No. 21-954

IN THE

Supreme Court of the United States

JOSEPH R. BIDEN, JR.,
PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioner,

v.

STATE OF TEXAS, ET AL.,
Respondents.

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

BRIEF OF AMICUS CURIAE CENTER FOR IMMIGRATION LAW AND POLICY, UCLA SCHOOL OF LAW IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Center for Immigration Law and Policy, based at the UCLA School of Law, is a hub for immigration scholarship and advocacy. Founded in 2020, the Center generates innovative ideas at the intersection of immigration scholarship and practice. It then works to transform those ideas into meaningful changes in immigration policy at the local, state, and national levels.

The Center has a strong interest in ensuring that the Court addresses the nationwide scope of the injunction entered below for two reasons. First, the role states play in influencing immigration law is one of the Center's core areas of research and advocacy. The Center therefore has a significant interest in issues arising from the growing impact of nationwide injunctions ordered in cases brought by states. Second, attorneys working in the Center represent a class of individuals subject to *nonrefoulement* interviews that occur pursuant to the "Migrant Protection Protocols" at the California-Mexico border. For that reason, the Center has a direct stake in the geographic scope of the injunction at issue here.

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[1] Counsel for all parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amicus*, its members, and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION

The injunction issued in this case exemplifies a practice that has "exploded in popularity" among the lower courts, see *Trump* v. *Hawaii*, 138 S. Ct. 2392, 2429 (2018) (Thomas, J., concurring): A small handful of states obtaining a nationwide injunction against a federal immigration policy. Based on a single-day bench trial that established meager, speculative economic harms to the two Respondent States—and no evidence of harm to Respondent States from terminating MPP in other states—the district court issued a permanent nationwide injunction that fundamentally alters federal policy toward people who seek asylum along the entire Southern border. In doing so, the district court cut off any possibility of percolation in the lower courts, and created significant pressure for this Court to grant review on an expedited timeline.

"This is not normal." *DHS* v. *New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring). And it does not have to be this way. This case gives the Court an opportunity to impose some much-needed restraint on this surging remedial practice.

As nationwide injunctions have taken root, their propriety—at least outside the class action context—has become the subject of intense judicial and academic debate. Two Justices of this Court have expressed the view that such injunctions may be unconstitutional. *Trump* v. *Hawaii*, 138 S. Ct. at 2425 (Thomas, J., concurring); *DHS* v. *New York*, 140 S. Ct. at 600 (Gorsuch, J., concurring). This Court, however, need not resolve broad questions about federal courts' inherent remedial powers to begin reining in this practice.

Amicus believes the decision below is wrong and warrants reversal on the merits. But the opinions below also flouted longstanding equitable principles that require injunctive relief be proportionate and narrowly drawn. Reaffirming those basic principles by applying them to the case at hand would go a long way toward curbing remedial excess in the lower courts.

In short, this Court should clarify that the injunction issued here should not have swept nationwide. And even if the Court otherwise agrees with the reasoning below, it should narrow the injunction to apply only with respect to the Respondent States.

SUMMARY OF ARGUMENT

I. For centuries, basic equitable principles have constrained courts' powers to issue injunctive relief. See *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944). Rather than crafting relief however they see fit, courts must draw injunctions that are proportionate to the injuries at stake, weighing the plaintiff's injuries against the burdens that an injunction would place on the defendant and public at large. See *Milliken* v. *Bradley*, 418 U.S. 717, 738 (1974); *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 312 (1982). In the same vein, courts fashioning injunctive relief must also be attentive to the interests of those not before the court. *Weinberger*, 456 U.S. at 312. These guardrails have long ensured fidelity to the core principle at the heart of the judiciary's equitable powers: the importance of tailoring relief to the particular facts of a given case. See *Milliken*, 418 U.S. at 738.

As nationwide injunctions have swelled in popularity, however, that limiting principle has fallen

by the wayside—particularly in cases brought by a subset of individual states challenging federal immigration policies.

The relief issued here provides a paradigmatic example. The district court ordered permanent injunctive relief out of all proportion to the limited, thus-far-unrealized economic harms alleged by the Respondent States. Even worse, it justified the injunction's geographic scope based on nothing more than a boilerplate invocation of the virtues of nationwide uniformity and unsubstantiated speculation that individuals who would otherwise have remained in Mexico under MPP would be paroled into the United States once MPP was terminated, move from the state in which they entered to Texas or Missouri, and, once there, apply for and obtain driver's licenses or use public services.

But neither of those rationales justifies an injunction that runs nationwide. Even the staunchest defenders of nationwide injunctions have disclaimed the view that uniformity alone justifies this remedy. After all, dis-uniformity is a common feature of many immigration laws and policies. Indeed, for most of its existence, MPP itself has not been implemented uniformly across the Southern border. And the possibility that individuals who would otherwise have remained in Mexico under MPP would eventually reach and reside in Texas or Missouri through indirect movement from other states is far too attenuated to justify such sweeping relief—even if it had found any basis in the trial record, which it did not.

The injunction issued here also took no heed of the interests of non-parties, including the 17 states who were absent from district court proceedings but have now filed an *amicus* brief urging reversal. And it all

but ignored the practicability of drawing relief more narrowly by limiting the injunction's geographic scope to the two Respondent States.

On appeal, the Fifth Circuit failed to rectify these missteps. Indeed, the opinion below made virtually no reference to the equitable principles that are supposed to ground courts' remedial analyses. Nor did it interrogate the possibility of ordering more limited relief. In short, by ignoring the fundamentals of crafting equitable relief, the lower courts here effectively empowered two states—one of which lacks an international border—to set immigration and border policy for the entire United States.

II. This Court should not let the injunction issued here stand. Regardless of whether it agrees with Respondents on the merits, this Court should make clear that any injunction in this case must be appropriately tailored. Here, an injunction proportionate to the harms alleged should, at most, prohibit MPP from being terminated within the Respondent States. Under that approach, the injunction would authorize the return to Mexico of individuals who were apprehended or presented themselves at ports of entry in Texas, the only Respondent State situated along the Southern border.

Correcting the lower courts' remedial analysis is critically important in this case, where the scope of the injunction will dictate the nature of the (virtually inevitable) follow-on litigation and any subsequent efforts by the federal government to terminate MPP. But it will also matter beyond the four corners of this case, by providing lower courts with a much-needed refresher on the longstanding principles that govern the scope of equitable relief.

I. The Injunction Issued Here Contravenes Basic Equitable Principles.

When a court issues an injunction, it exercises its "full coercive powers." *Nken* v. *Holder*, 556 U.S. 418, 428 (2009). An injunction is thus a "drastic and extraordinary remedy," one which "should not be granted as a matter of course." *Monsanto Co.* v. *Geertson Seed Farms*, 561 U.S. 139, 165 (2010). An injunction that runs nationwide is all the more drastic.[2]

In recent years, however, nationwide injunctions have not been quite so extraordinary, particularly in immigration cases—like this one—brought by states. See Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 418-9 (2017); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. Rev. 1065, 1071 (2018).[3]

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[2] The literature on this subject sometimes refers to this form of relief as "universal injunctions" to reflect the fact that they "are distinctive because they prohibit the Government from enforcing a policy with respect to anyone," rather than "because they have wide geographic breadth," *Trump* v. *Hawaii,* 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring). This brief uses the "more common term" of "nationwide injunctions," *id.*, but agrees this relief is distinctive primarily because of its impact on nonparties rather than its territorial reach.

[3] See also, e.g., *Texas* v. *United States*, 86 F. Supp. 3d 591, 672-74 (S.D. Tex. 2015) (enjoining the Obama Administration's Deferred Action for Parents of Americans (DAPA) program), *aff'd*, 809 F.3d 134, 187-88 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (mem.); *Washington* v. *Trump*, 2017 WL 462040, *2 (W.D. Wash. Feb. 3, 2017) (enjoining the Trump Administration's second Muslim Ban), *aff'd*, 847 F.3d 1151, 1166-67 (9th Cir. 2017); *Hawaii* v. *Trump*, 265 F. Supp. 3d 1140, 1160 (D. Haw. 2017) (enjoining the Trump Administration's third

Along the way, the lower courts appear to have lost sight of the guardrails that once hemmed in this remarkable use of the judicial power: namely, the requirements that courts draw injunctions proportionally and take into account the interests of persons and States not before the Court.

Sure enough, the district court here failed to heed those bedrock principles. Instead of fashioning its injunction to fit the equities of the case at hand, it issued relief wholly untethered from the scale of the injuries Respondents alleged. Rather than carefully considering the interests of nonparties—including the forty-eight states not present in this litigation—the district court fastened only on the Respondent States' interests. And, on appeal, the Fifth Circuit did even less. It dedicated sixty-three pages to its opinion affirming the district court, but never once discussed questions of remedial scope.

Muslim Ban), *aff'd in part, vacated in part*, 878 F.3d 662, 701-02 (9th Cir. 2017), *rev'd, remanded*, 138 S. Ct. 2392 (2018); *Regents of Univ. of Cal.* v. *DHS*, 279 F. Supp. 3d 1011, 1049 (N.D. Cal. 2018) (enjoining the Trump Administration's rescission of the Deferred Action for Childhood Arrivals (DACA) program), *aff'd*, 908 F.3d 476 (9th Cir. 2018), *rev'd in part, vacated in part*, 140 S. Ct. 1891 (2020); *New York* v. *DHS*, 408 F. Supp. 3d 334, 351-53 (S.D.N.Y. 2019) (enjoining the Trump Administration's public charge rule); *Texas* v. *United States*, 524 F. Supp. 3d 598, 666-67 (S.D. Tex. 2021) (enjoining the Biden Administration's 100-day moratorium on removals); *Texas* v. *United States*, No. 6:21-cv-00016, 2021 WL 3683913, at *61-63 (S.D. Tex. Aug. 19, 2021) (enjoining the Biden Administration's enforcement priority memoranda), *partially stayed*, 14 F.4th 332 (5th Cir. 2021), *vacated*, 24 F.4th 407 (5th Cir. 2021) (mem.), *appeal dismissed*, 2022 WL 517281 (5th Cir. Feb. 11, 2022).

A. Courts Must Ensure that Injunctive Relief Is Tailored and Proportional to the Harm Shown.

Federal courts do not possess boundless equitable powers. Although "equity is flexible," that flexibility is "confined within the broad boundaries of traditional equitable relief." *Grupo Mexicano de Desarollo S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 322 (1999). In issuing injunctive relief, federal courts thus must adhere to certain "requirements" enshrined over "several hundred years of history." *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944); see also *eBay Inc.* v. *MercExchange, LLC*, 547 U.S. 388, 395 (2006) (Roberts, C.J., concurring) (Although district courts are afforded some discretion in how they shape equitable remedies, "[d]iscretion is not whim." (citation omitted)).

The most basic of these requirements is the principle that injunctive relief must be carefully justified in light of the particular circumstances of a case, rather than dispensed reflexively and broadly. As Justice Baldwin recognized nearly two centuries ago, injunctions are "the strong arm of equity." *Bonaparte* v. *Camden & A.R. Co.*, 3. F. Cas. 821, 827 (C.C.D.N.J. 1830). There is no exercise of the equitable power "more delicate," nor "which requires greater caution, deliberation, and sound discretion," than issuing injunctive relief. *Id.*; see also *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 312 (1982). As such, injunctions must be tailored to take account of case-specific factors. *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979).

To operationalize that broad principle, this Court has commanded that injunctive relief be proportional. This requires taking a clear-eyed look at the precise

nature of the injury that gave rise to the suit and modulating relief accordingly. *Lewis* v. *Casey*, 518 U.S. 343, 357 (1996). Where the injury to the prevailing party is slight, equitable relief should typically be correspondingly modest. *Milliken* v. *Bradley*, 418 U.S. 717, 738 (1974) (in "any equity case, the nature of the violation determines the scope of the remedy"); *see also Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 420 (1977) (same); *Austin Indep. Sch. Dist.* v. *United States*, 429 U.S. 990, 992 (1976) (Powell, J., concurring) (faulting the Court of Appeals for ordering a degree of injunctive relief "far exceeding in scope any identifiable violations").

To apply this principle of proportionality, courts fashioning injunctive relief must weigh the harm suffered by the plaintiff against the burdens of imposing injunctive relief on the defendant and the public at large, including persons—and states—not before the court. *eBay*, 547 U.S. at 391; *Weinberger*, 456 U.S. at 312. After all, the "essence of equity jurisdiction" is "the power of the Chancellor" to "mould each decree to the necessities of the particular case," *Hecht*, 321 U.S. at 329, by "adjusting and reconciling public and private needs," *Milliken*, 418 U.S. at 738 (citation omitted).

Courts must also consider the viability of narrower alternatives. In *Trump* v. *International Refugee Assistance Project*, 137 S. Ct. 2080 (2017) (per curiam), for example, this Court trimmed an injunction that swept "much further" than what would have been necessary to redress the injuries of the plaintiffs and others "similarly situated." *Id.* at 2087-88. Likewise, in *Dayton*, this Court faulted the lower court because "instead of tailoring a remedy commensurate to the three specific violations, the Court of Appeals imposed

a systemwide remedy going beyond their scope." 433 U.S. at 417. And, in *Lewis,* this Court struck down a sweeping injunction because the "violation ha[d] not been shown to be systemwide, and granting a remedy beyond what was necessary to provide relief to [plaintiffs] was therefore improper." 518 U.S. at 360.[4]

B. Courts Must Also Take Nonparty Interests Into Account, Particularly Where a Subset of States Seeks to Enjoin a Federal Policy.

1. The same basic equitable principles that require courts to consider the broader public interest when crafting injunctive relief also require them to consider the interests of nonparties. "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger*, 456 U.S. at 312. Certainly, the "public consequences," *id.*, of injunctive relief extend to nonparties, who may suffer harm from an injunction, but nonetheless lack representation before the court issuing it.

Historical equity practice underscores the importance of considering the interests of nonparties who will be burdened by any injunctive remedy. This

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[4] *See also New York* v. *DHS*, 969 F.3d 42, 87-88 (2d Cir. 2020) (limiting geographic scope of injunction against Trump Administration's public charge rule to three plaintiff states); *Innovation Law Lab* v. *Wolf*, 951 F.3d 986, 990 (9th Cir. 2020) (limiting geographic scope of injunction against Trump Administration's Migration Protection Protocols (MPP) program to Ninth Circuit); *Texas* v. *United States*, 14 F.4th 332, 341 (5th Cir. 2021) (partially staying injunction against Biden Administration's enforcement priorities, citing its nationwide scope), *vacated*, 24 F.4th 407 (5th Cir. 2021) (mem.), *appeal dismissed*, 2022 WL 517281 (5th Cir. Feb. 11, 2022).

Court interprets federal courts' equitable authority through the lens of "the body of law which had been transplanted to this country from the English Court of Chancery." *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 105, (1945); see also *Trump* v. *Hawaii*, 138 S. Ct. at 2425 (Thomas, J., concurring). Nationwide injunctions were not expressly contemplated by the English system of equity, but scholars have identified a useful analog: the so-called bill of peace, an equitable tool that allowed "multiple plaintiffs" to "represent[] the whole set of possible plaintiffs." Bray, 131 Harv. L. Rev. at 426. Bills of peace, however, were not a mechanism to resolve legal questions "for the entire realm," absent any consideration of nonparties' potentially divergent interests. See Bray at 426. Instead, "these 'proto-class action[s]' were limited to a small group of *similarly situated* plaintiffs having some right in common." *Hawaii*, 138 S. Ct. at 2427 (Thomas, J., concurring) (citation omitted). That basic premise followed colonists across the Atlantic: In early American equity practice, courts would similarly "take care to make no decree [that would] affect the rights of nonparties." Bray, 131 Harv. L. Rev. at 427 (quoting *Joy* v. *Wirtz*, 13 F. Cas. 1172, 1174 (C.C.D. Pa. 1806)).

The principle of adequate representation of nonparty interests that emerged from historical equitable practice took firm hold in the context of class actions, where Rule 23's robust statutory scheme provides explicit mechanisms to protect nonparties. To "justify a departure from" the "usual rule that litigation is conducted by and on behalf of the individual named parties only," Rule 23 requires that class representatives "*possess the same interest* and suffer the same injury as the class members." *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 348-49 (2011)

(internal quotation marks and citations omitted) (emphasis added). In other words, the named plaintiffs must be "appropriate representatives of the class whose claims they wish to litigate." *Id.*[5]

When those statutory safeguards designed to protect nonparty interests are absent, courts considering whether to issue wide-reaching injunctions must take all the more care to weigh the interests of nonparties in evaluating the "public consequences in employing the extraordinary remedy of injunction." *Weinberger*, 456 U.S. at 312. "[A]n overbroad injunction can cause serious harm" to those persons or entities who were afforded "no opportunity to argue for more limited relief." Zayn Siddique, *Nationwide Injunctions*, 117 Colum. L. Rev. 2095, 2125 (2017).

2. The concerns that require protecting nonparty interests are particularly weighty in the context of nationwide injunctions, and all the more so where

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[5] Similarly, when organizations or associations with members living throughout the country seek nationwide injunctions, the relevant equities in crafting injunctive relief are more akin to those present in class actions, and less like those raised here, because the organizations' structure can serve as an analog to Rule 23's representativeness requirement. See, e.g., *Richmond Tenants Org., Inc.* v. *Kemp*, 956 F.2d 1300, 1302, 1309 (4th Cir. 1992) (affirming nationwide injunction in non-class action case brought by, *inter alia*, a national association of tenants' organizations, finding "[t]he injunction issued by the district court was appropriately tailored to prevent irreparable injury to plaintiffs[.]"); *Casa de Maryland, Inc.* v. *Wolf*, 486 F. Supp. 3d 928, 941, 972 (D. Md. 2020) (granting injunctive relief to all members of plaintiff organizations found to have associational standing on behalf of their members, including a national organization with thousands of members across the United States).

nationwide relief is sought by only a handful of states. As a general matter, broader relief means more nonparties, and less certainty that their interests have been adequately represented or are even aligned with the states seeking an injunction. Indeed, even in cases where all the requirements of Rule 23 are in place, this Court has cautioned that lower courts "should take care to ensure that nationwide relief is indeed appropriate in the case before it." *Califano*, 442 U.S. at 702.

Those concerns ring especially true for litigation in which some subset of states alleges a need for a nationwide injunction to vindicate interests that may not be shared by all their sister states. This Court has long emphasized the importance of incorporating states' interests into federal court decision making. Just this Term, this Court declared that "a federal court must 'respect . . . the place of the States in our federal system.'" *Cameron* v. *EMW Women's Surgical Center, P.S.C.*, No. 20-601, slip op. at 8 (U.S. Mar. 3, 2022) (quoting *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 75 (1997)). In joining our union, the several states "surrendered certain sovereign prerogatives," which "are now lodged in the Federal Government." *Massachusetts* v. *EPA*, 549 U.S. 497, 519 (2007). As a result, states suing the federal government are entitled to "special solicitude" in the standing analysis, empowering them to more easily vindicate their interests in federal court. *Id.* at 520.

But special solicitude is a two-way street. "Not only do States retain sovereignty under the Constitution, there is also a 'fundamental principle of *equal* sovereignty' among the States." *Shelby Cnty.* v. *Holder*, 570 U.S. 529, 544, (2013) (citation omitted). That one state can easily open the doors to federal

court to vindicate its own interests should not automatically entitle it to obtain nationwide policy changes that run against the possibly countervailing interests of other states. To the contrary: Allowing one or a few states to set nationwide policy through litigation often undermines our core constitutional principle that each and every state—not just the most litigious—should get a seat at the table. Thus, while "special solicitude" gives states a leg up (at least as to standing) within their territory, that same principle also puts a heavy thumb on the scale *against* nationwide relief when states seek injunctive relief that stretches into the territory of other states that do not share their interests.

For that reason, a state's standing to *pursue* an injunction should not translate inflexibly into justification for an injunction of nationwide scope. Instead, in performing traditional equitable analysis of the "public interest," courts evaluating claims for nationwide injunctive relief made by states should be sensitive to the consequences for other states with potentially divergent interests. Anything less would cast aside ancient equitable principles of nonparty representation and undermine the "equality of the States [that] is essential to the harmonious operation of the scheme upon which the Republic was organized," *Shelby Cnty.*, 570 U.S. at 544 (citation omitted).

C. There Was No Justification for a Nationwide Injunction Here.

As the discussion above makes clear, nationwide injunctions should be an extraordinary remedy, not the default option, particularly in cases brought by individual states. Before issuing and affirming an injunction of this scope, the district court and Fifth

Circuit should have weighed all the equities with care and considered more narrowly tailored alternatives. They did not.

Instead, the district court here issued an injunction of nationwide scope even though the harm that established standing was far too minor to warrant that drastic remedy. Even assuming the harm sufficed to support robust relief *within the Respondent States*, the district court erred by ordering nationwide relief based on nothing more than cursory invocation of uniformity concerns and the wholly speculative possibility that people who would not have come into the United States if MPP had remained partially in effect would move from the states through which they entered to Texas or Missouri, then cost Respondents money while there. The injunction issued in this case thus reflects the very worst of a "patently unworkable" trend that "must, at some point," be restrained. *DHS* v. *New York*, 140 S. Ct. at 600 (Gorsuch, J., concurring).

1. This Injunction Is Disproportionate to Respondents' Attenuated Theory of Harm and Ignores Countervailing States' Interests.

The nationwide scope of the relief granted by the district court is entirely out of proportion with the showing of harm offered by the Respondent States. Both the district court and the Fifth Circuit held that Texas and Missouri had standing to pursue their claims because of injuries stemming from the increased cost of providing driver's licenses and public services to immigrants who would come within their borders after MPP was terminated. *Texas* v. *Biden*, 20 F.4th 928, 970 (2021), *as revised* (Dec. 21, 2021). However, as the government argued below—and the Fifth Circuit acknowledged—"Texas has not shown it

has already issued any licenses to immigrants who became eligible because of MPP's termination." *Id.* at 971. Perhaps that suffices for Article III standing, *id.* But standing to pursue a claim does not, without more, entitle a plaintiff to an injunction, *eBay*, 547 U.S. at 391, let alone a nationwide injunction, *Califano*, 442 U.S. at 702.

If the court had applied basic equitable principles of remedial proportionality, it would have concluded that this modest and thus-far conjectural pocketbook injury did not justify enjoining federal immigration law nationwide. See *Dayton*, 433 U.S. at 420; *Lewis*, 518 U.S. at 361. All the more so here, where the injunction "dramatically intrudes on the Executive's . . . authority to manage the border and conduct the Nation's foreign policy." U.S. Br. at 18; see also *eBay*, 547 U.S. at 391 (injunctions must reflect "balance of hardships between the plaintiff and defendant"). But the district court made no effort to properly situate the Respondent States' meager injuries within its equitable analysis, nor did it weigh them against the countervailing burdens of ordering maximal injunctive relief.

To justify a nationwide injunction based on the States' narrow theory of harm, the district court further reasoned that "a geographically limited injunction would likely be ineffective because [noncitizens] would be free to move among states." *Texas* v. *Biden*, No. 2:21-CV-067-Z, 2021 WL 3603341, at *27 (N.D. Tex. Aug. 13, 2021). In other words, the court concluded: 1) that individuals who would otherwise have remained in Mexico would be paroled into the United States once MPP is terminated; 2) that some of those individuals would move from the state in which they entered to Texas or Missouri; and 3)

that, once there, those individuals would apply for and obtain driver's licenses or public services from those states. Yet the district court pointed to no evidence to support its speculation that people paroled into *other* states who would otherwise have been returned to Mexico under MPP would travel to Texas or Missouri and, once there, apply for driver's licenses or use public services. Nor could it have; nothing in the record indicated there would be *any* such persons, let alone enough of them to justify a nationwide injunction. Moreover, as the Fifth Circuit acknowledged, because MPP is discretionary, there "would always remain some possibility that *any given parolee* would have been paroled even under MPP," *Texas* v. *Biden*, 20 F.4th at 971, rendering this theory of harm still more speculative.

This reasoning failed to account for an obvious difference between enjoining MPP only in Texas and enjoining it elsewhere along the Southern border. Where individuals enter the United States through Texas and reside there, the alleged economic harm to *that* state is directly traceable to the challenged federal policy. But the harm arising from such individuals entering into *other* states occurs only if they later move to Texas or Missouri and then obtain driver's licenses or public services. The latter theory of harm is far too attenuated, under basic equitable principles of tailoring and proportionality, to justify relief beyond the Respondent States' borders.

Moreover, by ordering nationwide relief for Respondents without ever considering the countervailing interests of other states, the district court effectively permitted two states to set nationwide immigration policy at the expense of the forty-eight states who did not participate in the

district court proceedings, including the 17 states that have filed as *amici* in favor of Petitioners. The district court found that special solicitude for "quasi-sovereign interests," apparently arising from the Respondent States' economic interest in not paying to issue more driver's licenses and public services, opened the door for Texas and Missouri to get into federal court to seek relief without necessarily "meeting all the normal standards for redressability and immediacy." *Texas* v. *Biden*, 20 F.4th at 970 (quoting *Massachusetts*, 549 U.S. at 517-518). But those economic interests are no more compelling than other states' countervailing interests in, for example, expanding their tax bases and labor forces by welcoming paroled noncitizens, or their interest in vindicating their residents' desire to be reunited with noncitizen family members who would otherwise be subject to MPP. By failing to even consider such interests before issuing a nationwide injunction, the district court improperly privileged the Respondent States' interests and thus disregarded core structural principles of interstate equality.

In short, rather than "mould[ing] [its] decree to the necessities of the particular case," *Hecht*, 231 U.S. at 329, or "adjusting and reconciling public and private needs," *Milliken*, 418 U.S. at 738 (citation omitted), the district court ordered an "inordinately—indeed, wildly—intrusive" remedy, *Lewis*, 518 U.S. at 362. And, by failing to address these weighty issues, the Fifth Circuit compounded the district court's error.

2. A Narrow Alternative to Nationwide Relief Is Readily Available.

The courts below further erred by failing to meaningfully consider any less burdensome, more tailored alternative to nationwide relief. Such relief was possible—and remains so.

As the district court recognized, DHS initially implemented MPP by returning people to Mexico only through San Diego, California. *Texas* v. *Biden*, 2021 WL 3603341, at *5. DHS later expanded the program, on a piecemeal basis, to include returns through El Paso, Texas, then Calexico, California, and ultimately to other ports of entry along the Southern border. *Id.* Later, when the Ninth Circuit affirmed a nationwide injunction against enforcement of MPP, it nonetheless "stay[ed] the injunction insofar as it operates outside the geographical boundaries of the Ninth Circuit," out of a recognition that "the proper scope of injunctions against agency action is a matter of intense and active controversy." *Innovation Law Lab*, 951 F.3d at 990. Even returns pursuant to the reimplementation of MPP ordered by the courts below in this case have occurred in a phased fashion across some but not all ports of entry along the Southern border.[6]

Thus, for nearly all of its existence, returns to Mexico pursuant to MPP have occurred on a geographically limited basis. It was and remains eminently practicable to limit the scope of the injunction to require reimplementation of MPP in only some geographic areas, and the district court should have taken that into account.

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[6] U.S. Dep't of Homeland Security, *Guidance Regarding the Court-Ordered Reimplementation of the Migrant Protection Protocols* (Dec. 2, 2021), https://www.dhs.gov/ sites/default/files/ 2022-01/21_1202_plcy_mpp-policy-guidance_508.pdf.

3. The Need for Uniformity in Immigration Policy Is Inadequate Justification for Nationwide Relief Here.

The district court offered only one other basis for issuing such sweeping relief in this case: "federal *immigration* law must be uniform." *Texas* v. *Biden*, 2021 WL 3603341, at *27 (citing *Texas* v. *United States*, 809 F.3d 134, 187 (5th Cir. 2015)). That talismanic assertion is not adequate justification for issuing a nationwide injunction.

a. Invoking uniformity has become a handy but ill-considered shorthand for proper equitable analysis in a surging number of immigration cases involving nationwide injunctions. See *supra* n.3. But as even Professor Frost, a staunch defender of nationwide injunctions, has recognized, "[i]n most contexts . . . neither the fact that a federal law or policy extends nationwide (as most do), nor uniformity provides an adequate rationale for nationwide injunctions." Frost, 93 N.Y.U. L. Rev. at 1102.

As Frost explains, "our federal judicial system is intentionally designed to allow lower courts to reach different conclusions about the meaning of federal law." *Id.* The structure of our judiciary thereby privileges percolation and judicial restraint over uniformity, *particularly* in cases featuring federal policies. For example, in holding that nonmutual collateral estoppel does not apply to the federal government, this Court explained that a contrary approach "would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue." *United States* v. *Mendoza*, 464 U.S. 154, 160 (1984). "Allowing only one final adjudication would deprive this Court of the benefit it receives from

permitting several courts of appeals to explore a difficult question before this Court grants certiorari." *Id.* So too here.

Although some lower courts have suggested that immigration law must necessarily be uniform, in fact the normal rule favoring percolation of issues through lower court litigation has long been the norm in immigration law. To this day, splits in the lower courts routinely result in non-uniform immigration policies that last for years. As in other areas of the law, if the splits become sufficiently deep, this Court resolves them. Until that time they persist while the lower courts weigh in, notwithstanding the alleged need for "uniform" immigration law.

For example—in the MPP context itself—from January 2020 until July 2021, a class-wide preliminary injunction entered in the Southern District of California required U.S. Customs and Border Protection ("CBP") to provide people in CBP custody along the California-Mexico border access to counsel while awaiting and undergoing MPP *nonrefoulement* interviews. The order was not binding outside California, and the government did not implement it elsewhere. *Doe* v. *Wolf*, 432 F. Supp. 3d 1200 (S.D. Cal. 2020); *Doe* v. *Mayorkas*, 854 F. App'x 115 (9th Cir. 2021).

Similar examples of limited injunctions abound. Since 2018, in a matter closely related to MPP, a class-wide preliminary injunction entered in the District of Columbia has required that arriving asylum seekers found to have a credible fear of persecution or torture must be considered for parole pursuant to a previously issued parole directive, and has prohibited ICE from detaining class members absent an individualized determination that they present a flight risk or danger

to the community. *Damus* v. *Nielsen*, 313 F. Supp. 3d 317, 323 (D.D.C. 2018). But that injunction applies only to people in U.S. Immigration and Customs Enforcement ("ICE") custody in the jurisdiction of the Detroit, El Paso, Los Angeles, Newark, and Philadelphia field offices. *Id.* at 325.[7]

b. It is of no moment here that the "Constitution requires 'an *uniform* Rule of Naturalization.'" *Texas* v. *United States*, 809 F.3d at 187 (citing U.S. Const. art. I, § 8, cl. 4). MPP is not—and does not even relate to—a rule of naturalization. It governs whether individuals applying for asylum at the Southern border will be returned to Mexico or instead detained or paroled in the United States while their cases are pending. The same is true of the statutes upon which the district court relied in ordering the government to enforce MPP. See, e.g., 8 U.S.C. §§ 1225, 1229. None even remotely relate to naturalization. That constitutional provision is therefore irrelevant to the question of the scope of an injunction related to MPP.

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[7] There are *many* other examples of circuit splits that, for years, rendered important aspects of the immigration laws non-uniform until this Court resolved the split. For nearly ten years, circuits were split on whether a grant of Temporary Protected Status ("TPS") constitutes an "admission" for purposes of eligibility for adjustment of status, an issue of profound importance to several hundred thousand people and the orderly administration of the immigration laws. See *Sanchez* v. *Mayorkas*, 141 S. Ct. 1809, 1812 & n.3 (2021). In 2021, this Court resolved the split and held that a grant of TPS does not constitute an admission. *Id.* at 1815. See also *Jennings* v. *Rodriguez*, 138 S. Ct. 830 (2018) (partially resolving a more than five-year-old circuit split on whether thousands of individuals detained in ICE custody for prolonged periods could pursue release from detention before an immigration judge).

Moreover, even if it were relevant, the naturalization rule's constitutional mandate "does not suggest that federal judges have no room to disagree with each other on the meaning of immigration law, or that the first court that addresses the meaning of a federal immigration statute has the power to control other courts' resolutions of that question." Frost, 93 N.Y.U. L. Rev. at 1103.

While policy uniformity is a valid factor informing the proper scope of injunctive relief, it is but one of many that courts should consider in weighing the equities and fashioning tailored relief. The district court's contrary logic would justify nationwide relief in any case involving immigration policy, regardless of the stakes or extent of injury. This Court should not sanction that extreme approach, which contravenes bedrock principles of equity that require "mould[ing] each decree to the necessities of the particular case," *Hecht*, 321 U.S. at 329.

4. The APA Does Not Mandate Nationwide Injunctions.

Likewise, the fact that this case features a claim under the APA does not axiomatically demand nationwide relief. This Court has never held that the phrase "shall . . . hold unlawful and set aside" in 5 U.S.C. § 706(a)(2) somehow mandates district courts to issue nationwide injunctions against the federal government in every case.

Nor should it. This Court has already suggested the APA does not mandate nationwide injunctions. In *Monsanto*, the Court explained that "no recourse to the additional and extraordinary relief of an injunction" was warranted for an APA violation where "*partial* or complete vacatur" was possible. *See* 561 U.S. at 165-66 (emphasis added).

Moreover, the APA does not displace traditional principles of equitable remedial discretion such that it *requires* nationwide injunctions anytime a court finds an agency action unlawful. In *Hecht*, this Court confronted an analogous situation in which a lower court interpreted the Emergency Price Control Act to require the issuance of an injunction once a violation was found. 321 U.S. at 321-22, 326. Emphasizing that "equity practice with a background of several hundred years of history" was distinguished by "[f]lexibility rather than rigidity," the Court declined to adopt the view that under all circumstances in which a violation is found, the court must issue an injunction, holding that "if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made." *Id.* at 329. More recently, this Court recognized it "should not construe a statute to displace courts' traditional equitable authority absent the 'clearest command,' or an 'inescapable inference' to the contrary." *Miller* v. *French*, 530 U.S. 327, 340 (2000) (citations omitted); *see also Nken*, 556 U.S. at 433.

No such clear command or inescapable inference exists here. As a matter of plain text, Section 706's grant of authority to "set aside" an order says nothing about whether the court's ruling should govern the federal government's conduct as to nonparties, including nonparty States, some of whom oppose this lawsuit. And nothing in the legislative background of the APA's enactment supports the conclusion that the APA's "set aside" language requires mandatory nationwide injunctions in all APA cases. *See* Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 Duke L.J. 291, 313-14 (2003). Without a clear command to the contrary, the district court here retained equitable

authority to order a remedy that was appropriately tailored to the needs of this case; it was not required to issue a nationwide injunction simply because it granted relief under the APA.

II. This Court Should Make Clear that No Nationwide Injunction Should Have Issued Here.

The district court here improperly issued—and the Fifth Circuit improperly affirmed—an injunction of nationwide scope without adequately balancing the equities or considering more tailored options. That remedial defect will remain even if this Court otherwise agrees with the opinion below on the merits. Thus, regardless of this Court's view of the substantive issues in this case, it should correct the lower courts' flawed approach to remedies.

A. This Court Should Narrow the Injunction.

Even if this Court agrees with the district court and the Fifth Circuit on the merits, it should still address the panel's inability to justify nationwide relief by narrowing the injunction to order reimplementation of MPP only in Texas and Missouri.[8]

After all, geographically limiting relief in this fashion is eminently practicable given MPP's history

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[8] Because Missouri is a party to this litigation (and the district court did consider its interests), concerns about the overbroad geographic scope of the injunction do not apply to that state. However, even assuming Missouri has made a showing of harm sufficient to justify its inclusion in the injunction, it is unclear what practical impact ordering the reimplementation of MPP in Respondent States would have within Missouri. MPP has only ever been implemented in states that share a land border with Mexico; MPP has never been implemented in Missouri.

of piecemeal implementation. And it would matter on the ground, even once this Court has ruled on the merits. If this Court agrees with the reasoning of the court below, it would, of course, be making nationwide precedent about MPP's rescission. In many cases, the fact that this Court sets nationwide precedent effectively moots any issue regarding the scope of any underlying injunction, thereby frustrating this Court's ability to set clear guidance regarding when lower courts should issue nationwide injunctions.

This is not such a case. Even if this Court agrees with Respondents' view of the merits, the geographic scope of the injunction will remain relevant because the opinion below did not entirely foreclose the government from terminating MPP. Rather, the court below offered two bases for its decision: first, that the administration's explanation was inadequate, *Texas* v. *Biden*, 20 F.4th at 998, and second, that federal law requires the government to implement MPP until such time as the federal government can construct adequate detention facilities for asylum seekers, *id*. Addressing either (or both) of those purported defects in the government's rescission of MPP will require further federal action.

The government—which has already formally attempted to end MPP twice—may very well try to do so again. If and when it does, the geographic scope of the present injunction will make a world of difference. If the injunction runs nationwide, the government may not be able to rescind MPP again *anywhere* without first pleading for modification of the injunction from the district court. That approach effectively empowers two states and a single district court with what amounts to pre-clearance authority whenever the government seeks to alter any aspect of

MPP, despite the profoundly limited record on which the court issued this nationwide injunction.

In contrast, if this Court narrows the injunction to only Texas and Missouri, the federal government will be free to implement a rescission that complies with this Court's ruling in every other part of the Southern border—giving it the flexibility to begin rolling out critical policy imperatives without first seeking permission from a single district court judge.

The starting point matters, of course, for purposes of judicial management; letting the government make the first move preserves the possibility of percolation in the lower courts regarding the legality of its renewed rescission efforts, and avoids vesting undue power in the hands of one district court judge. It also matters for purposes of democratic legitimacy. It places the politically accountable and nationally representative Executive Branch—not two states and one judge—in the driver's seat for a decision of immense national importance and political salience.

B. Modifying the Remedy Is Especially Important if This Court Agrees with Only One of the Opinion Below's Two Bases.

If this Court agrees with the opinion below on only one of the two bases it supplied for enjoining the government, then modifying or vacating the injunction will be all the more important. Injunctions should be proportionate to the legal infirmity that gives rise to the prevailing party's entitlement to relief. In "any equity case, the nature of the violation determines the scope of the remedy." *Milliken*, 418 U.S. at 738. The district court here issued a nationwide injunction based on a violation of *both* the APA and INA. And the Fifth Circuit likewise upheld the injunction on *both*

grounds. If this Court agrees with only one of those two grounds, it should either narrow the injunction itself or remand to the lower courts to reconsider whether a nationwide injunction would be proportionate given the newly-altered equitable landscape.

C. Remand Without Vacatur Would Also Be Appropriate.

Alternatively, if this Court agrees with the lower courts on APA grounds, it could address the improper remedy issued here by ordering remand without vacatur. "[N]o recourse to the additional and extraordinary relief of an injunction [is] warranted" where "a less drastic remedy" like this one is available. *See Monsanto*, 561 U.S. at 165-66 (approving of complete or partial vacatur in an APA case). As the opinion below itself explained, "[r]emand without vacatur of [an] agency action is 'generally appropriate when there is at least a serious possibility that the agency will be able to substantiate its decision given an opportunity to do so.'" *Texas* v. *Biden*, 20 F.4th at 1000 (citation omitted). Although remand without vacatur should not be the default remedy for all violations of the APA, it would be appropriate here, where the government issued a new, more thorough explanation of its decision after the administrative record had been set. Under those unusual conditions, because the court of appeals was disinclined to consider the new, more detailed explanation on its own, ordering remand without vacatur is more appropriate than maintaining a particularly broad and invasive injunction based on an infirmity that the agency has already attempted to cure.

CONCLUSION

For the foregoing reasons, this Court should order the lower courts to modify the remedy issued below.

Respectfully submitted,

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