Nos. 24A884, 24A885, 24A886

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.

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

v.

WASHINGTON, *et al.*,
Respondents.

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

v.

NEW JERSEY, *et al.*,
Respondents.

ON APPLICATIONS FOR PARTIAL STAYS OF THE INJUNCTIONS ISSUED BY THE UNITED STATES DISTRICT COURTS FOR THE DISTRICT OF MARYLAND, THE WESTERN DISTRICT OF WASHINGTON AND THE DISTRICT OF MASSACHUSETTS

BRIEF OF CIVIL PROCEDURE PROFESSORS SUZETTE MALVEAUX, ALAN TRAMMELL, ALEXI PFEFFER-GILLETT, AND DOUG RENDLEMAN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF THE AMICI CURIAE[1]

Amici curiae are law professors at the Washington and Lee University School of Law,[2] who have 90 years of experience combined teaching civil procedure, complex litigation, federal courts, injunctions, remedies, and constitutional law. Suzette M. Malveaux, the Roger D. Groot Professor of Law, is author of *Class Actions, Civil Rights, and the National Injunction*, 131 Harv. L. Rev. F. 56 (2017), and co-author of *Class Actions and Other Multi-Party Litigation: Cases and Materials* (2d ed. 2008 & 3d ed. 2012). Alan Trammell is a Professor of Law and the author of *The Constitutionality of Nationwide Injunctions*, 91 U. Colo. L. Rev. 977 (2020) and *Demystifying Nationwide Injunctions*, 98 Tex. L. Rev. 67 (2019). His scholarship also has appeared in the *Columbia Law Review*, the *Virginia Law Review*, and the *Cornell Law Review*. Alexi Pfeffer-Gillett is an Assistant Professor of Law whose scholarship has appeared or is forthcoming in the *University of Pennsylvania Law Review*, the *BYU Law Review*, and the *Minnesota Law Review Headnotes*. Doug Rendleman is the Robert E.R. Huntley Professor of Law, Emeritus, and taught for fifty years. He is author of *Preserving the Nationwide National Government Injunction to Stop Illegal Executive Branch Activity*, 91 U. Colo. L. Rev. 887 (2020) and *Complex Litigation: Injunctions, Structural Remedies, and Contempt* (2010). He is co-author of *Remedies, Cases and Materials* (9th ed. 2018). He is serving as an American Law Institute

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[1] Amici file this brief pursuant to Sup. Ct. R. 37.3. This brief has been authored entirely by amici. No Party or Party counsel, or any other person or entity, has contributed money or other financial support to fund the preparation or filing of this brief, except for research assistance funded by Washington & Lee University School of Law. *See* Sup. Ct. R. 37.6.

[2] Amici's institutional affiliation is for identification purposes only.

Advisor to the Restatement (Third) of Torts Remedies. Amici's analysis of whether and under what circumstances district courts may issue nationwide injunctions may assist the Court in resolving the Government's application for a stay in this case.

SUMMARY OF ARGUMENT

Nationwide injunctions are constitutional.[3] Their core feature—courts' power to render decisions that directly benefit nonparties—is consistent with traditional equitable practices. Accordingly, the Article III "judicial power" comprehends such remedies. Nationwide injunctions also comport with Article III's case-or-controversy requirement, including constitutional standing.

Broad remedies are sometimes necessary, especially when government actors willfully disregard people's rights, and the usual tools of aggregate litigation (such as class actions) are not practically available to vindicate those rights. Moreover, courts can readily navigate prudential concerns about nationwide injunctions, from fears of judge shopping to prematurely freezing the law. Courts remain attuned to these concerns, and Congress and the Judicial Conference have effective tools to assess and implement any necessary limitations. In appropriate cases, including this one, nationwide injunctions remain a vital tool in holding government accountable to the people.

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[3] No term is perfect. The focus here is on injunctions (1) that govern the totality of a defendant's wrongful conduct, even as to nonparties, and (2) that a court issues absent a duly certified class action. When the defendant is the federal government, the injunction, almost of necessity, applies nationwide. Here, amici intend no distinction between the terms "universal" and "nationwide" injunctions.

ARGUMENT

I. Article III Permits Federal Courts to Issue Nationwide Injunctions

Article III courts are vested with broad equitable jurisdiction under both the Constitution and federal statutes, dating back to the Founding and the Judiciary Act of 1789. The historical throughline of the modern nationwide injunction traces back even further to bills of peace issued by the English Court of Chancery that, in appropriate cases, directly and intentionally benefited nonparties. Moreover, nationwide injunctions are consistent with Article III's case-or-controversy requirement, including attendant doctrines like standing. Accordingly, such injunctions are constitutional.

A. *Courts of Equity May Issue Injunctions that Directly Benefit Nonparties*

This Court consistently notes that the Judiciary Act of 1789 conferred jurisdiction over "all suits . . . in equity" and that such jurisdiction was the same as that "exercised by the High Court of Chancery in England at the time of the adoption of the Constitution." *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (quoting A. Dobie, *Handbook of Federal Jurisdiction and Procedure* 660 (1928)). Historically, this jurisdiction included the bill of peace, which courts of equity issued to "prevent multiplicity of suits." 2 Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America* § 853, at 147–48 (2d ed. 1839); 1 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* §§ 243, 246, at 255–57 (1881).

In recent years, legal historians have shown that bills of peace could do precisely what modern nationwide injunctions do—create obligations that directly benefit nonparties. Bills of peace were "adaptable tools" that "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." Brief of Amici Curiae Legal Historians in Support of Plaintiff and Appellee the City of Chicago at 9–10, *City of Chicago v. Barr*, 961 F.3d 882 (7th Cir. 2020) (No. 18-2885) [hereinafter Brief of Legal Historians] (citing Joseph Story, *Commentaries on Equity Pleadings* §§ 120–124 (2d ed. 1840)). One scholar has suggested that bills of peace were simply a "proto-class action." Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 426 (2017). Not so. While bills of peace could operate akin to a joinder device, they also allowed suits that directly and intentionally benefited nonparties (for example, beneficiaries of a common fund) and even bound nonparties (for example, proprietors subject to a toll in the City of London). Brief of Legal Historians, *supra*, at 10–11. Critically, these and other examples trace back centuries before the Founding of the American Republic.

Other scholars have persuasively traced this established equitable principle across various American cases in the nineteenth and twentieth centuries. *See, e.g.*, Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 Harv. L. Rev. 920 (2020); James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex parte* Young, 72 Stan. L. Rev. 1269 (2020). Part of this story includes the merger of law and

equity in the United States. Thus, federal courts carry forward that equitable tradition and have broad constitutional authority to order appropriate relief.

True, prudence usually counsels courts to bring all interested parties into a lawsuit, Brief of Legal Historians, *supra*, at 10 n.5, and procedural innovations such as the modern class action device enable courts to do so more readily. But sometimes joinder and class certification are not feasible. *See* Malveaux, *Class Actions, Civil Rights, and the National Injunction*, *supra*, at 58–60; Trammell, *Demystifying Nationwide Injunctions*, *supra*, at 115–18. In those situations, courts of equity in England and the United States long have recognized that they may adjudicate rights and obligations for the benefit of parties and nonparties alike. Viewed in this historical context, nationwide injunctions are not an aberrant phenomenon, birthed in the 1960s, but have deep roots dating back to the Nation's Founding and the equitable tradition inherited from English practice. *See* Br. for Professor Mila Sohoni 9.

B. *Nationwide Injunctions Are Consistent with Article III's Case-or-Controversy Requirement*

When courts properly issue nationwide injunctions, they do so, as here, in the context of a live case or controversy and for the benefit of a plaintiff who has standing. The potential concerns about nationwide injunctions pertain to the scope of relief. As explained below, those concerns are prudential and do not implicate the Constitution. *See* Trammell, *Demystifying Nationwide Injunctions*, *supra*, at 74–91; Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. Rev. 1065, 1080–90 (2018).

Some courts and commentators have tried to shoehorn scope-of-relief concerns into Article III. In essence, they suggest that the federal "judicial power" prohibits courts from adjudicating the rights and obligations of nonparties or, relatedly, that courts may issue relief only to parties that have demonstrated constitutional standing. *See, e.g.*, Bray, *supra*, at 471–72; Aaron-Andrew P. Bruhl, *One Good Plaintiff Is Not Enough*, 67 Duke L.J. 481, 517–19 (2017). As a matter of historical practice, these arguments are incorrect. *See supra*. They also are inconsistent with how this Court has understood Article III standing.

The familiar tripartite framework for standing "requires that an injury be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010). Moreover, a plaintiff must establish standing for each form of relief sought. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101–10 (1983); *O'Shea v. Littleton*, 414 U.S. 488, 495–99 (1974).

As this Court has refined and explained doctrines that flow from the case-or-controversy requirement, *see Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125–26 (2014), it has carefully distinguished *standing* from the *scope of remedy*. *See, e.g.*, *Salazar v. Buono*, 559 U.S. 700, 713 (2010) (plurality opinion) (noting that extent of relief concerns the merits, not standing); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (reaffirming that "the nature of the violation determines the scope of the remedy").

This distinction makes sense. Standing is a threshold question that regulates which persons rightfully may invoke the power of Article III courts and seek redress. Determining the appropriate scope of relief happens once a plaintiff has proved the nature and extent of the defendant's violation. Most importantly for present purposes, any error in crafting the appropriate relief is just that—reversible error. If, for example, a court orders a defendant to pay damages exceeding what the plaintiff has proved at trial, an appellate court would not find that the trial court lacked jurisdiction, but instead would remand to determine the appropriate relief. Trammell, *Constitutionality of Nationwide Injunctions*, *supra*, at 985.

So, too, in the context of nationwide injunctions. Courts have wide latitude to tailor relief to the specific case, and appellate courts can (and do) narrow relief that sweeps too broadly. *See, e.g.*, *U.S. Army Corps of Eng'rs v. N. Plains Res. Council*, 141 S. Ct. 190, 190 (2020) (mem.).

In sum, nationwide injunctions are indeed "consistent with the historical limits on equity and judicial power." *Cf. Trump v. Hawaii*, 585 U.S. 667, 720 (2018) (Thomas, J., concurring) (asserting the contrary). A throughline of equitable practice from the pre-Founding period to the present demonstrates that courts have the power and discretion, under appropriate circumstances, to issue relief beyond the parties.

II. Equitable Principles Allow Courts to Determine When Nationwide Injunctions Are Necessary

A. *Equity Prevents Artful Evasions of Legal Obligations*

Nationwide injunctions fit comfortably within a long and noble tradition of equity's response to government officials' creative attempts to evade their legal

obligations. Throughout the twentieth century, when officials disregarded citizens' constitutional rights, equity stood ready to meet the moment.

In *Ex parte Young*, Minnesota Attorney General Edward Young worked with the state legislature to impose lower rates on railroads and, most significantly, devise penalties so draconian that no reasonable person would dare to violate them. 209 U.S. 123, 127–30 (1908). The usual method of contesting the rates' constitutionality at law—in defense to a criminal prosecution—was not practically available, precisely because the criminal penalties were so severe. Equity stepped in. This Court permitted an injunction against Attorney General Young that, in effect, commanded him to bring his official conduct into line with the Constitution's dictates. See John Harrison, *Ex parte* Young, 60 Stan. L. Rev. 989, 1013 n.99 (2008).

The Civil Rights Era witnessed even more blatant attempts to evade legal obligations. During the period of massive resistance in the South, when many school boards actively sought to avoid their obligations under *Brown v. Board of Education*, 347 U.S. 483 (1954), and its progeny, courts devised creative equitable remedies, including structural injunctions that compelled school systems to adopt specific desegregation procedures, such as busing, ratios, and redrawn attendance zones. *See Swann*, 402 U.S. at 22–31; Goodwin Liu, Brown, Bollinger*, and Beyond*, 47 How. L.J. 705, 716 (2004).

Prophylactic injunctions of this nature strive to prevent future harm by regulating not just a defendant's core illegal behavior, but also conduct that, while technically lawful on its own, contributes to the violations. Tracy A. Thomas, *The*

Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief, 52 Buff. L. Rev. 301, 314–15 (2004). They became an increasingly powerful—and necessary—tool in pushing back against willful constitutional violations and refusals to take meaningful corrective action. Beyond the school desegregation context, these injunctions have enabled courts to ensure that prison systems and psychiatric hospitals cannot violate citizens' constitutional rights with impunity. *See, e.g.*, *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Hutto v. Finney*, 437 U.S. 678 (1978); *Brown v. Plata*, 563 U.S. 493, 502 (2011).

Nationwide injunctions present only the latest variation on the same equitable theme—responding to willful lawlessness. They are powerful remedies, and courts rightly proceed with caution to ensure that such remedies are necessary and appropriate. *See, e.g.*, City of Chicago v. Sessions, 888 F.3d 272, 292 (7th Cir. 2018). At their core, though, nationwide injunctions are most appropriate when government officials act in bad faith. Trammell, *Demystifying Nationwide Injunctions*, *supra*, at 105–06. Such bad faith can take the form of artful evasions or, even more clearly, brazen defiance of legal obligations.

Vigilance in the face of bad faith remains vital. Judges have come under attack—in the form of unwarranted calls for impeachment and even threats to their physical safety—simply for doing their jobs. In recent months, courts have expressed concern about what they perceive as conspicuous bad faith, as the current administration openly defies lawful court orders. Likewise, this Court has responded to exigencies that arise through bad faith, including efforts to skirt basic due-process

obligations and avoid judicial review. *See Trump v. J.G.G.*, No. 24A931, 2025 WL 1024097, at *2 (U.S. Apr. 7, 2025) (per curiam).

Seen in context, nationwide injunctions are nothing new. They remain consistent with equity's role in vindicating underenforced rights and are appropriate in certain situations, including when officials actively try to avoid their obligations. Across all these contexts, extraordinary lawlessness warrants extraordinary remedies. *See* Trammell, *Constitutionality of Nationwide Injunctions*, *supra*, at 995.

B. *Prudential Concerns About Nationwide Injunctions Are Not Present Here and Do Not Prevent Courts From Issuing Them in Appropriate Circumstances*

While nationwide injunctions (or relief akin to them) have existed since at least 1913, their more recent invocation over the last few decades has resulted in rigorous debate about their propriety. *See* Sohoni, *Lost History of the "Universal" Injunction*, *supra*, at 943. Many of their more controversial features are inapplicable in this case or are otherwise cabined by well-established guardrails. Scholars have rightly identified potential pitfalls with nationwide injunctions, but when those concerns are absent or mitigated (and broad relief is otherwise justified) nothing prevents courts from granting appropriate relief. *See* Trammell, *Demystifying Nationwide Injunctions*, *supra*, at 72; Zachary D. Clopton, *National Injunctions and Preclusion*, 118 Mich. L. Rev. 1, 38–39 (2019).

First, one of the most contentious features of nationwide injunctions is that they incentivize forum shopping. While forum shopping is tacitly encouraged in our adversarial civil litigation system in service of zealous representation, *see* Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, *supra*, at 57

(discussing forum shopping as common strategic practice); *see, e.g.*, 28 U.S.C. § 1391,[4] in single-judge districts parties have been able to select their presiding judge with almost surgical precision, *see* Scott Dodson, *The Culture of Forum Shopping in the United States*, 57 Int'l Law. 307, 323 (2024); Trammell, *Demystifying Nationwide Injunctions*, *supra*, at 107–08. Commentators, and even judges, agree that such political judge shopping undermines the random-selection process and the well-accepted principle that parties should not be able to cherry-pick the judge before whom they appear. *See, e.g.*, Dodson, *supra*, at 323; Josh Gerstein, *Kagan Repeats Warning that Supreme Court Is Damaging Its Legitimacy*, POLITICO (Sept. 14, 2022), https://www.politico.com/news/2022/09/14/kagan-supreme-court-legitimacy-00056766.

However, the procedural posture of this case raises no such alarm. Aside from a generalized claim that nationwide injunctions "invite forum shopping," the Government tellingly does not contend that any forum shopping occurred in any of the consolidated cases here. App. 19–20.[5] Notably, none of the cases was filed in a single-judge "division"—negating the most acute judge-shopping concern.[6]

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[4] It bears noting that the invocation of class actions as an alternative solution to nationwide injunctions falls short because parties also forum shop based on court receptivity to class certification. *See* Malveaux, *Class Actions, Civil Rights, and the National Injunction*, *supra*, at 57.

[5] All citations to the Government's stay applications are to its filing in Trump v. CASA, Inc., No. 24A884 ("App.").

[6] *See* App. 18a (complaint filing in Western District of Washington); W.D. Wash. Local Civil Rule 3(d) ("Unless otherwise provided in these Rules or the General Orders of the Court, all actions, causes and proceedings shall be assigned by the clerk to judges by random selection."); App. 25a (complaint filing in District of Maryland); *Organizational Structure*, Md. Manual On-Line, https://msa.maryland.gov/msa/mdmanual/39fed/02usd/html/02usd.html (last visited Apr. 28, 2025) (listing six judges in the District of Maryland's Southern Division); App. 75a (complaint filing in District of Massachusetts); *Judges*, U.S. Dist. Ct. for the Dist. of Mass.,

Second, in some cases, nationwide injunctions run the risk of forcing judges to rule without the benefit of a complete record and more precedent. *See, e.g.*, Bray, *supra*, at 461–62. This lack of percolation can result in the Court's ruling on an issue with less input from the courts below and prematurely freezing the law.

No such concern is present here. This case has seen ample percolation. By the Government's own admission, plaintiff-respondents' motions for injunctive relief received not only consideration from three separate district courts, but also review by three separate appellate courts, all of which sided with the plaintiff-respondents. App. 10–15. Moreover, numerous other safeguards ensure that courts have an ample record and are well-equipped to rule on the substantive legal questions, especially when reducing delay and uncertainty outweighs any benefit from gathering more information. *See* Malveaux, *Class Actions, Civil Rights, and the National Injunction*, *supra*, at 57; Clopton, *supra*, at 38. For example, a single judge's nationwide injunction receives expedited full appellate review from a three-judge panel. *See, e.g.*, *Nat'l Treasury Emps. Union v. Vought*, No. 25-5091, 2025 WL 996856 (D.C. Cir. Apr. 3, 2025) (granting emergency motion to stay preliminary injunction); *Am. Fed'n of Gov't Emps., AFL-CIO v. U.S. Off. of Pers. Mgmt.*, No. 25-1677, 2025 WL 914823 (9th Cir. Mar. 26, 2025) (denying emergency motion to stay preliminary injunction).

The current system enables district judges on the ground to be nimble when plaintiffs are substantially likely to win on the merits and face immediate irreparable

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https://www.mdd.uscourts.gov/judges (last visited Apr. 28, 2025) (listing twenty judges, of which seventeen serve in the Boston courthouse where *New Jersey v. Trump* was filed).

harm—a formidable standard. This includes moments of national crisis, such as indiscriminate firing of thousands of workers and withholding of congressionally appropriated funds that safeguard the environment. *See, e.g.*, *Chi. Women in Trades v. Trump*, No. 25 C 2005, 2025 WL 1114466 (N.D. Ill. Apr. 14, 2025); *Woonasquatucket River Watershed Council v. U.S. Dep't of Agric.*, No. 1:25-CV-00097-MSM-PAS, 2025 WL 1116157 (D.R.I. Apr. 15, 2025). This is especially true when numerous lawsuits raise the same essential legal question. *See* Doug Rendleman, *Preserving the Nationwide National Government Injunction to Stop Illegal Executive Branch Activity*, *supra*, at 946. Percolation is not an end unto itself. At moments of constitutional crisis, and when fundamental rights are at stake, courts appropriately weigh competing values.

Third, some critics posit that nationwide injunctions are inappropriate because of their indeterminacy and inconsistency. *See* Bray, *supra*, at 466–68. For example, permitting judges to issue "complete relief"—even if it means beyond the parties to a case—risks giving judges unbridled discretion that can be wielded politically in either direction. *Id.*[7]

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[7] To be sure, what is good for the goose is good for the gander. *See, e.g.*, *Rule by District Judges II: Exploring Legislative Solutions to the Bipartisan Problem of Universal Injunctions*, Hearing Before the Senate Comm. on the Judiciary, 119th Cong. (2025) (Statement of Professor Samuel L. Bray, John N. Matthews Professor of Law, Notre Dame Law School) (citing "overtime regulations of the Obama administration," "the travel ban in the [first] Trump administration," and "student loan forgiveness in the Biden administration"), https://www.judiciary.senate.gov/imo/media/doc/2025-04-02_testimony_bray.pdf. For example, according to a *Harvard Law Review* study, the first Trump administration experienced 64 total nationwide injunctions, of which 92% were issued by a judge appointed by the opposing Democratic party. *Chapter Four District Court Reform: Nationwide Injunctions*, 137 Harv. L. Rev. 1701, 1705 (2024). The Biden administration experienced 14 total nationwide injunctions, of which 100% were issued by a judge appointed by the opposing Republican party. *Id.*

But this doesn't mean that all nationwide injunctions are politically motivated, or that the purported surge in them against the current administration is not justified. The Government complains that "[u]niversal injunctions have reached epidemic proportions since the start of the current Administration." App. 3. But quantity alone hardly tells the complete story. Instead, requests for nationwide injunctions must be contextualized within the actions and attempted actions of each administration. *See* Malveaux, *Class Actions, Civil Rights, and the National Injunction*, *supra*, at 62; *Rule by District Judges II: Exploring Legislative Solutions to the Bipartisan Problem of Universal Injunctions*, Hearing Before the Senate Comm. on the Judiciary, 119th Cong. (2025) (Statement of Stephen I. Vladeck, Agnes Williams Sesquicentennial Professor of Federal Courts, Georgetown University Law Center), https://www.judiciary.senate.gov/imo/media/doc/2025-04-02_testimony_vladeck.pdf.[8] The courts serve as an important check on abuse of executive power, thereby necessitating their discretion to issue relief beyond the parties in some cases. *See* Malveaux, *Class Actions, Civil Rights, and the National Injunction*, *supra*, at 62. This is especially true where the rule of law is in jeopardy and the most vulnerable populations are being targeted. *See id.* at 64. Stripping

[8] Professor Vladeck has documented evidence illustrating that grants of preliminary injunctions against the Trump administration are not as partisan as some accounts suggest. Stephen I. Vladeck, *136. Setting the Record Straight on the Anti-Trump Injunctions*, One First (Mar. 31, 2025), available at https://www.stevevladeck.com/p/136-setting-the-record-straight-on.

citizenship from, by the Government's own admission, "millions" of legal citizens born to immigrant parents, App. 3, presents a textbook case of such unlawful targeting.

Fourth, some critics of nationwide injunctions suggest that more legally palatable alternatives are readily available: nonparties can simply bring their own lawsuits or parties can bring class actions that seek injunctive relief nationwide. *See, e.g.*, George Rutherglen, *Universal Injunctions: Why Not Follow the Rule?*, 107 Va. L. Rev. Online 300, 311 (2021); Bray, *supra*, at 474–75. But these proposals are untethered from the reality that most Americans face in this country. The difference between those who file suit and those who don't is not merely a timing issue, with the former getting relief that the latter will eventually obtain via precedent. *See* Malveaux, *Class Actions, Civil Rights, and the National Injunction*, *supra*, at 61, 63–64. With the vast majority of Americans unable to afford a lawyer to pursue litigation or unaware of their legal rights, they would be subjected to a second-tier system of justice, unprotected from unconstitutional or illegal government action by virtue of their socio-economic status for years to come, if not indefinitely. *See* Alexi Pfeffer-Gillett, *Unfair by Default: Arbitration's Reverse Default Judgment Problem*, 171 U. Pa. L. Rev. 459, 491–92, 494 (2023); Norman W. Spaulding, *The Ideal and the Actual in Procedural Due Process*, 48 Hastings Const. L.Q. 261, 263 (2021). Injunctive relief beyond the parties tempers this potential disparity and prevents nonparties from suffering irreparable harm.

Nor is it the case that a party can easily pursue nationwide relief by bringing a Rule 23(b)(2) injunctive class action. Research has shown that between this Court's

jurisprudence over the last fifty years, Congressional legislation, and several lower court rulings, it is increasingly more difficult for litigants to bring class actions. *See, e.g.*, Malveaux, *Class Actions, Civil Rights, and the National Injunction*, *supra*, 59–60. To be sure, Rule 23 aggregate litigation provides a due-process framework that is unavailable in the context of nationwide injunctions. But the myriad class-action obstacles, absent reform, make this avenue more aspirational than anything else. *See id.* at 60. Moreover, class actions are not a panacea, as certain kinds of aggregation defy class treatment, and they often are not feasible in the face of imminent harm. Trammell, *Demystifying Nationwide Injunctions*, *supra*, at 115–18.

Fifth, the three consolidated cases here do not trigger concerns about issue preclusion. Scholars have called attention to nationwide injunctions' potential for asymmetric preclusion—a single plaintiff might bind the government, but the government cannot bind subsequent plaintiffs, a situation akin to nonmutual issue preclusion. *See, e.g.*, *id.* at 96; Clopton, *supra*, at 5–6. But just because a nationwide injunction would have a binding effect on the government does not mean such relief is *per se* invalid. Instead, "viewing nationwide injunctions through the lens of preclusion" helps "explain why such remedies are not categorically verboten and also can provide a theoretically robust understanding of the circumstances under which they should issue." Trammell, *Demystifying Nationwide Injunctions*, *supra*, at 96.[9]

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[9] Some courts and commentators mistakenly suggest that *United States v. Mendoza*, 464 U.S. 154 (1984), which did not permit a plaintiff to invoke offensive nonmutual issue preclusion against the government, forbids nationwide injunctions. *See* Trammell, *Demystifying Nationwide Injunctions*, *supra*, 99 (2019) (collecting cases and commentary). The text and logic of *Mendoza* do not support that broad reading. Instead, *Mendoza* identified a further set of policy considerations that courts should

The circumstances here suggest that the nationwide injunctions issued below by three separate courts are entirely appropriate.

Indeed, none of the concerns that courts consider in the nonmutual preclusion context arise here. There is no evidence of wait-and-see gamesmanship by plaintiffs, who all filed complaints on the same date, January 21, 2025, App. 18a, 25a, 75a—one day after the President's Executive Order, App. 75a; *see also Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 (1979) (expressing concern that plaintiffs have "incentive to adopt a 'wait and see' attitude, in the hope that the first action by another plaintiff will result in a favorable judgment."); Trammell, *Demystifying Nationwide Injunctions*, *supra*, 108–09 (2019) (arguing that courts assessing nationwide injunctive relief should consider "wait-and-see gamesmanship").[10]

Moreover, if plaintiffs' intention were indeed to exploit issue preclusion by filing as many cases as possible under the expectation that most would be unsuccessful but one might happen to prevail, it would make little sense for multiple plaintiffs, including multiple state attorneys general, to have joined their claims. *See* App. 10–14. In this scenario, any plaintiff's failure to secure injunctive relief would bar that plaintiff from separately seeking the same injunctive relief elsewhere. If

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consider, including the potential for one-and-done litigation, lack of percolation, and prematurely freezing the law. 464 U.S. at 159–61. When those concerns are absent, nonmutual preclusion can be appropriate. *See* Trammell, *Demystifying Nationwide Injunctions*, *supra*, at 97–101 (so arguing and collecting cases); Clopton, *supra*, at 20–37 (arguing *Mendoza* does not prevent nationwide injunctions).

[10] Nor do the three separate proceedings below, with three separate courts ordering preliminary injunctive relief, trigger the "one-and-done scenario—when only a single court has considered a particular question and that court's decision becomes binding everywhere." Trammell, *Demystifying Nationwide Injunctions*, *supra*, at 107.

exploiting nonmutual issue preclusion had been the goal, the joined plaintiffs in these cases would have been better off filing separate, individual actions to maximize the chances of success.

Nor is there a risk of entrenching one result among inconsistent judgments, as all three sets of plaintiffs prevailed in the lower courts. *Id.* And all three cases were in U.S. district courts and therefore provided similar procedural opportunities for the government. *See id.*; *see also Parklane*, 439 U.S. at 330–31. The proceedings here thus implicate *none* of the preclusion fairness concerns that would justify skepticism toward, much less partially staying, the unanimous decisions of the courts below that injunctive relief is warranted under the circumstances of plaintiff-respondents' claims.

C. *Rulemakers, Congress, and Lower Courts Are Well Suited to Institute Appropriate Guardrails to Nationwide Injunctions*

Even if the Court is persuaded that a partial stay is appropriate under the specific circumstances in this case, it should not throw the baby out with the bathwater by eliminating the nationwide injunction wholesale. The Judicial Conference's Advisory Committee on Civil Rules ("the Rulemakers"), Congress, and lower courts have various tools in their toolbox to establish appropriate limitations and are doing so. The Rulemakers have the institutional capacity to craft systemic procedural reform and rules regarding nationwide injunctions. *See, e.g.*, Fed. R. Civ. P. 65. While the Court's jurisprudence is tethered to individual, idiosyncratic cases with limited records, the Rulemakers have the resources and data to conduct rigorous widespread impact studies and to understand broader litigation realities. They bring

their expertise and practical experience to bear when establishing various standards for civil litigation. The Rulemakers—with the input of thousands of judges, lawyers, law professors, legal organizations and others who participate in the robust public note and comment process—can craft rules informed by boots-on-the-ground knowledge. *See* Rules Enabling Act of 1934, 28 U.S.C. §§ 2071–2077. Moreover, this swath of participants gives the Rulemakers the advantage of a relatively democratic public process, which takes into account the interests of various stakeholders. Indeed, the Rulemakers have already studied and drafted guidance on the issue of "judge-shopping"—one of the most dubious practices and common complaints about nationwide injunctions. The Rulemakers' guidance on the random assignment of cases when relief is beyond the parties, found in its April 1, 2025 Agenda Book for the Civil Rules Committee, demonstrates the body is already actively engaged in this issue. Meeting Agenda from the Advisory Comm. on Civ. Rules 350–51 (Apr. 1, 2025), https://www.uscourts.gov/sites/default/files/2025-03/2025-04-civil-rules-committee-agenda-book-final-updated-3.28.25.pdf.

Congress is also poised to craft guardrails that would rein in the most problematic features of nationwide injunctions. While the Rulemakers are comprised of judges, lawyers, and academics selected by the Chief Justice, Congress, as an elected body of representatives, is responsive to and representative of the people's interests. Congress can also be relatively creative and nimble. Unlike the Court, Congress is not constrained by the four corners of a case; and unlike the Rulemakers, Congress is not inhibited by the Rules Enabling Act. *See id.* § 2072 (a)–(b). Unencumbered, Congress can entertain a broad swath of reforms that enhance the

advantages of nationwide injunctions, while curbing their disadvantages. Indeed, Congress has held hearings and is actively considering various bills regarding nationwide injunctions. *See, e.g.*, No Rogue Rulings Act, H.R. 1526, 119th Cong. (2025); Court Shopping Deterrence Act, H.R. 2274, 119th Cong. (2025); Judicial Relief Clarification Act of 2025, S. 1206, 119th Cong.

Finally, the lower courts themselves, in large measure, are already equipped to assess the propriety of nationwide injunctions. Outlier courts stand in stark contrast to those rigorously applying the preliminary injunctive standard. *See* Alexander Gouzoules, *Choosing Your Judge*, 77 SMU L. Rev. 699, 717 (2024). To justify a preliminary injunction, a court must determine whether the plaintiff satisfies the stringent test required, as "an extraordinary remedy [is] never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 24 (2008).

In sum, the Court need not and should not eliminate the nationwide injunction wholesale. "It is too blunt an instrument to address the complexity of our tripartite system of government, our pluralistic society, and our democracy." Malveaux, *Class Actions, Civil Rights, and the National Injunction*, *supra*, at 56.

CONCLUSION

The Court should deny the Government's partial stay application.

Respectfully submitted,

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