuit affirmed the district court granting a nationwide injunction, *City of Los Angeles v. Sessions*, No. 18-7347, 2019 WL 1957966, at *6 (C.D. Cal. Feb. 15, 2019), but it is applicable only to conditions added to Fiscal Year 2018 Byrne JAG grants. Also, the nationwide injunction in the Los Angeles

To help seek relieve beyond individual cities, the U.S. Conference of Mayors and Evanston, Illinois, sued as well. A federal district court in Illinois has permanently enjoined the Attorney General from imposing any of the conditions against Evanston and any members of the U.S. Conference of Mayors for Fiscal Years 2017, 2018, and in all future grant years. *City of Evanston,* 412 F. Supp. 3d at 889.

A nationwide injunction for as long as the Department of Justice intends to impose all of these conditions would have allowed local governments to avoid the choice of losing their federal funding or complying with grant conditions all courts but one have ruled are unlawful. As Gregg Costa explains:

> Although the nationwide injunction is problematic because it enables a judge with outlier views to halt enforcement of a policy on grounds most judges would reject, for challenges to policies that are plainly unlawful the rule of law would favor speedy and uniform judicial action. For regulatory schemes that depend on nationwide application for effective implementation, a patchwork of traditional, parties-only injunctions may be more disruptive than even an injunction that halts enforcement in full.

Gregg Costa, *An Old Solution to the Nationwide Injunction Problem*, Harvard Law Review Blog (Jan. 25, 2018).

While the government claims that nationwide injunctions have "take[n] a toll on the federal court system" (U.S. Br. 46) so does duplicative litigation. It also takes

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case is stayed pending a decision from the Ninth Circuit in *City and County of San Francisco, California v. Sessions*.

a financial toll on local governments, even those big enough to be able to sue.

But if federal courts can't issue nationwide injunctions, small local governments—which make up the majority of local government in the United States—are the real losers. As Judge Real explained when he granted a nationwide injunction in the Los Angeles case, which has been stayed, it isn't fair to other local governments (all smaller than Los Angeles at least in California) who have to compete with Los Angeles for limited dollars, that only Los Angeles can avoid the additional conditions. *See City of Los Angeles v. Sessions*, No. 18-7347, 2019 WL 1957966, at *6 (C.D. Cal. Feb. 15, 2019) ("This Court cannot reasonably provide complete relief to Los Angeles without enjoining Defendants from imposing the Conditions as to all competitors. An injunction that bars Defendants from applying the Conditions only as to Los Angeles does little to ensure an even playing field.").

While a number of larger cities have sued, "what is the evidence that percolation among the circuits yields better-reasoned decisions?" Spencer E. Amdur & David Hausman, *Response, Nationwide Injunctions and Nationwide Harm*, 131 Harv. L. Rev. F. 49, 52 (2017). As the court pointed out in the Chicago case, adding grant conditions presented a narrow issue of law that was not fact-dependent and would not vary among localities, and therefore "does not present the situation in which courts will benefit from allowing the issue to percolate through additional courts." *City of Chicago,* 888 F.3d at 291.

This example happens to involve the current administration, but prior administrations were just as likely to transgress the bounds of federalism. Local governments also brought federalism-based suits against the

federal government under President Obama. *See, e.g., Montgomery Cty. v. FCC*, 811 F.3d 121 (4th Cir. 2015); *City of Oakland v. Lynch*, 798 F.3d 1159 (9th Cir. 2015); *City of Berkeley v. U.S. Postal Serv.*, No. C 14-04916 WHA; No. C 14-05179 WHA, 2015 WL 1737523 (N.D. Cal. Apr. 14, 2015); *City of Spokane v. Federal Nat'l Mortgage Ass'n*, 775 F.3d 1113 (9th Cir. 2014); *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012). Not coincidentally, these suits were all filed by medium-to-large local governments.

This issue transcends politics. Federalism would be substantially under-enforced if the many thousands of small towns could not enjoy the benefits of injunctions obtained in suits filed by the handful of big cities with the resources to do so.

CONCLUSION

The judgment of the U.S. Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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