No. 24A884

IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, et al.,

Applicants,

v.

CASA, INC., ET AL.,

Respondents.

On Application for a Partial Stay of the Injunction Issued by the United States District Court for the District of Maryland

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BRIEF OF LEGAL HISTORIANS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are professional legal historians who have taught courses and published scholarship on the history of equity and legal and constitutional history more generally. *Amici* have an interest in ensuring that the equitable remedy at issue in this case is understood in its proper historical context. We thus file this brief in support of Respondents.

Amici's names are set forth in the Appendix following the Conclusion. Historical and other sources cited in this brief, such as English cases, may be found at the following link: https://www.mto.com/amicusbriefhistoricalsources/.

INTRODUCTION AND SUMMARY OF ARGUMENT

Injunctions issued to protect the rights of non-parties—of which nationwide injunctions are a special case[2]—are traditional equitable remedies. Courts of equity have long granted injunctions to protect the rights of non-parties and have long granted injunctions against governments and their officers. The history of equity also includes injunctions of comparable scope to nationwide injunctions.

Equity courts in 1789 could "adapt their decrees to all the varieties of circumstances …, and adjust them to all the peculiar rights of all the parties in

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[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] *See* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 419-20 & n.5 (2017) (defining nationwide injunctions as injunctions that restrain the federal government from enforcing an invalid law against non-parties).

interest." 1 Joseph Story, *Commentaries on Equity Juris. as Administered in England & Am.* § 28 (2d ed. 1839) [hereinafter Story, C. Eq.]. Courts of equity existed to decide upon and settle the rights of all persons interested in the subject matter of the suit. Courts of equity, it was said, do complete justice—not justice by halves.

To that end, early American equity courts could fashion injunctions that protected the rights of non-parties and that even ran against non-parties. Courts of equity could also issue injunctions against government officials, functionally restraining the actions of governments at the municipal, state, and federal levels. As early as 1831, this Court's jurisprudence recognized such remedies as being within its equity powers. Although the Court dismissed *Cherokee Nation v. Georgia* for lack of jurisdiction, Justice Joseph Story, concurring with the dissent, would have entered an injunction enjoining the State of Georgia and all of its officers and agents from enforcing any Georgia laws in Cherokee territory against anyone. 30 U.S. 1 (1831).

Not only did equity courts have the power to grant injunctions resembling modern nationwide injunctions, but they in fact issued injunctions of astonishing scope: In the late 1800s and early 1900s, federal courts sitting in equity issued labor injunctions restraining hundreds of thousands of workers to protect the free flow of commerce nationwide. While we doubt the lawfulness of injunctions restraining union members from lawfully engaging in strikes or collective bargaining, and Congress indeed limited the federal courts' power to issue such injunctions in the 1930s, they demonstrate that equity courts had the equitable powers to issue nationwide injunctions in the early republic.

That more such injunctions did not issue at that time and were not issued against the federal government is due to a variety of historical factors, not any inherent limitation on the remedies available in equity. For one, very few federal laws were held unconstitutional in the 18th and 19th centuries. Moreover, the federal government was structured in a fundamentally different fashion than it is today. And federal courts lacked their modern broad federal question jurisdiction.

But the likeliest explanations for the absence of nationwide injunctions before the 20th century relate to sovereign immunity, jurisdiction, and venue. First, the United States did not broadly waive its sovereign immunity from suit until its 1976 amendments to the Administrative Procedure Act. A nationwide injunction against the United States could thus not have issued before 1976. Second, restrictions on venue and personal jurisdiction meant litigants needed to sue cabinet-level officers in Washington, D.C., if they wanted something approximating a modern nationwide injunction. Geography and expense—not the powers of courts of equity—were the practical obstacles to nationwide injunctions for much of American history.

The history of equity thus supports broad, nationwide injunctions. And whether a particular equitable remedy is proper should be determined by equity's historical principles (e.g., whether the remedy grants complete relief, whether the remedy runs *in personam* against a party). Although that history is complex, it is characterized by flexibility and discretion, and rarely by unyielding rules. Moreover, especially where an equity remedy is already entrenched—as the practice of granting nationwide injunctions is—Congress, not the Court, is the proper body to consider

potential reform, should it be necessary, as has historically been the practice. *See* Section 20 of the Clayton Act in 1914 ch. 323, § 7, 38 Stat. 730, 738 (1914) (regulating the remedial authority of the federal courts by restraining issuance of broad labor injunctions); Section 4 of the Norris-LaGuardia Act in 1932 ch. 90, 47 Stat. 70, 70-71 (1932) (same).

ARGUMENT

I. Equity Permits Nationwide Injunctions

A. Equity Courts Have Historically Granted Injunctions Protecting the Rights of Non-Parties

Courts of equity have long issued injunctions that protect the interests of non-parties. The most direct mechanism by which courts of equity did this in the 18th and 19th centuries was through "bills of peace."[3] But courts of equity have also crafted injunctions that, by dint of their scope or subject-matter, clearly protected non-plaintiffs.

1. "Bills of Peace" Were Used to Resolve Claims Where Many Individuals Shared a Common Interest

Equity courts used "bills of peace" to "prevent multiplicity of suits." 2 Story, C. Eq., *supra*, § 853, at 147-48; 1 John Norton Pomeroy, *A Treatise on Equity Juris.* § 243, 246, at 255-57 (1881); Robert Henley Eden, *A Treatise on the Law of Injunctions*

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[3] Sam Bray has questioned the historical pedigree of nationwide injunctions. *See* Bray, *Multiple Chancellors, supra* at 437-45. But Bray concedes that bills of peace existed in historical equity, and admits that courts of equity have always had the power to order remedies to protect nonparties. *Id.* at 426; *see also* Spencer E. Amdur & David Hausman, *Nationwide Injunctions and Nationwide Harm*, 131 Harv. L. Rev. F. 49, 53 & n.29 (2017) ("Bray explains that traditional equity sometimes extended relief to 'nonplaintiffs' whose claims were 'identical' to the plaintiffs.'").

359 (1821). Bills of peace could be like class actions, and the earliest were, involving suits between tithe-owners and parishioners, *Brown v. Vermuden* (1676) 22 Eng. Rep. 796, 1 Ch. Cas. 272; or tenants and their lords, *How v. Tenants of Bromsgrove* (1681) 23 Eng. Rep. 277, 1 Vern. 22; or tenants of one manor and the tenants of another, *Lord Tenham v. Herbert* (1742) 26 Eng. Rep. 692, 2 Atk. 483.[4] It is a conceptual mistake to think of bills of peace as mere class action devices, however, because the "prevent[ion of] multiplicity of suits" was the criterion for obtaining one. 2 Story, C. Eq., *supra*, § 853, at 148; 1 Pomeroy, *supra*, §§ 246, 251, at 257, 263, Eden, *supra*, at 359-62; *see* George L. Clark, *Equity*, § 437, at 578 (1928) ("[T]o prevent … either repeated actions between one plaintiff and one defendant or numerous actions between several plaintiffs and one defendant or between one plaintiff and several defendants.").

Bills of peace were adaptable tools. They could be used to sue numerous defendants or sue on behalf of numerous plaintiffs, even if not all interested parties—plaintiff or defendant—were joined in the action. *See* Joseph Story, *Commentaries on Equity Pleadings* §§ 120-24 (2d ed. 1840) [hereinafter Story, Eq. Pl.]; *Smith v. Swormstedt*, 57 U.S. 288, 302-03 (1853) (holding that in cases involving a "common interest or a common right," a "court of equity permits a portion of the parties in

[4] These early cases involved plaintiffs suing on behalf of similarly situated individuals and in our view offer a ready analogy to modern nationwide injunctions. The Court extended its relief to the unnamed parties in these cases because they were "similarly situated" or had "some right in common." Many nationwide injunctions are issued for the same reason.

interest to represent the entire body, and the decree binds all of them the same as if all were before the court").

The "general rule, in Courts of Equity" was that unnamed parties "ought to be" joined in a suit if they could be. Story, Eq. Pl., *supra* §§ 76a, 76c. But where the interests of justice weighed in favor of permitting a suit with fewer than all the parties, equity permitted it. *See id*. §§ 76c, 77. For example, if a group of plaintiffs is "very numerous" or "if some of them are unknown," then requiring them all to become parties to the suit would be "impracticable" or "exceedingly inconvenient." *Id*. § 122. Where several parties had "distinct rights against a common fund," a small group of them could bring suit on behalf of the group in order to enforce those mutual rights. Story, Eq. Pl., *supra*, § 121 n.2; *Hichens v. Congreve* (1828) 38 Eng. Rep. 917, 922-23, 4 Russ. 562, 576-77. Indeed, Bills of peace could protect thousands of non-parties at a time. For example, a bill brought in the Queen's Privy Council by a single plaintiff in 1565 established "on behalf of the inhabitants of the Isles of Jersey and Guernsey" that "all suits commenced there … [or between] subjects of those isles, should be heard, ordered, and adjudged in the same isles, and not [in England]." Raymond B. Marcin, *Searching for the Origin of the Class Action*, 23 Cath. U. L. Rev. 515, 523-24 (1974). Similarly, a bill of peace was permitted to establish the right of the City of London to collect a toll despite naming only a few proprietors subject to the toll as defendants. Story, Eq. Pl., *supra*, § 124 (citing *City of London v. Perkins* (1734) 1 Eng. Rep. 1524, 3 Brown P.C. 602). Justice Story's 1840 treatise on equity pleading

provides an extensive accounting of additional equity suits involving unnamed parties. *See* Story, Eq. Pl., *supra*, §§ 77-135, at 77-136.

Pomeroy in his *Treatise on Equity Jurisprudence* explains just how powerful bills of peace became as tools to restrain unlawful government action on a broad scale. Wrote Pomeroy in 1881,

> In a large number of the States the rule has been settled … that a suit in equity will be sustained when brought … even by a single taxpayer suing on his own account, to enjoin the enforcement and collection, and to set aside and annul any and every kind of tax or assessment laid by county, town, or city authorities, either for general or special purposes, whether it be entirely personal in its nature and liability or whether it be made a lien on the property of each taxpayer, whenever such tax is illegal….

1 Pomeroy, *supra*, § 260, at 277. Not only could "a single taxpayer suing on his own account" enjoin the collection of a tax against anyone, but a taxpayer could, in many States, enjoin any government action that would merely result in higher taxes. *See id.*; *accord* Clark, *supra*, § 443, at 589-91. Wrote Pomeroy, "[t]he courts have … sustained these equitable suits, and have granted the relief, and have uniformly placed their decision upon the inherent jurisdiction of equity to interfere for the prevention of a multiplicity of suits." 1 Pomeroy, *supra*, § 260, at 278. Later in the chapter, Pomeroy points out that equity courts did not uniformly agree about such suits. *See id.* § 266, at 286 (noting that some courts held "that, as a general rule, or except under very special circumstances, a court of equity will not exercise its jurisdiction" to issue such broad injunctions). But Pomeroy's precedents unquestionably demonstrate that, as a historical matter, courts of equity awarded

injunctive relief restraining the government and protecting the rights of thousands of similarly situated non-parties without requiring that they be joined together in a class action.

2. Ordinary Bills for Injunctions Also Frequently Protected Individuals with a Common Interest

In addition to bills of peace, equity courts granted injunctions that, by virtue of the restraint they placed on the actions of defendants, effectively enjoined the defendant's actions with respect to many individuals all at once.

Injunctions to abate nuisances fall into this category. In *Mayor of Georgetown v. Alexandria Canal Co.*, this Court recognized that a "court of equity … will now take jurisdiction in case of a public nuisance, at the instance of a private person; where he is in imminent danger of suffering a special injury, for which, under the circumstances of the case, the law would not afford an adequate remedy." 37 U.S. 91, 98 (1838); *see* 2 Story, C. Eq., *supra*, §§ 921-924a at 201-04. Pursuant to that principle, in 1822 Chancellor Kent permitted a private plaintiff to enjoin the obstruction of Vestry Street. *Corning v. Lowerre*, 6 Johns. Ch. 439, 1822 WL 1753 (N.Y. Ch. 1822). Indeed, "American judges invoked the injunctive remedy to restrain all kinds of encroachments on public lands and ways." *See* William J. Novak, *The People's Welfare: Law & Regulation in Nineteenth-Century America* 128 (1996). These suits, by abating public nuisances, affected the rights of the entire public.

Early officer suits functioned similarly. In *Belknap v. Belknap*, Chancellor Kent enjoined state inspectors from draining certain swamps because they would have acted in excess of their statutory authority. 2 Johns. Ch. 463, 1817 WL 1598

(N.Y. Ch. 1817). Kent explained that draining the swamp would not only destroy the plaintiffs' mill, but would also "affect[], more or less, all the others which are supplied by its waters." *Id.* at 472. Kent cited, among other cases, *Hughes v. Trustees of Morden College* (1748) 27 Eng. Rep. 973, 1 Ves. Sen. 188, wherein Lord Hardwicke allowed an injunction to restrain turnpike commissioners from continuing construction of a turnpike. These and other injunctions against public improvements had significant impacts on the rights of the public at large—*i.e.* hundreds or perhaps thousands of non-parties. *See Bonaparte v. Camden & A.R. Co.*, 3 F. Cas. 821, 827 (C.C.D.N.J. 1830) (collecting cases enjoining public officers).

Courts sitting in their "law" jurisdiction could also issue writs like mandamus, prohibition, quo warranto, and certiorari that operated like universal injunctions. These writs could command officers to act (or refrain from acting) against the whole world. *See* Steven L. Winter, *The Metaphor of Standing & the Problem of Self-Governanc*e, 40 Stan. L. Rev. 1371, 1396-1409 (1988).

If any case gives lie to the notion that a court of equity could not protect the rights of non-parties against the government, and at a massive scale, it is *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). The Cherokee Nation sued in this Court's original jurisdiction

> for an injunction, to restrain the state of Georgia, the governor, attorney-general, judges, justices of the peace, sheriffs, deputy sheriffs, constables, and others the officers, agents, and servants of that state, from executing and enforcing the laws of Georgia or any of these laws, or serving process, or doing any thing towards the execution or enforcement of those laws, within the Cherokee

> territory, as designated by treaty between the United States and the Cherokee nation.

Id. at 2. This Court dismissed the case on jurisdictional grounds, holding that the Cherokee Nation could not invoke the Supreme Court's original jurisdiction. *Id.* at 19-20. Justice Thompson, joined by Justice Story, dissented. *Id.* at 50, 80 (Thompson, J., dissenting). On the question of remedy, the dissenters concluded that an injunction was "fit and proper … and ought therefore to be awarded." *Id.* at 77-80. The injunction sought in *Cherokee Nation* would have prevented the State of Georgia from enforcing any Georgia laws within the Cherokee territory. Justice Story, one of the nation's preeminent equity scholars, thought it within a court of equity's power to grant that injunction.

Justice Story was not alone in his understanding of the scope of courts' equitable powers. In *Smyth v. Ames*, a group of stockholders sued the Nebraska officials responsible for enforcing a Nebraska railroad rate statute. 169 U.S. 466 (1898). The Court held that the statutorily set rate was unconstitutionally low. In discussing the remedy, the Court explained that a court sitting in equity "can make a comprehensive decree covering the whole ground of controversy and thus avoid the multiplicity of suits that would inevitably arise under the statute." *Id.* at 517. Because the Nebraska statute would create liability for the railroad to numerous people, "only a court of equity [was] competent to meet" the occasion of crafting a remedy. *Id. at* 518. "[A] general decree … would avoid a multiplicity of suits, and give a remedy more certain and efficacious than could be given in any proceeding instituted against the company in a court of law; for a court of law could only deal

with each separate transaction involving the rates to be charged for transportation." *Id.* at 517-18. That multiplicity of suits, inevitable without a broad equitable decree, would be an "emergency[.]" *Id.* at 518.

B. Equity Courts Have Historically Granted Broad Injunctions to Protect the Rights of Tens or Even Hundreds of Thousands

Courts of equity have historically issued broad injunctions enjoining hundreds of thousands of non-parties to protect the rights of hundreds of thousands more. In the late 19th century, federal courts began granting injunctions to enjoin labor unions from striking against corporations like railroads. *See* William E. Forbath, *The Shaping of the Am. Labor Movement*, 102 Harv. L. Rev. 1109 (1989). So many injunctions of such enormous scope were issued that the era came to be known as the era of "government by injunction." *See* Felix Frankfurter & Nathan Greene, *The Labor Injunction* 1 (1930). These injunctions were so broad they were called "omnibus injunctions" and "Gatling-gun injunctions." Frankfurter & Greene, *supra* at 87; Forbath, *supra*, at 1177, 1184.

Labor injunctions were not strictly addressed to the parties to the suit; often they were "addressed to anyone who happened to get actual notice" of them. Owen M. Fiss, *The Civil Rights Injunction* 16 (1978); *see* Frankfurter & Greene, *supra*, at 89, 123-25. "It was not uncommon for such decrees to address ten thousand workers and 'whomsoever' would aid and abet them." Forbath, *supra*, at 1184. In an article in the *Harvard Law Review*, William Forbath documents numerous such injunctions: "in 1896, all the trade unionists of Kansas City"; "in 1905, California's scores of thousands of union women and men"; again in 1905, "all the printers in Chicago and

thirty other cities"; in 1919, "all the nation's bituminous coal miners." *Id.* "In West Virginia and southwestern Pennsylvania, whole mining counties came under permanent injunctions." *Id.*

An exemplary injunction from the era is the "Rail Strike Injunction" issued by a single Chicago Federal District Judge on September 1, 1922. The order enjoined "all railway employees, attorneys, servants, union agents, associates and members and all persons acting in aid or in conjunction with them" nationwide—at least 400,000 people—from doing anything that could possibly support the then-ongoing railroad strike, including "loitering," "picketing," and "encouraging" anyone to interfere with the functioning of the railroads. *Text of the Rail Strike Injunction Defining the Acts Now Restrained*, N.Y. Times, Sept. 2, 1922. The judge maintained the order for months. *See United States v. Ry. Emps.' Dep't of AFL,* 283 F. 479 (N.D. Ill. 1922); *see also* 286 F. 228 (N.D. Ill. 1923); 290 F. 978 (N.D. Ill. 1923).[5] Over protests that the federal courts lacked authority to issue these sweeping injunctions, the Supreme Court repeatedly upheld them. *See, e.g.*, *In re Debs*, 158 U.S. 564, 582-600 (1895).

To be clear, as a policy matter, we do not believe these courts should have issued injunctions to curtail the rights of union members and prevent them from engaging in lawful strikes or collective bargaining. Eventually, Congress used its power to regulate the remedial authority of the federal courts to restrain issuance of

[5] For additional examples, see Edward Berman, *Labor and the Sherman Act*, app. C, at 284-325 (1930) (outlining 85 Sherman Act labor injunctions).

these labor injunctions. *See* Section 20 of the Clayton Act in 1914, *supra*; Section 4 of the Norris-LaGuardia Act in 1932, *supra*. And rightfully so, in our opinion. But the point is that, as a matter of "traditional *equity*," these broad injunctions at nationwide scale were clearly permissible. *See Debs*, 158 U.S. at 582-600 (emphasis added).

C. Other Limitations on Judicial Power, Not Limitations on Equitable Remedies, Explain Why Federal Courts Did Not Grant Modern Nationwide Injunctions Against the Federal Government in the 18th and 19th Centuries

Injunctions restraining the United States from nationwide enforcement of an invalid law could not have happened until after 1976. That is not because equity courts could not have issued such injunctions. In fact, as early as the 1930s, and perhaps earlier, functionally equivalent (but difficult to bring) suits for broad injunctive relief against top federal officers did happen. Instead, nationwide injunctions (and their functional equivalents) were rare in American law before 1976 for two especially noteworthy reasons. First, the United States enacted its first general waiver of sovereign immunity in 1976 in amendments to the Administrative Procedure Act. Second, officer suits to restrain high ranking executive branch officials like the Attorney General and the Heads of the various Departments (the only officials against whom an injunction approximating a nationwide injunction could run) were difficult to bring. In the absence of the modern venue statute, and because of other doctrinal barriers that no longer exist, a modern nationwide injunction could have been brought only in Washington, D.C. Those two factors

contribute substantially to the absence of nationwide injunctions before the mid-20th century.[6]

1. The United States' Sovereign Immunity Prevented Courts From Issuing Nationwide Injunctions

The United States did not waive its sovereign immunity from suit in a general way until the enactment of Amendments to the Administrative Procedure Act in 1976. *See* Gregory C. Sisk, *Litigation with the Federal Government* § 4.10(b), at 339 (2016). "Before 1976, a lawsuit asserting unlawful action by a federal agency generally had to be framed as a suit against the individual government official responsible for the action, because the United States had not waived its sovereign immunity to be sued directly." *Id.* Moreover, an officer suit "would be treated as against the Government itself and, thus, barred by sovereign immunity, unless: (1) the official had acted outside of his statutorily delegated authority, or (2) the official had acted contrary to constitutional command." *Id.* Before the 1976 amendments to the Administrative Procedure Act, it was difficult to frame a lawsuit against government policy that did

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[6] Additional factors likely also contributed to the absence of nationwide injunctions before the mid-20th century. For example, Congress enacted general federal question jurisdiction in 1875, which some scholars credit for changing the culture of judicial review of executive branch action. *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908, 913, 947-58 (2017); Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 Colum. L. Rev. 939, 947 (2011). The New Deal's expansion of the federal administrative state also fundamentally altered the relationship between Congress, the courts, and the Executive Branch and prompted more aggressive judicial oversight of Executive Branch action. *See* William E. Leuchtenburg, *The Supreme Court Reborn*, 213-36 (1995).

not trespass on the United States' sovereign immunity. *See* Jonathan R. Siegel, *ACUS & Suits Against Gov't*, 83 Geo. Wash. L. Rev. 1642, 1649 (2015).

2. Courts Were Unable to Exercise Jurisdiction and Venue Over Cabinet-Level Federal Officers Nationwide

As noted above, before the Administrative Procedure Act's general waiver of sovereign immunity, plaintiffs sued federal officers for injunctions. Officer suits against state and federal officials have been used throughout American history to restrain or compel Executive Branch officers to comply with the law. *See* Charles Warren, *Fed. & State Court Interference*, 43 Harv. L. Rev. 345, 373 nn.136-37 (1930) (collecting dozens of cases dating back to 1838); *see also Ex parte Young*, 209 U.S. 123, 155-68 (1908); *United States v. Lee*, 106 U.S. 196, 212-23 (1882); *Osborn v. Bank of U.S.*, 22 U.S. 738, 846-47 (1824).

But officer suits have an important limitation, namely, the powers of the officer enjoined dictate the scope of the injunction issued. An officer suit against the local United States Attorney can only restrain prosecutions in the local district. Thus, to obtain a nationwide injunction before the Administrative Procedure Act, a litigant would have needed to sue not the local U.S. Attorney, but the Attorney General.

To get an injunction of nationwide scope, a plaintiff needed to sue to enjoin a cabinet-level official. But for much of American history, an officer suit could not be instituted against an officer over whom the Court could not obtain personal jurisdiction and venue. Thus, the only place that a plaintiff could have obtained a nationwide injunction was Washington, D.C. *See* Clark Byse & Joseph V. Fiocca, *Section 1361 of the Mandamus & Venue Act of 1962 & "Nonstatutory" Jud. Rev. of*

Fed. Admin. Action, 81 Harv. L. Rev. 308 (1967) (explaining venue limitations); *see also, e.g.*, *Nesbitt Fruit Prods. v. Wallace*, 17 F. Supp. 141, 142-43 (S.D. Iowa 1936) (holding that the Secretary of Agriculture could only be sued for injunction in Washington, D.C.); *Abe Rafelson Co. v. Tugwell*, 79 F.2d 653, 654 (7th Cir. 1935) (discussing similar district court holding). The difficulty and expense of maintaining a lawsuit in Washington, D.C., deterred plaintiffs from seeking nationwide injunctions when injunctions against local federal officials would achieve adequate results.

Notwithstanding these practical impediments, during the New Deal era, large corporations, like the railroads, *did* sue in Washington, D.C., and they *did* secure the functional equivalent of nationwide injunctions in officer suits. For example, in *Railroad Retirement Board v. Alton R. Co.*, "134 class I railroads, two express companies, and the Pullman Company," sued the Railroad Retirement Board and its individual members in the Supreme Court of the District of Columbia, "praying an injunction against [the Railroad Retirement Act's] enforcement." 295 U.S. 330, 340 (1935). The court granted the decree, and the Supreme Court affirmed. *See id.*

II. Federal Courts' Equity Power Should Be Construed in Line with Traditional Principles of Equity

To determine whether a remedy is a traditional equitable remedy, courts should ask whether the remedy is in line with equity's traditional principles. That test best effectuates the historical purpose of equity and minimizes the likelihood of error in interpreting the historical record.

To apply this test—that is, to ascertain whether a remedy is in line with equity's traditional principles—it is critical to understand the history and origins of those principles. American law grew out of English law, which had two primary court systems, the common law courts and the equity courts. Stephen N. Subrin, *How Equity Conquered Common Law: The Fed. Rules of Civ. Proc. in Hist. Persp.*, 135 U. Pa. L. Rev. 909, 914, 918-19 (1987). Equity arose because of the inflexibility and formalism of the common law writ system. *Id.* at 918-21. Equity's purpose was to look beyond forms and do right and justice where the law courts gave inadequate relief. *Id.*

Equity and law complement each other. *See* John H. Langbein, et al., *Hist. of the Common Law* 268, 287 (2009). A trustee holds *legal* title to trust property and may resort to a law court to protect it. A beneficiary holds *equitable* title and may resort to equity to enjoin the trustee to act for his benefit. The *in personam* character of equity means that it can control the conduct of a party notwithstanding where the party's actions might take place. *See id.* at 286 ("Equity acts *in personam*[,]" meaning it can command a person to do a thing on pain of contempt, such as convey title to property, cease a trespass, or even refrain from suit in another court); *see also Phelps v. McDonald*, 99 U.S. 298, 308 (1878) ("Where the necessary parties are before a court of equity, it is immaterial that the *res* of the controversy … is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary … which he could do voluntarily, to give full effect to the decree against him."); *Penn v. Lord Baltimore*, (1750) 27 Eng. Rep. 1132, 1 Ves. Sen. 444, 448-49

(decreeing specific performance of a contract respecting lands lying in North America, outside the original jurisdiction of the English Chancery court).

In the United States, federal courts administered law and equity separately until the 20th century, when the two systems merged with the adoption of the Federal Rules of Civil Procedure. *See* John F. Duffy, *Admin. Common Law in Jud. Rev.*, 77 Tex. L. Rev. 113, 147-48 & n.173 (1998). As a result of merger, federal "courts now can give specific relief without being concerned about potential interference with another independent system of courts or the niceties of equity jurisdiction." 4 C. Wright & A. Miller, *Federal Practice & Procedure* § 1043 (4th ed. 2025). "[T]he merger of law and equity and the abolition of the forms of action furnish a single uniform procedure by which a litigant may present his claim in an orderly manner to a court empowered to give him *whatever relief is appropriate and just*." *Id.* (emphasis added).

A. Traditional Equity Is Defined by a Mandate to Fashion Appropriate Remedies

The purpose of the equity power, as traditionally understood, was to make right and just—*ex aequo et bono*—those instances where the civil law was lacking. *See* 4 Blackstone, Commentaries *50 (original purpose of equity was "to give remedy in cases where none was before administered"). Laws and common law rules were fixed and unyielding; common law courts doled out strict dispositions accordingly. *Cf.* 1 Story, C. Eq., *supra*, §§ 2-3 (defining equity as "the correction of the law, wherein it is defective by reason of its universality"). The limits of the common law, therefore, necessarily meant that common law courts could not address the "unanticipated

case." Michelle Johnson & James Oldham, *Law versus Equity—As Reflected in Lord Eldon's Manuscripts*, 58 Am. J. Legal Hist. 208, 224 (2018). "[A]ll possible applications of a law could not be envisioned when the law or rule of law, was created," *id.,* nor can they ever be. Similar restraints applied to the scope of relief: while common law courts were "compelled to limit their inquiry to the very parties in the litigation before them, although other persons may have the deepest interest in the event of the suit," equity courts, in contrast, "can adapt their decrees to all the varieties of circumstances, which may arise, and adjust them to all the peculiar rights of all the parties in interest." 1 Story, C. Eq., *supra*, at § 28. Equity is thus a system that, by the very nature of its principles, is designed to adapt to the needs of a changing society. *See, e.g.*, Johnson & Oldham, *supra*, at 224. As Story wrote in his treatise on Equity Pleading:

> It is the constant aim of Courts of Equity to do complete justice, by deciding upon and settling the rights of all persons interested in the subject-matter of the suit, so that the performance of the decree of the Court may be perfectly safe to those, who are compelled to obey it, and also, that future litigation may be prevented. Hence, the common expression, that Courts of Equity delight to do justice, and not by halves.

Story, Eq. Pl., *supra*, § 72. And though the issuance of injunctions "ought … to be guarded with extreme caution and applied only in very clear cases," they are nonetheless "manifestly indispensable for the purposes of social justice in a great variety of cases, and therefore should be fostered and upheld by a steady confidence." 2 Story, C. Eq., *supra*, § 959a; *see* Suzette M. Malveaux, *Class Actions, Civil Rights, & the Nat'l Injunction*, 131 Harv. L. Rev. F. 56, 56 (2017).

Equity is not defined by a determined set of remedies, nor is it fixed in time. To be sure, many equitable remedies courts grant today are identical to their 18th century counterparts. But many are not. *See, e.g.*, Robert F. Nagel, *Separation of Powers & the Scope of Fed. Equitable Remedies*, 30 Stan. L. Rev. 661, 661–63 (1978) (discussing federal courts' use of structural injunctions and expansive use of supervisory receivers and monitors). The mere fact that some aspects of equity practice remain unchanged cannot foreclose adapting equity to modern circumstances. *See Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (holding that the First Amendment protects videogames); *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008) (noting that the argument that the Second Amendment only protects those arms in existence in the 18th century "border[s] on the frivolous"). In any case, injunctions materially similar to the injunction issued in this case have been in use for more than fifty years. *See* Samuel L. Bray, *Multiple Chancellors: Reforming the Nat'l Injunction*, 131 Harv. L. Rev. 417, 437-45 (2017).

B. Article III and the Judiciary Act Do Not Countermand Traditional Principles of Equity

Both Section 11 of the Judiciary Act of 1789, 1 Stat. 73, 78, and Article III of the United States Constitution grant the federal courts equity jurisdiction. In granting courts "equity" jurisdiction in the Judiciary Act of 1789, the First Congress did not intend to freeze the courts' equity jurisdiction in time. *See, e.g.,* 1 Julius Goebel, Jr., *Hist. of the Supreme Court of the United States: Antecedents & Beginnings to 1801*, at 502 (2010) ("The [Senate] Committee's bill [to enact the Judiciary Act] at various junctures reveals an anticipation that federal judges would exercise the

familiar and traditional function of molding the law [of remedies] by judicial decision."). Neither does Article III contemplate the "carv[ing] up of judicial power" depending on "the particular form or effect of the equitable relief sought." Mila Sohoni, *The Lost History of the "Universal" Injunction,* 133 Harv. L. Rev. 920, 934 (2020). Rather, "Article III confers a singular power upon all federal courts to decide 'Cases[] in . . . Equity.'" *Id.* at 927 (quoting U.S. Const. art. III, § 2, cl. 1). Article III's grant of "equity" jurisdiction must be understood by reference to its "basic principles" even as "new and different" circumstances for its application arise. *Brown*, 564 U.S. at 790.

A holding that nationwide injunctions are beyond a court's equity powers would be tantamount to a constitutional holding that Congress cannot, even if it wishes, grant federal courts the authority to issue nationwide injunctions. *See* Bray, *Multiple Chancellors*, *supra*, at 471-72. That would be an awesome conclusion. It would forever constrain Congress's power to confer on Article III courts the capacity to oversee the Executive Branch. That matters because Congress has delegated enormous power to the Executive Branch over the last century. And as the price of that delegation, Congress has permitted the federal courts to assume greater equitable power to rein in unlawful Executive Branch action. Congress has the power to limit or restrict the ability of a federal court to grant injunctive relief and has exercised that power in a number of statutes.[7] Congress has revisited the power of

[7] *See* 8 U.S.C. § 1251(f)(2) (altering the standard for granting an injunction in limited circumstances); 26 U.S.C. § 7421(a) (prohibiting suits to restrain assessment or

the federal courts to issue injunctive relief over the past half century but has not withdrawn the authority to issue nationwide injunctions. Congress's decision *not* to limit courts' ability to issue nationwide injunctions is persuasive evidence that Congress approves of their use. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 155-56 (2000).

C. Absent Guidance from Congress, the Court Should Hesitate to Overturn Fifty Years of Established Equity Practice in Light of Equity's Complex History

This Court has said that federal courts may only issue equitable relief "traditionally accorded by courts of equity." *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 319 (1999). But history is a notoriously difficult subject and courts understandably struggle to identify a version of history that "reflect[s] the complexity and contingency of equity's past." Samuel L. Bray, *The Supreme Court & the New Equity*, 68 Vand. L. Rev. 997, 1000-01 (2015). Despite their commitment to objectivity, historians understand that historical "facts" or "truths" rarely appear straightforward, that any exploration into history is necessarily selective, and all good accounts of history are interpretive. The problem is especially acute for the history of American equity which is understudied and underwritten. Notions of "traditional" equity can easily become distorted if only one

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collection of taxes); 28 U.S.C. § 1342 (limiting federal court power to enjoin, suspend or restrain the operation of state rate orders); 28 U.S.C. § 2283 (limiting power of federal courts to enjoin state court proceedings); 29 U.S.C. § 52 (exempting labor organizations from the Sherman Act and prohibiting courts from enjoining certain labor activities); 29 U.S.C. § 101 (limiting injunctive relief arising from labor disputes); 42 U.S.C. § 1983 (limiting injunctive relief against judicial officers).

or another facet is explored. Many accounts of equity leave out or skip over the (unsavory, but historically important) railroad litigation and broad labor injunctions. Equity has always been multifaceted, remedially creative, and the subject of a contested history. *See* Kellen R. Funk, *The Union of Law & Equity: The United States, 1800–1938*, in *Equity & Law: Fusion & Fission* 296-300, 327-29 (John Goldberg, Henry Smith, & P.G. Turner, eds., 2020).

The Court should construe traditional remedies in equity to mean those in line with basic principles of equity. Those principles counsel flexibility and discretion. The Court should therefore tread carefully, where, as here, a practice is long established, where the consequences of decision would forever restrain the political branches of government, and where new historical claims have only recently come to light. *See Grupo Mexicano*, 527 U.S. at 322 ("[F]or a wrenching departure from past practice, Congress is in a much better position than we … to design the appropriate remedy."); Bray, *Multiple Chancellors, supra* at 481 ("Imagine that legal questions were resolved quickly, comprehensively, and with immediate finality. That system would be criticized as rash, perhaps even as an illegitimate exercise of authority.").

CONCLUSION

For the foregoing reasons, the district court did not exceed its constitutional or statutory authority by issuing a nationwide injunction.

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Respectfully submitted,

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