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.,

Respondents.

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

BRIEF OF PROFESSORS OF CIVIL PROCEDURE AND FEDERAL COURTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are law professors and legal scholars with expertise in civil procedure and federal jurisdiction. *Amici* have an interest in the proper interpretation of the authority of the federal courts. *Amici* submit that the Government's assertion that federal courts lack authority to issue injunctions that protect nonparties is not supported by history, precedent, or Article III of the Constitution.

Zachary D. Clopton is a professor of law at Northwestern Pritzker School of Law. His research and academic interests include civil procedure and federal courts. His recent scholarship has appeared in the Stanford Law Review, Michigan Law Review, California Law Review, NYU Law Review, and University of Chicago Law Review.

Amanda Frost is a professor of law at American University Washington College of Law. She writes and teaches in the fields of constitutional law, immigration and citizenship law, federal courts and jurisdiction, and judicial ethics. Her articles have appeared in the Duke Law Journal, Northwestern Law Review, NYU Law Review, and Virginia Law Review, among other

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[1] Pursuant to Rule 37.6, *amici* certify that no counsel for a party has authored this brief in whole or in part and that no one other than *amici* and their counsel has made any monetary contribution to the preparation and submission of this brief. All parties have consented to the filing of this brief.

publications, and she authors the "Academic Round-up" column for SCOTUSblog.

Suzette Malveaux is a professor of law at the University of Colorado Law School and director of the Byron R. White Center for the Study of American Constitutional Law. She writes and teaches in the areas of civil procedure, complex litigation, civil rights, and employment discrimination. Her articles have appeared in the Harvard Law Review Forum, George Washington Law Review, and Washington University Law Review, and she co-authored Class Actions and Other Multi-Party Litigation: Cases and Materials (2d 2006, 3d 2012).

Alan Trammell is a professor of law at the University of Arkansas School of Law (Fayetteville). He writes and teaches in the areas of civil procedure, federal courts, and conflict of laws. His most recent scholarship has appeared in the Virginia Law Review, Texas Law Review, Cornell Law Review, Vanderbilt Law Review, and Notre Dame Law Review.

SUMMARY OF ARGUMENT

In *Trump v. Pennsylvania* (No. 19-454), the Government asks this Court to categorically prohibit injunctions that protect nonparties. But history, precedent, and Article III of the Constitution do not support a categorical rule against such injunctions. Instead, whether an injunction should issue in a given case is a complex, fact-sensitive question that should be resolved on a case-by-case basis.

First, although critics of so-called universal injunctions claim that the history of equity compels their categorical prohibition, this claim is overbroad and subject to challenge. Historically, English and American courts protected nonparties through bills of peace, privity, and common law writs, and there are early examples of federal courts using the type of injunction challenged in this case.

In addition, although critics of universal injunctions claim that *United States v. Mendoza*, 464 U.S. 154 (1984), implies that nonparties should never benefit from judgments against the federal government, that decision shows only that the scope of relief may account for policy considerations. *Mendoza*'s analysis does not support a blanket prohibition on universal injunctions.

Finally, while many critics of universal injunctions claim that nonparty relief is inconsistent with Article III, it is well established that federal-court authority is not categorically limited to parties who can demonstrate Article III

standing in the initial proceeding. And, importantly, a ruling grounded in Article III would disempower Congress from authorizing relief that protects nonparties, even in limited and well-defined areas.

Unless and until Congress provides guidance to the federal courts on the proper scope of relief, federal courts should use their equitable discretion to account for the important policy issues raised by universal injunctions. District courts should carefully weigh the balance of equities and the public interest, and appellate courts should, in turn, expeditiously review preliminary injunctions that provide widespread relief. This Court's settled precedents support such a measured approach, which is far preferable to the unjustified, categorical prohibition that the Government requests.

ARGUMENT

I. THE HISTORY OF EQUITY DOES NOT COMPEL FEDERAL COURTS TO REFRAIN FROM ISSUING INJUNCTIONS THAT PROTECT NONPARTIES

In his concurring opinion in *Trump v. Hawaii*, Justice Thomas criticized "universal injunctions," which he described as "[i]njunctions that prohibit the Executive Branch from applying a law or policy against anyone." 138 S. Ct. 2392, 2424 (2018). Justice Thomas's critique focused on history. *Id.* at 2424–29. He reasoned that federal courts' authority to grant equitable relief "must comply with [the] longstanding principles of equity that predate this

country's founding" and that "[u]niversal injunctions do not seem to comply with those principles." *Id.* at 2426. The Government now adopts this argument. Pres. Br. 44.

But history demonstrates that traditional principles of equity *did* allow for injunctions that protected nonparties. Moreover, a changing legal landscape further calls into question the vitality of the historical case against universal injunctions. Historical practice thus does not compel a categorical rule prohibiting federal courts from exercising their equitable discretion to issue injunctions that protect nonparties.

A. Traditional Equity Practice Permitted Bills Of Peace And Other Injunctions That Protected The Rights of Nonparties

First, the fact that "bills of peace" protected nonparties at equity demonstrates that criticisms of universal injunctions sweep too broadly. *See generally, e.g.,* Stephen C. Yeazell, From Medieval Group Litigation to the Modern Class Action 24–26 (1987) (discussing bills of peace); 7A Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 1751 (3d ed.) (Aug. 2019 Update) (same); Thomas D. Rowe, Jr., *A Distant Mirror: The Bill of Peace in Early American Mass Torts and Its Implications for Modern Class Actions*, 39 Ariz. L. Rev. 711 (1997) (same); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. Rev. 1065 (2018) (same).

Even universal-injunction critics acknowledge that the early history of equity permitted bills of

peace. Justice Thomas, for example, wrote in his *Trump v. Hawaii* concurring opinion:

> [O]ne of the recognized bases for an exercise of equitable power was the avoidance of "multiplicity of suits." Courts would employ "bills of peace" to consider and resolve a number of suits in a single proceeding. And some authorities stated that these suits could be filed by one plaintiff on behalf of a number of others.

138 S. Ct. at 2427 (citations omitted). Similarly, Professor Samuel Bray acknowledged that bills of peace are "probably the closest analogy in traditional equity to the [universal] injunction." Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 426 (2017).

Yet these critics fail to acknowledge the implications of this history. The very existence of bills of peace undermines any argument that the history of equity categorically precludes injunctive relief that benefits nonparties. Bills of peace did not require that all affected persons become parties, a feature that remained true of representative actions at least through the beginning of the twentieth century. *See* Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 Harv. L. Rev. 920, 964, 976 n. 364 (2020). As a result, any

categorical claims about the scope of equitable remedies are unsupported.[2]

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[2] *Amici curiae* Professors Bagley and Bray seek to distinguish bills of peace by claiming that they required "representativeness" and that the modern class action covers "the entire waterfront." *See* Brief For Nicholas Bagley And Samuel L. Bray As *Amici Curiae* Supporting Petitioners at 11. But *amici* cannot just wish away bills of peace, and in any event, their reasons for doing so are unavailing.

First, with respect to "representativeness," *amici* do not explain why one cherry-picked element of equity pleading should be transported into this context as a constitutional limit. *See*, *e.g.*, Sohoni, *supra*, at 940–41. Moreover, representativeness was not in fact a categorical requirement at equity, and whatever notion of "representativeness" that did apply did not require that persons purportedly affected become actual parties at the outset of the litigation. *See*, *e.g.*, Joseph Story, Commentaries on Equity Pleadings (2d ed. 1840), §§ 76a-76c, 77-135; Brief of *Amici Curiae* Legal Historians in Support of Plaintiff-Appellee the City of Chicago, *City of Chicago v. Whitaker*, No. 18-2885, 2018 U.S. 7th Cir. Briefs Lexis 41 at *15–*20 (7th Cir. Nov. 15, 2018); Sohoni, *supra*, at 964, 976 n. 364.

Second, the notion that the modern class action takes up "the entire waterfront" is misleading at best. *Amici* do not—and cannot—explain how a Federal Rule of Civil Procedure could have the effect of depriving federal courts of the judicial power to hear cases and controversies that they would have held without it. *See*, *e.g.*, *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941); 28 U.S.C. § 2072(b). Note, too, that *amici* cite *Taylor v. Sturgell*, 553 U.S. 880 (2008), as support for their claim. But *Taylor* was a policy-driven decision about the proper scope of the federal common law of preclusion; it imposed no limits on judicial power or on constitutionally available remedies. *Id.* at 891–92.

Further, it was not just bills of peace that protected nonparties at equity. Equity courts also issued ordinary injunctions that had the effect of protecting the rights of nonparties, including in public nuisance cases and in early officer suits. *See* Brief of *Amici Curiae* Legal Historians in Support of Plaintiff-Appellee the City of Chicago, *City of Chicago v. Whitaker*, No. 18-2885, 2018 U.S. 7th Cir. Briefs Lexis 41 at *20–*22 (7th Cir. Nov. 15, 2018) (citing *inter alia Mayor of Georgetown v. Alexandria Canal Co.*, 37 U.S. 91 (1838); *Corning v. Lowerre*, 6 Johns. Ch. 439, 1822 WL 1753 (N.Y. Ch. 1822); *Belknap v. Belknap*, 2 Johns. Ch. 463, 1817 WL 1598 (N.Y. Ch. 1817); *Bonaparte v. Camden & A.R. Co.*, 3 F. Cas. 821 (C.C.D.N.J. 1830)). Once again, even on this narrow view, traditional equity practice permitted injunctions that protected nonparties.

Indeed, *amici*'s argument about class actions shows why their entire claim about universal injunctions goes too far. *Amici* suggest that the modern class action essentially replaces the bill of peace, even though its requirements were not identical. This argument concedes that modern equivalents need not be identical to their historical analogs. So, too, this Court could approve of the practice of nonparty-protecting injunctions even if it could not identify in the history of equity an exact replica of the district court's injunction from this case.

B. Traditional Equity Included A Concept Of Privity

Second, and frequently overlooked by universal-injunction critics, injunctive relief *also* traditionally extended beyond parties through the doctrine of privity.

Injunctions traditionally bound privies. *See, e.g., Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945) (describing "the common-law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control"); 11A Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 2956 (3d ed.) (Aug. 2019 Update); Restatement (First) of Judgments § 83 (1942).

Privies also could be protected by injunctions. *See*, *e.g.*, Restatement (First) of Judgments § 83 ("A person who is not a party but who is in privity with the parties in an action terminating in a valid judgment is, to the extent stated in §§ 84-92, bound by and *entitled to the benefits of* the rules of res judicata.") (emphasis added). Privies could sue for civil contempt. *See* E. H. Schopler, *Who May Institute Civil Contempt Proceedings*, 61 A.L.R.2d 1083 (1958). And privies could enforce injunctions against former parties. *See Gunter v. Atl. Coast Line R.R. Co.*, 200 U.S. 273, 283 (1906).

Privity also expanded the scope of injunctive relief against government defendants.[3] In his *Trump v. Hawaii* concurring opinion, Justice Thomas relied on *Scott v. Donald*, 165 U.S. 107 (1897), for the proposition that injunctions against government defendants (there, South Carolina government defendants) should protect only parties. *See Trump v. Hawaii*, 138 S. Ct. at 2428. But, less than a decade after *Scott*, this Court heard another case filed against South Carolina government defendants showing that injunctions against government defendants in fact may protect nonparties. In *Gunter v. Atlantic Coast Line Railroad Co.*, 200 U.S. 273 (1906), the railroad sued various state and municipal defendants seeking an injunction against the collection of taxes. *Id.* at 281-82. The railroad relied on a previous injunction issued against the government defendants in a case brought by Thomas E. B. Pegues, the railroad's predecessor in interest. *Id.* This Court began its analysis by acknowledging an "undoubted" right:

> We at once treat as undoubted the right of the Atlantic Coast Line Railroad Company to the benefits of the decree in the Pegues Case, since it is conceded in the argument at bar that that company, as the successor to the

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[3] As described *infra* note 4, a notion of privity permitted *nonparty* preclusion against the federal government more than 80 years before this Court's decision in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

> rights of Pegues, is entitled to the protection of the original decree rendered in his favor.

Id. at 283. This acknowledgement was consistent with prevailing views of privity at the time. *See Wilson v. Alexander*, 276 F. 875, 880 (5th Cir. 1921) (characterizing Atlantic Coast and Pegues as in privity).

This Court's "undoubted" application of privity to extend the effects of injunctions beyond actual parties further undermines any categorical argument about the scope of relief in the history of equity.

C. The History Of Nonmutual Preclusion Provides Additional Support For Universal Injunctions

Third, the history of the law of preclusion further complicates critics' historical narrative. In *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), this Court authorized offensive nonmutual issue preclusion, thereby permitting plaintiffs to invoke a prior equitable adjudication in a subsequent action—even though they were not parties to the original suit. *Id.* at 331. *Parklane* thus means that, through the law of preclusion, plaintiffs in one case could be protected nationwide by prior judgments (including prior equitable judgments) issued in other cases. *Id.; see Baker ex rel. Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998) ("For claim and issue preclusion (res judicata) purposes, in

other words, the judgment of the rendering State gains *nationwide* force.") (emphasis added).[4]

The same considerations that led this Court to accept nonparty-protecting preclusion in *Parklane* also lend their support to nonparty-protecting injunctions. *See*, *e.g.*, *Nat'l Spiritual Assembly of Bahá'ís of U.S. Under Hereditary Guardianship, Inc. v. Nat'l Spiritual Assembly of Bahá'ís of U.S., Inc.*, 628 F.3d 837, 848–57 (7th Cir. 2010) (connecting conceptions of privity in injunctions and preclusion).

Moreover, the *Parklane* decision shows that this Court is willing to countenance exactly the form of historical translation that would support universal injunctions in this case. Petitioners in *Parklane* argued that nonmutual preclusion violated the Seventh Amendment because it deprived them of a jury trial and because nonmutual preclusion would not have been applied in 1791. *See* 439 U.S. at 333.

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[4] Even before *Parklane*, nonparties could receive the benefit of preclusion if they were in privity with parties. *See supra*, Section I.B. Indeed, a notion of privity even permitted nonparty preclusion against the *federal government*. *See United States v. Des Moines Valley R.R. Co.*, 84 F. 40, 42–43 (8th Cir. 1897) (permitting nonparty preclusion against the federal government); *see also Chicago, Rock Island & Pac. R.R. Co. v. Schendel*, 270 U.S. 611, 619–20 (1926) (quoting *Des Moines Valley* approvingly); *Taylor v. Sturgell*, 553 U.S. 880, 899–900 (2008) (characterizing *Des Moines Valley* as applying the still-accepted principle that "[a] party may not use a representative or agent to relitigate an adverse judgment").

This Court held that nonmutual preclusion did not violate the Seventh Amendment because there was an historical through line from the mutual preclusion available in 1791 to the nonmutual preclusion that developed later. 439 U.S. at 333–37. Similarly, this Court might find a through line from traditional injunctions that protected parties to later-developing injunctions that protect nonparties. The historical examples of relief that protected nonparties mentioned above makes the case stronger yet.

In short, because traditional equity allowed for injunctions to protect nonparties and because nonmutual preclusion offers another path, history does not require a categorical prohibition on federal courts issuing injunctions that protect nonparties.

II. NEW HISTORIAL RESEARCH FURTHER ESTABLISHES THAT FEDERAL COURTS MAY ISSUE INJUNCTIONS THAT PROTECT NONPARTIES

Historical support for injunctions protecting nonparties also may be found outside of early equity. Recent research has revealed that English common law courts going back centuries have issued relief that protects nonparties by writ, while other research has uncovered more and earlier examples of U.S. federal courts issuing injunctions that protect nonparties. So while critics argue that these injunctions depart from historical practice, a rule barring such injunctions actually would represent the greater departure.

A. Traditional English (and American) Courts Used Common Law Writs To Achieve The Functional Equivalent Of Universal Injunctions

Universal-injunction critics' myopic focus on the courts of equity fails to reckon with common law writs that historically protected nonparties in the same way as universal injunctions.

Recent research by Professor James Pfander and Jacob Wentzel has drawn attention to the practice of the English court of King's Bench, the supreme court of common law. James E. Pfander & Jacob Wentzel, *The Common Law Origins of* Ex parte Young, 72 Stan. L. Rev. (forthcoming 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3484165 (last visited Apr. 7, 2020). Pfander and Wentzel explain the role of King's Bench in regulating government conduct starting in the seventeenth century:

> Over time, King's Bench developed a series of writs. . . to correct the unlawful administration of government. These "administrative" writs . . . of *certiorari*, *mandamus*, and *prohibition*, which formed the pillars of common law's system of government oversight, enabled public-rights suitors to challenge the unlawful action of early administrative bodies such as commissions, boards, and justices of the peace. When these challenges were successful, they resulted in the issuance of specific relief, in the form of judgments to *quash* (certiorari), *command* (mandamus), or *prevent* (prohibition) official action in

> conformance with law. Notably, these judgments bore significant resemblance to injunctions in that they ordered official defendants to take or not to take specified action on pain of contempt. Importantly, too, the judgments were sometimes thought to disable an illicit course of government action as a general matter, thereby conferring benefits on similarly situated non-parties.

Id. at *6–*7 (internal notes omitted). In other words, traditional English courts had the power to "control unlawful government action as a general matter, with reference to those aggrieved and without regard to party status." *Id.* at *54. And Pfander and Wentzel's research shows that such practices found their way into early American courts as well. *Id.* at *54–*57 (citing *inter alia*, *Morewood v. Hollister*, 6 N.Y. 309 (1852); *State v. Justices of Middlesex County*, 1 N.J.L. 283 (1794); *Union Pacific Railroad Co. v. Hall*, 91 U.S. 343 (1875)).

In short, therefore, federal courts today are on solid historical footing when issuing relief that protects nonparties against government action. That some historical articulations of this power were labeled "common law" (rather than "equity") should be of no moment to a court system in which law and equity have merged, *see* Fed. R. Civ. P. 2, and in which "[t]he judicial Power . . . extend[s] to all Cases, in Law and Equity . . . ." U.S. Const. art. III, § 2.

B. Claims Regarding The Absence Of Injunctions Protecting Nonparties In U.S. Courts Are Overstated

In addition, recent research further challenges critics' claim about the absence of injunctions that protect nonparties in U.S. courts.

First, in *City of Chicago v. Whitaker*, legal historians filed a compelling brief arguing that there are historical precedents to injunctions like the one issued in this case. *See* Brief of *Amici Curiae* Legal Historians in Support of Plaintiff-Appellee the City of Chicago, *City of Chicago v. Whitaker*, No. 18-2885, 2018 U.S. 7th Cir. Briefs Lexis 41 at *15–*28 (7th Cir. Nov. 15, 2018). They also explained why other doctrines account for the sparse use of "universal injunctions" in the 18th and 19th centuries. *Id.* at 28–34.

In addition, recently published research of Professor Mila Sohoni has surfaced other examples of injunctions protecting nonparties that go back more than a century. Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 Harv. L. Rev. 920 (2020). This Court itself issued a universal injunction in 1913, when it restrained a federal statute affecting newspapers from being enforced not just against the two plaintiff publications but also against "other newspaper publishers" pending its decision in that case. *See id.* at 944–46.[5] In

[5] A copy of the Supreme Court's order in *Journal of Commerce & Commercial Bulletin v. Burleson*, 229 U.S. 600,

addition, at least as far back as 1916, three-judge federal courts issued injunctions against the enforcement of *state* laws that reached beyond the plaintiffs in those suits. *See id*. at 925. For example, in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), this Court affirmed a universal injunction that entirely barred the enforcement of the Oregon compulsory public-schooling law in suits brought by two schools suing for themselves alone. *See* Sohoni, *supra*, at 959–61. And in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), this Court affirmed an injunction that reached beyond the plaintiff class of Jehovah's Witnesses and their children to *also* shield "any other children having religious scruples" from the state's compulsory flag-salute law. *See* Sohoni, *supra*, at 989–91 (quoting final decree).

These examples and others undermine claims that nonparty-protecting injunctions are new, and they suggest that it would be a prohibition on such injunctions—rather than the injunctions themselves—that would be out of step with historical practice.

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600 (1913) (per curiam) has been made available here: https://perma.cc/4KDR-J4HA. The suit and its companion case were eventually decided under the caption *Lewis Publishing Co. v. Morgan*, 229 U.S. 288 (1913).

III. PRECEDENT DOES NOT PROHIBIT FEDERAL COURTS FROM ISSUING INJUNCTIONS THAT PROTECT NONPARTIES

Some critics of universal injunctions also argue that injunctions protecting nonparties contradict this Court's decision in *United States v. Mendoza*, 464 U.S. 154 (1984). That is incorrect.

Mendoza held that the doctrine of offensive nonmutual issue preclusion permitted in *Parklane* should not be used against the federal government in that case. *Id.* at 162–64; *cf.* 18A Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Juris. § 4465.4 (3d ed.) (Aug. 2019 Update) (noting that *Mendoza* does not categorically prohibit nonmutual preclusion against the government). Critics argue that if a nonparty does not get the preclusive benefit of a prior adjudication against the federal government, then that the same nonparty should not get the remedial benefit of an injunction against the federal government either.

This is the wrong lesson to draw from *Mendoza*. *Mendoza* was not grounded in history or Article III—it was a policy determination through and through. 464 U.S. at 159–63. As a result, *Mendoza* is appropriately read as stating only that the scope of nonparty protection is a matter of policy judgment. So, too, courts may exercise policy judgment when deciding the scope of relief that is appropriate in a particular case. *See, e.g.*, Zachary D. Clopton, *National Injunctions and Preclusion*, 118 Mich. L. Rev. 1 (2019); Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 Tex. L. Rev. 67 (2019); Frost, *supra*, at 1065 (2018);

Suzette M. Malveaux, Response, *Class Actions, Civil Rights, and the National Injunction*, 131 Harv. L. Rev. F. 56 (2017).

Furthermore, *Mendoza*'s policy-specific arguments were tailored to nonmutual issue preclusion—and are poor fits for the universal-injunction context. Central to the majority's position in *Mendoza* is that the federal government is subject to many lawsuits across the country, and many of those suits address issues that—if resolved against the government—would determine numerous cases. 464 U.S. at 159–61. Given that possibility, this Court worried that the government would be obliged to appeal *every* adverse ruling in order to avoid being locked into a particular determination. *Id.* at 160–61.

Whatever one makes of that concern in the issue-preclusion context, it has little effect in the universal-injunctions debate. Universal injunctions are contemplated only in a relatively small number of cases.[6] The few such injunctions that issue should not—and will not—take the government by surprise. And because this remedy is issued only in extraordinary circumstances, the government could

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[6] Universal injunctions, of course, are limited by the usual test for the issuance of injunctive relief. *See, e.g.*, *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Moreover, the balancing of equities and the public interest (among other interests) may look different when the requested relief is "universal" rather than local.

quickly appeal adverse decisions and appellate courts could expeditiously hear those appeals.

The *Mendoza* Court also worried about inhibiting the percolation of issues through the courts. *Id.* at 160. But, across contexts, this Court has made clear that a policy preference in favor of percolation does not compel a categorical rule. For example, this Court explained:

> It often will be preferable to allow several courts to pass on a given class claim in order to gain the benefit of adjudication by different courts in different factual contexts. For this reason, a federal court when asked to certify a nationwide class should 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. But we decline to adopt the extreme position that such a class may never be certified.

Califano v. Yamasaki, 442 U.S. 682, 702–03 (1979); *see also Parklane*, 439 U.S. at 331 (authorizing offensive nonmutual issue preclusion against private parties, which also would limit percolation). And, importantly, universal injunctions do not bar the government from continuing to litigate in other courts, nor have they stopped many courts from hearing cases and reaching their own decisions on the merits. *See* Frost, *supra* at, 1065 (collecting examples of such cases).

Moreover, universal-injunction cases such as this one are seemingly weak candidates for a

percolation argument, given that these suits typically proceed quickly to appellate (if not Supreme Court) review and often are characterized by the participation of numerous intervenors and *amici curiae* who provide the functional equivalent of district-court percolation. And, just as *Califano* suggested in another context (*see* 442 U.S. at 702–03), a court issuing a universal injunction may consider the value of percolation as part of its discretionary, fact-sensitive analysis. *See*, *e.g.*, *City of Chicago v. Sessions*, 888 F.3d 272, 290 (7th Cir. 2018), vacated in part, 2018 WL 4268817 ("[O]nce a court determines that preliminary relief is required, the court must be able to engage in the 'equitable balancing' to determine the relief necessary. Rarely, that will include nationwide injunctions. Granted, it is an imprecise process, but that is endemic to injunctions, and courts are capable of weighing the appropriate factors while remaining cognizant of the hazards of forum shopping and duplicative lawsuits.").

None of this is to say that policy arguments will tip in favor of universal injunctions in all cases—far from it. *Mendoza* is a reminder that district courts should exercise their discretion cautiously in these cases, and courts of appeals should review these cases in light of the awesome power of equitable remedies. But *Mendoza* does not mean that district courts may never issue injunctions that protect nonparties.

IV. ARTICLE III DOES NOT COMPEL FEDERAL COURTS TO REFRAIN FROM ISSUING INJUNCTIONS THAT PROTECT NONPARTIES

Finally, some critics of universal injunctions suggest that these remedies are inconsistent with Article III standing requirements. This view of the federal judicial power is supported by neither case law nor logic.

As this Court explained in *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645 (2017), "*at least one* plaintiff must have standing to seek each form of relief requested in the complaint." *Id.* at 1651 (emphasis added) (alteration omitted). District courts may provide class-wide relief even if some of the class members did not establish standing in the first instance. *See*, *e.g.*, *Langan v. Johnson & Johnson*, 897 F.3d 88, 93 (2d Cir. 2018) (rejecting Article III objection "as long as the named plaintiffs have standing to sue the named defendants"); *see also Morrison v. YTB Int'l, Inc.*, 649 F.3d 533, 536 (7th Cir. 2011) ("There's no problem with standing. Plaintiffs have standing if they have been injured, the defendants caused that injury, and the injury can be redressed by a judicial decision."). In other words, courts may issue relief to many, even if only one plaintiff has established standing.

In addition, Professor Amanda Frost has collected many other situations in which federal courts provide relief despite a lack of standing. *See* Frost, *supra*, at 1065 (discussing injunctions against future conduct, facial challenges to statutes, mootness exceptions, next friends, and associational standing, among others). Privity and

nonmutual preclusion also show that judgments may be invoked by nonparties regardless whether they would have had standing in the original proceeding. *See supra*, Sections I.B and C; *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 151 (2015) (minimizing Article III concerns with respect to issue preclusion); *see also Baker ex rel. Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998) ("A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. For claim and issue preclusion (res judicata) purposes, in other words, the judgment of the rendering State gains *nationwide* force.") (emphasis added).

And, of course, federal courts are not prohibited from issuing judgments that affect nonparties—regardless whether the nonparties would have standing on their own. *See Califano*, 442 U.S. at 702 ("Nor is a nationwide class inconsistent with principles of equity jurisprudence, since the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class."); *Hills v. Gautreaux*, 425 U.S. 284, 293–94 (1976) ("A federal court is required to tailor the scope of the remedy to fit the nature and extent of the constitutional violation.") (quotation marks and alteration omitted); Sohoni, *supra*, at 931–32 (discussing *in rem* actions, admiralty, public nuisance, and injunctions against illegal acts, all of which benefit nonparties).

Accordingly, although the Government invokes Article III, the real issue is one of *remedy* rather than standing. As this Court has explained:

> The nature of the relief available after jurisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy." *Avco Corp. v. Machinists*, 390 U.S. 557, 561, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968). *See also Davis v. Passman*, 442 U.S. 228, 239–240, n. 18, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979) ("*[J]urisdiction* is a question of whether a federal court has the power ... to hear a case"; "*relief* is a question of the various remedies a federal court may make available.").

Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 351–52 (2008).

This distinction is more than just semantics. A decision relying on Article III not only constrains federal courts, but also would have the effect of dramatically undercutting the power of Congress. Congress cannot authorize federal courts to exercise jurisdiction that exceeds Article III of the Constitution. *See*, *e.g.*, *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491 (1983) ("Congress may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution.") Were this Court to hold that Article III categorically prohibits injunctions that protect

nonparties, then Congress would be unable to authorize federal courts to issue any injunctions that protect nonparties—even in limited, enumerated circumstances.[7] And as noted above, such a prohibition would be out of step with the historical practice stretching from traditional equity through more than a century of decisions from this Court and other federal courts.

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[7] Here, too, *amici* Bagley and Bray's reliance on *Taylor v. Sturgell*, 553 U.S. 880 (2008) undermines their argument. Recall that *amici* seek to cast aside the history of bills of peace by claiming that they have been replaced by modern class actions, and they cite *Taylor* for support of this proposition. *See supra* note 2. But *Taylor* did not question the Article III power of the federal courts to enforce nonparty preclusion. And, indeed, *Taylor* reaffirmed that Congress may authorize nonparty preclusion through a "special statutory scheme" even where preclusion would not otherwise apply. 553 U.S. at 895. A decision of this Court to categorically prohibit injunctions that protect nonparties would countermand the same kind of congressional latitude that this Court approved in *Taylor*.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that history, precedent, and Article III of the Constitution do not compel this Court to impose unjustified, categorical limits on the authority of federal courts to issue injunctions.

Respectfully submitted,

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