Nos. 24A884, 24A885, & 24A886

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, et al.,
Applicants,
v.
STATE OF WASHINGTON, et al.,
Respondents.

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.
STATE OF NEW JERSEY, et al.,
Respondents.

On Applications for Partial Stays of the Injunctions Issued by the United States District Courts for the Western District of Washington, the District of Maryland, and the District of Massachusetts.

BRIEF FOR AMICUS CURIAE ALAN B. MORRISON IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS[1]

The amicus curiae Alan B. Morrison is an associate dean at the George Washington University School of Law where he teaches civil procedure and constitutional law. He also litigates cases in the federal courts in which the claim is that a federal statute or an action by a federal agency is unconstitutional or inconsistent with other federal law and thus may not be applied anywhere in the United States. As in this case, the major issue on remedy is whether a federal court, other than this Court, may issue what is often referred to as a national or universal injunction, that would benefit persons not a party to a particular lawsuit.

In the view of amicus, where one stands on this issue is often determined by where one sits in the pending case, except for the Department of Justice, which defends most of these cases, and is consistent in its opposition to any national injunctions. Amicus, on the other hand, believes that national injunctions are appropriate in some situations, but not in others. He has written two short essays, one during the Biden Administration and one during the current Trump Administration, supporting a legislative solution to the problem that would generally preclude their use unless ordered by a panel of three judges.[2] He submits this brief

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[1] Pursuant to Rule 37.6, amicus states that no party, counsel for any party, or any person other than amicus authored this brief or made any monetary contribution for its preparation or submission.

[2] Alan B. Morrison, Limiting National Injunctions, National Law Journal, March 28, 2025, https://www.law.com/nationallawjournal/2025/03/28/limiting-nationwide-injunctions/; Alan Morrison, It's Time to Enact a 3-Judge Court Law for National Injunctions, US Law Week, February 6, 2023, https://news.bloomberglaw.com/us-law-week/its-time-to-enact-a-3-judge-court-law-for-national-injunctions.

to urge the Court to deny the stay and, in effect, to remit the issue to Congress, which is the proper body to balance the competing interests and craft a solution that cannot and should not be devised by the judicial branch.

INTRODUCTION & SUMMARY OF ARGUMENT

This case is in a highly unusual posture. Respondents succeeded on the merits in the lower courts to their challenge that President Trump's Executive Order on birthright citizenship is unconstitutional. The application for a stay does *not* contest the merits rulings in any of these three cases, although it spends four pages arguing that the States, but not the other plaintiffs, are not entitled to any relief. Rather, their opposition is confined to the fact that the orders protect every person in the United States who may be adversely affected by the Executive Order. Moreover, unlike many stay applications in this Court, the application here does not contain an alternative request that the Court treat the application as a petition for a writ of certiorari and grant the petition, setting the case down for briefing and argument.

This stay application is unusual for another reason: the only stated harm to the applicants is that they are prevented from "developing guidance about how they would implement the Order." App. at 2; these "universal injunctions compromise the Executive Branch's ability to carry out its functions." App. at 3. But without identifying any specific action that applicants would take but for the court orders, there is no irreparable harm, and hence no basis for a stay of any order. In short, applicants' harm appears to be limited to the long time grievance of the Justice Department that universal injunctions are unlawful and that this is the case to stop

them. However, absent any defense in this Court on the merits of the birthright Order, which is the most important factor in a request for a stay, applicants are seeking an advisory opinion which it may not do consistent with the case or controversy requirement of Article III.

There is another, perhaps more fundamental, reason why this Court should simply deny the requested stay. The advisability of universal injunctions is not an always or never question, but, instead, whether to grant one depends on all the circumstances of the case. For example, it may be feasible to exclude the named plaintiff from a rule, such as one requiring a vaccination against COVID, while allowing it to continue to be applied to others until there is a final decision. In addition, preliminary injunctions may be more problematic than permanent injunctions, while those approved by three judges would seem to be less objectionable than one issued by a single judge. In some cases, great unfairness would occur if the relief were limited, for example, so that only some members of an industry were relieved of the burdens of a new law or regulation because a universal injunction were categorically unavailable. And while class actions may help in some cases, there are many situations where attempting to certify a class may cause intolerable delays and potentially create unanticipated preclusion problems.

Part of the problem is that there are competing policy options in deciding whether to grant a national injunction that are impossible to reconcile on a one size fits all basis. On the one hand, there is the principle that the same law ought to apply to everyone, so that if A wins an injunction against a new agency rule, it is somehow

unfair to everyone else if only A benefits from that ruling. On the other hand, a single judge may be seriously in error in a case, and while it is tolerable to allow the plaintiff to benefit temporarily from that victory, the Government should not always have to halt a national program just because one judge said it was unlawful. The answer to the problem is further affected by possible solutions, such as requiring a three-judge court before a national injunction can be entered, which can only be provided by federal legislation.

For these reasons and others set forth below, the Court should deny the stay and make it clear to all that, while the Court will entertain stay applications in cases in which the merits are not conceded, efforts to seek a definitive judicial answer to the issue of the legality of national injunctions is not the business of the Court.

ARGUMENT

THE STAY SHOULD BE DENIED BECAUSE APPLICANTS HAVE NOT CHALLENGED THE RULING ON THE MERITS IN THIS COURT.

The law is clear that often the determinative factor in deciding whether a stay should be granted is whether the party seeking it will prevail on the merits. *Ohio v. Environmental Protection Agency,* 603 U.S. 279, 292 (2024). In their stay applications, applicants do not challenge the rulings below on the merits that the birthright Executive Order is invalid although they do devote five pages in their application in its defense. That should be the end of the stay inquiry, but applicants contend that the "merits" here is the issue of whether lower federal courts may ever issue injunctions that cover persons not named as parties in the case and not within

the geographic reach of the court issuing the order. According to applicants, the answer is always no, and they ask the Court to so rule. Applicants are wrong in their conclusion and wrong in their effort to recast the merits issue in that way because to do so would result in the Court issuing an advisory opinion in violation of Article III. *Carney v. Adams,* 592 U.S. 53, 58 (2020).

As the application shows, the Department of Justice, in administrations of both parties, has objected to injunctions of the kind issued here that protect persons not named as parties, especially when those persons are not within the jurisdiction of the court that issued the injunction. Although this Court has had this scope of an injunction issue before it on several occasions, it has been unable to resolve it, generally because it decides the merits, making the injunction issue academic: if the plaintiff wins, the Government is bound by that ruling, and if the plaintiff loses on the merits, the entire injunction is gone. The decision of the Solicitor General not to contest the merits here is an effort to isolate the injunction issue so that the Court will decide it, hopefully by forbidding all national injunctions, no matter the circumstances.

But this Court decides cases and controversies, with real facts and real legal claims, and does not issue advisory opinions. The law is clear that the standard for granting a stay is "whether the applicant is likely to succeed on the merits, (2) whether it will suffer irreparable injury without a stay, (3) whether the stay will substantially injure the other parties interested in the proceedings, and (4) where the public interest lies." *Ohio v. EPA, supra,* 603 U.S. at 291. What applicants ask the

Court to do is to put aside all of the facts in these cases except the extent of the injunctions granted below and conclude that the lower courts may never issue an injunction of the kind issued here, no matter what the facts may be. This request is no different than if the Solicitor General had filed a petition with this Court with the following question presented: "May a lower federal court ever issue an order that benefits persons other than the named parties?" The Court would reject that request for an advisory opinion, just as it should reject this application for a stay here which is the equivalent of a request for an advisory opinion on national injunction because that request is forbidden by Article III.

There was a legitimate way that the Government could have presented the national injunction issue to this Court. All it had to do was to seek a stay and argue that it would prevail on the merits of the birthright issue itself. But that path would run the risk of losing (or winning) the constitutional claim immediately, and that was a risk it chose not to take since it appears to care more about the injunction issue than about the merits of the birthright order. Or it could also have lost the stay because, as the applications show, there are no concrete harms that will befall the Government if these national injunctions continue in effect. All that the applications assert are general complaints about an inability to "implement" an Executive Order that seeks to overturn a constitutional understanding going back more than 100 years and that itself had a built in delay of thirty days before it went into effect. Those grounds might well have been enough to deny the stay application without the Court having to pass on the broader and much more difficult issue of whether national

injunctions are ever permitted, which further explains why the Government sought to isolate the national injunction issue.

Given the posture of these cases, amicus does not ask the Court to reject the Government's position on national injunctions as a matter of law, but it is almost certainly wrong as two examples illustrate. Congress has provided that judicial review of the decisions of a number of agencies is to take place via direct review in the courts of appeals. *See* 21 U.S.C. § 387l(a)(1); 15 U.S.C. § 717r(b); & 28 U.S.C. § 2344. In many cases, regulated parties will seek stays of those rules, and as far as amicus is aware, no court or scholar has suggested that the particular court of appeals that has the case lacks the ability to issue a stay or a final judgment that precludes the enforcement of the rule anywhere in the United States. Yet if the Government's view that federal courts can only grant relief to named parties, or perhaps parties within the jurisdiction of the issuing court, the regional courts of appeals would be precluded from issuing stays and final orders that have a national impact, a practice that no one has ever questioned. Although the orders issued in these cases came from district courts, all of them were also upheld on interlocutory appeal, which makes them analogous to stay orders of the courts of appeals on direct review.

Another example involves the facts of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). President Truman directed his Secretary of Commerce to take control of the nation's steel mills to prevent work stoppages that would halt production of steel products needed for the Korean War effort. It is not clear whether all or only some of the companies affected by the order sued in the District of

Columbia. In any event, the district court enjoined the order entirely. However, under the Government's theory, the Secretary could continue to control the operations of any of the companies not named as plaintiffs, all of which were located outside the District of Columbia, an outcome that makes no sense and is not compelled by any law.

On the other extreme, the "always" position is erroneous. Yes, federal law should be the same everywhere so that everyone is treated equally. But just because a single judge decides an issue of federal law against the federal government, even if affirmed by a court of appeals, does not mean that the government may not challenge that determination elsewhere. *United States v. Mendoza,* 464 U.S. 154 (1984). That conclusion carries special force where the issue is being litigated in other courts and the government has prevailed in some of the cases. This potential for a "one-way-ratchet effect" (App. at 21) is another reason why the "always," or even a presumption of "always," is mistaken.

The national injunction dilemma has no simple answer, but instead should be decided based on all the circumstances. That is because the answer involves a tradeoff between the equality principle—everyone should be subject to the same laws—and the principle that the federal government should not be bound by a single adverse ruling. The propriety of a national injunction will not be the same in every case because the all-important relevant facts will be different.

Amicus agrees that the current situation is not ideal, but disagrees with the Government that the solution lies with this Court. The inevitable tradeoff necessarily

involves a set of policy choices that are best left to the political branches. In addition, as discussed below, some elements of what amicus views as a better balanced process require statutory changes or involve line drawings of the kind most appropriate for Congress. This is a particularly good time for the Court to defer to Congress because the House of Representatives has passed a bill on this subject and several bills are pending in the Senate.[3]

Without suggesting that these options cover all possibilities, the following suggestions illustrate the tools that Congress has available that the Court probably could not employ. As amicus has written (see note 2, *supra*), much of the basis for a claim of overreach of a national injunction is that the order was entered by a single district judge, sometimes actually chosen by plaintiff, but at least from a group of judges in a particular district that plaintiff considers to be favorable as a whole. One cure for national injunctions aided by forum shopping is to require that those injunctions can only be issued by a three-judge court, with review by certiorari in this Court. This is the practice for some other cases of importance that are covered by 28 U.S.C. § 2284.

Another option, either alone or in combination with a three-judge court, is to preclude broader preliminary, but not final injunctions. Or Congress could impose a higher threshold on the merits or in terms of the balance of harms before a national injunction could issue. Or it could create special rules in cases of true emergencies, like preventing a mass deportation where the plaintiffs established that they had

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[3] H.R. 1526, 119th Cong., 1st Sess.; S. 1206, 119th Cong., 1st Sess.; S. 1099, 119th Cong., 1st Sess.; S. 1090, 119th Cong., 1st Sess.

been denied even the most basic due process protections. Congress could also require that similar cases be transferred to a single forum which would be specifically allowed to issue national injunctions. A similar concept is employed in 28 U.S.C. § 2112, which establishes a system so that challenges to federal agency decisions that are commenced in any court of appeals within a ten day window after the agency action become final are transferred to a single court of appeals for resolution there by a panel of three judges.

Another possibility, although not one that amicus favors, is to make national injunctions available for class actions. In their effort to ban all national injunctions, applicants blithely suggest that "affected individuals could instead seek class certification and, if appropriate, seek class-wide preliminary relief. See Fed. R. Civ. P. 23." App. at 38. Surely, the Government would not support nationwide relief if the complaint simply asserts that class certification will be sought. But requiring full compliance with Rule 23, even for actions under Rule 23(b)(2), *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338 (2011), would take considerable time and would almost certainly create an incentive for the Government to fight class certification, making any timely relief more difficult to obtain. Perhaps Congress could devise a quick look certification for these cases or impose a heightened standard of proof before a class-like remedy could be ordered. Or, approaching the question from the opposite perspective, it could require a court to make a specific finding, when it issued a national injunction, explaining in detail why more limited relief will not adequately protect the named plaintiffs and other injured persons.

The House-passed bill on national injunctions contained a provisions creating a three-judge court exception to the ban on national injunctions for cases brought by two or more States located in different circuits, apparently on the theory that those cases present more compelling circumstances for broader relief. But they also often raise complicated standing issues in contrast to cases brought by parties directly affected by the challenged action. Such a rule would also create further incentives for State Attorneys General to bring these cases at a time when some observers believe that there are too many of those cases already. Once again, the point is not to endorse or oppose any specific alternative, but to illustrate that Congress has more varied tools to solve this problem than this Court, which would have no authority to adapt most of them. Moreover, Congress can combine options and/or adjust traditional rules in ways that would not be available to this Court, and it can also make its changes prospective only.

Amicus recognizes that Congress is very polarized politically and that any significant legislation is very difficult to enact. However, the current impetus for legislative action has arisen because of the many challenges to actions by the Trump administration. Even if the current President's ability to fight off his attackers is likely to be the motive that members of the President's party have to support limitations on national injunctions, they need to keep in mind the likelihood that the shoe will be on the other foot when an administration of the other party is once again in control of the Executive Branch.

CONCLUSION

The Court should deny the stay and make it clear that Congress is the proper forum in which the issue of how to handle requests for national injunctions should be resolved.

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