

How Nationwide Injunctions Have Thwarted Recent Immigration Policy

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ABSTRACT: Nationwide injunctions are a relatively recent phenomenon that have been used with increasing frequency to halt policies, laws, and regulations. A nationwide injunction can keep a policy from going into effect in the whole nation, despite the fact that it is issued by a single district court judge. The Obama and Trump administrations have both had major immigration reform plans thwarted due to nationwide injunctions issued by district court judges. Not surprisingly, the use of nationwide injunctions has become a hotly debated topic. A recent Supreme Court concurring opinion suggested that the use of nationwide injunctions is unconstitutional. Legislation has been in the works to stop the remedy's use. Proponents argue that the nationwide injunction is sometimes necessary, especially in the immigration context, in order to provide complete relief against nationwide suffering. Persons opposed to the nationwide injunction point to the lack of historical or textual basis for its use and its disruption of the separation of powers between the branches of the government. Ultimately, this Note argues that nationwide injunctions do not belong as a remedy in the immigration law context.

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I. INTRODUCTION

Nationwide injunctions are a highly contentious and timely topic, mainly as a result of the Trump Administration's immigration policies.¹ The halting of President Obama's immigration policy in 2014 provides a brief illustration of how a nationwide injunction works. Then-President Obama attempted to put an immigration policy in play through the use of an Executive Action; however, a single district court judge in the Southern District of Texas issued a ruling that stopped the plan from going into effect, not only in Texas or even just the Fifth Circuit, but completely halted it from going into effect anywhere in the United States.² With the ability to issue a nationwide injunction, it seems almost as though a district court judge has as much power, if not even more, than the President of the United States in regards to the policy, executive order, or regulation at issue.

Additionally, nationwide injunctions are political. They are a political remedy because nationwide injunctions are often used by judicial activists belonging to one party as a tool to stop the immigration plans of the other party by bringing suit in either a liberal or conservative district.³ The differing reactions over time of former Attorney General Jeff Sessions reflect the highly political nature of nationwide injunctions. When the district court judge stopped President Obama's immigration plan, "[a]s a senator, Mr. Sessions cheered that ruling, saying it was 'an injunction that stopped the Obama

1. Ariane de Vogue, *The Big Legal Issue Buried in the Travel Ban Case*, CNN: POL. (Apr. 25, 2018, 11:03 AM), <https://www.cnn.com/2018/04/25/politics/supreme-court-nationwide-injunctions-travel-ban/index.html> [<https://perma.cc/56FL-34U8>].

2. *Texas v. United States*, 86 F. Supp. 3d 591, 646, 677-78 (S.D. Tex. 2015).

3. Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum-Shopping, Politicizing Courts, and Eroding Constitutional Structure*, GEO. MASON L. REV. (forthcoming) (manuscript at 17-20) (on file with author).

administration from proceeding with its lawless immigration system.”⁴ However, when a district court judge in Hawaii issued a nationwide injunction halting President Trump’s Executive Order regarding immigration issues, Sessions said, “I really am amazed that a judge sitting on an island in the Pacific can issue an order that stops the President of the United States from what appears to be clearly his statutory and constitutional power.”⁵

Nationwide injunctions are a hot topic among lead government actors. Recently, in *Trump v. Hawaii*, the Supreme Court passed up an opportunity to address the constitutionality of nationwide injunctions as a remedy.⁶ The case was regarding President Trump’s travel ban against citizens from certain Muslim-majority countries.⁷ In a concurring opinion, however, Justice Thomas suggested that the propriety of the remedy should be addressed by the Supreme Court.⁸ Additionally, the House of Representatives voted on a bill that would prohibit nationwide injunctions as a remedy.⁹ Former Attorney General Jeff Sessions directed Department of Justice attorneys to argue against using nationwide injunctions.¹⁰ It seems likely that the constitutionality and the continued use of nationwide injunctions in U.S. courts is a question that will soon be directly addressed.

This Note argues that district court judges should not use nationwide injunctions as an equitable remedy to halt immigration policies, regulations, or executive actions. Part II of this Note gives a background of nationwide injunctions in the United States. Specifically, it describes how nationwide injunctions work and then canvases the use of nationwide injunctions in the immigration context during the Obama and Trump administrations. Part II of this Note highlights why the constitutionality of nationwide injunctions is an extremely timely topic that needs to be addressed. Part III characterizes the politics surrounding this issue by discussing the arguments for and against nationwide injunctions. Lastly, Part IV of this Note suggests that the solution

4. Adam Liptak, *Trump’s Losing Streak in Courts Is Traceable to Conservative Judges*, N.Y. TIMES (Apr. 27, 2017), <https://www.nytimes.com/2017/04/27/us/politics/trump-legal-defeats.html> [https://perma.cc/5ZMB-H8K7].

5. Rebecca Savransky, *Sessions ‘Amazed’ Judge ‘on an Island in the Pacific’ Halted Trump Travel Order*, HILL (Apr. 20, 2017, 3:03 PM), <https://thehill.com/homenews/administration/329763-sessions-amazed-judge-sitting-on-an-island-in-the-pacific-can-stop> [https://perma.cc/W3CG-BEF3] (reporting on Sessions’ comments that the suits against President Trump’s executive order were being brought “in the very, very liberal 9th Circuit”).

6. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (reversing the injunction on grounds of abuse of discretion rather than on constitutionality).

7. *Id.* at 2403–04.

8. *Id.* at 2424–25 (Thomas, J., concurring).

9. Injunctive Authority Clarification Act of 2018, H.R. 6730, 115th Cong. § 2 (2018).

10. Memorandum from the Attorney Gen. on Litig. Guidelines for Cases Presenting the Possibility of Nationwide Injunctions to Heads of Civil Litigating Components U.S. Attorneys 2 (Sept. 13, 2018), available at <https://www.justice.gov/opa/press-release/file/1093881/download> [https://perma.cc/3VBN-NVKF].

to this problem is to stop the use of nationwide injunctions in the immigration context. The remedy given by a judge should be limited to the parties before the court in an immigration suit. Persons challenging an immigration policy or regulation can bring a class action, if need be.¹¹ Additionally, if people are unhappy with new developments in the immigration context, they can turn to the political process.

II. BACKGROUND

This Part briefly describes what a preliminary injunction is and what elements a complainant must meet in order for a court to issue an injunction. Furthermore, this Part gives a brief overview of the history of nationwide injunctions in the United States. To highlight the politics of nationwide injunctions as a remedy, this Part gives a brief overview of both the Obama and Trump administrations' immigration policies that were halted by nationwide injunctions. This Part also gives a more in-depth look at the caselaw regarding President Trump's recent immigration policies because the caselaw is what has really brought nationwide injunctions and their constitutionality to the forefront in politics and the media today.

A. THE BASIC ELEMENTS OF THE NATIONWIDE INJUNCTION

There are different kinds of injunctions and several elements must be met for a judge to order an injunction as a remedy. Black's Law Dictionary defines an injunction as "[a] court order commanding or preventing an action. To get an injunction, the complainant must show that there is no plain, adequate, and complete remedy at law and that an irreparable injury will result unless the relief is granted."¹² A federal court may order a temporary restraining order or a preliminary injunction.¹³ A temporary restraining order can be given without giving notice to the party it is issued against.¹⁴

In contrast to a preliminary injunction, a temporary restraining order is limited in how long it can last since its purpose is to give the court time to have a preliminary injunction hearing.¹⁵ A preliminary injunction is "[a]

11. The Supreme Court has suggested that a class action suit in an immigration setting may not be the easiest or most appropriate course of action. *Jennings v. Rodriguez*, 138 S. Ct. 830, 851–52 (2018). However, the dissent in *Jennings* argued that there is no reason to think a class action in that particular case was impermissible. *Id.* at 875–76 (Breyer, J., dissenting).

12. *Injunction*, BLACK'S LAW DICTIONARY (11th ed. 2019); see also *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 61 (1975); *Sampson v. Murray*, 415 U.S. 61, 88 (1974); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506–07 (1959).

13. Rachel A. Weisshaar, Note, *Hazy Shades of Winter: Resolving the Circuit Split over Preliminary Injunctions*, 65 VAND. L. REV. 1011, 1017 (2012).

14. FED. R. CIV. P. 65(b)(1).

15. Weisshaar, *supra* note 13, at 1017–18.

temporary injunction issued before or during trial to prevent an irreparable injury from occurring before the court has a chance to decide the case.”¹⁶ It is well established “that an injunction is an equitable remedy.”¹⁷ As a legal remedy, “[i]njunctive relief . . . is not a freestanding cause of action, but rather—as its moniker makes clear—a form of relief to redress the other claims asserted by Plaintiff.”¹⁸ Preliminary injunctions are given if a court infers that action must be taken very quickly because there is a sense of urgency attached to the protection of the plaintiff.¹⁹

Courts have emphasized that an injunction is “an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.”²⁰ The Federal Rules of Civil Procedure, Rule 65, is typically offered as the textual basis that allows federal courts to issue injunctions.²¹ The biggest question that sparks much of the controversy today is the question of the “geographic breadth” or “geographic scope” of a preliminary injunction.²² Rule 65 requires “that the injunction ‘describe in reasonable detail . . . the act or acts restrained or required’ and identify the ‘[p]ersons [b]ound,’” but does not give any indication of how far a preliminary injunction should be able to reach.²³

B. THE HISTORICAL CONTEXT OF NATIONWIDE INJUNCTIONS IN THE UNITED STATES

A nationwide injunction is when a judge issues an injunction that affects not only the plaintiff, but the whole country, although it has been called other terms. It is worth noting that many people, in following Professor Samuel L. Bray, who has written extensively on the history of this type of injunction, will only refer to the remedy as a “national injunction.”²⁴ Professor Bray believes that the term “[n]ationwide injunction” is especially inapt, because it emphasizes territorial breadth, when the real point of distinction is that the injunction protects nonparties.²⁵ It has been said that particularly in the immigration context, these injunctions are actually universal injunctions because “[t]he significant feature of these injunctions” in these immigration

16. *Preliminary Injunction*, BLACK’S LAW DICTIONARY (11th ed. 2019).

17. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982).

18. *Base One Techs., Inc. v. Ali*, 78 F. Supp. 3d 186, 199 (D.D.C. 2015).

19. *Avitabile v. Beach*, 277 F. Supp. 3d 326, 336 (N.D.N.Y. 2017).

20. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam)).

21. FED. R. CIV. P. 65.

22. See Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095, 2102 (2017).

23. *Id.* (alteration in original) (footnotes omitted) (quoting FED. R. CIV. P. 65(d)(1)(C)–(2)).

24. Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 419 (2017).

25. *Id.* at 419 n.5.

cases is that “[t]hey prohibit enforcement of the challenged law, regulation, or policy against the entire universe of people who might be subject to enforcement of the challenged law, regulation or policy, whether parties to the constitutional litigation or otherwise.”²⁶

Professor Bray identifies the 1963 case *Wirtz v. Baldor Elec. Co.*²⁷ as the first instance of a national injunction as a remedy.²⁸ Although the case only involved three plaintiffs challenging the Secretary of Labor’s wage determination for an industry, the court held that the Secretary’s determination was invalid not only to the three plaintiffs before the court, but “to any business in the [relevant] industry.”²⁹

Nationwide injunctions have adversely affected both political parties. A judge’s issuance of a preliminary injunction can, and often does, keep a proposed government plan or executive order from going into action.³⁰ The Obama and Trump administrations, in particular, have seen judges frequently issue nationwide injunctions.³¹ The nationwide injunction is used by both political parties to hinder the policies of the other.³²

26. Howard M. Wasserman, “Nationwide” Injunctions Are Really “Universal” Injunctions and They Are Never Appropriate, 22 LEWIS & CLARK L. REV. 335, 350 (2018) (contending that a nationwide injunction is not interchangeable with a universal injunction, because a nationwide injunction only affects persons and regulations within the nation).

27. See generally *Wirtz v. Baldor Elec. Co.*, 337 F.2d 518 (D.C. Cir. 1963) (issuing an injunction against the Secretary of Labor’s minimum wage determination because the plaintiffs were faced with imminent monetary harm).

28. Bray, *supra* note 24, at 437–38.

29. *Id.* at 437.

30. Frank Chang, *The Administrative Procedure Act’s Stay Provision: Bypassing Scylla and Charybdis of Preliminary Injunctions*, 85 GEO. WASH. L. REV. 1529, 1533 (2017).

31. *Id.* at 1531.

32. Amanda Frost, *Academic Highlight: The Debate over Nationwide Injunctions*, SCOTUSBLOG (Feb. 1, 2018, 10:21 AM), <http://www.scotusblog.com/2018/02/academic-highlight-debate-nationwide-injunctions> [<https://perma.cc/7MEG-9TK9>]; Liptak, *supra* note 4 (“The Trump administration’s losing streak in courts around the nation has in large part been a product of precedents established by conservative judges in the Obama era. It turns out that legal principles meant to curb executive overreach are indifferent to the president’s party.”); Jason L. Riley, *When District Judges Try to Run the Country*, MANHATTAN INST. (July 18, 2018), <https://www.manhattan-institute.org/html/when-district-judges-try-run-country-nationwide-injunction-11357.html> [<https://perma.cc/AP79-L5TZ>] (“When a federal district court in Texas issued a nationwide injunction in 2015 that halted the implementation of President Obama’s amnesty program . . . many on the political right cheered. Two years later, when a federal district court in Maryland issued a nationwide injunction that blocked President Trump’s efforts . . . it was the left’s turn to celebrate.”); Jeff Sessions, *Nationwide Injunctions Are a Threat to Our Constitutional Order*, NAT’L REV. (Mar. 10, 2018, 12:20 PM), <https://www.nationalreview.com/2018/03/nationwide-injunctions-stop-elected-branches-enforcing-law> [<https://perma.cc/RD89-NKSN>] (“This is not a political or a partisan issue. After all, this has been a problem for administrations of both parties. Until President Trump, the President with the most nationwide injunctions was President Obama. Before him, it was President Clinton.”).

It did not go unnoticed by the media and scholars that liberals who were starkly against nationwide injunctions during the Obama Administration were quick to celebrate their issuance against President Trump’s Executive Orders, and vice versa.³³ In the context of immigration law, both President Trump and President Obama have had actions and policy plans halted due to preliminary nationwide injunctions.

C. *THE PERIL OF PRESIDENT OBAMA’S IMMIGRATION POLICY AT THE HANDS OF A NATIONWIDE INJUNCTION*

Although President Trump’s immigration policies and their history with nationwide injunctions is at the forefront of this Note because of the timeliness of President Trump’s policies, this Section outlines how a nationwide injunction halted one of President Obama’s immigration policies. This speaks to the use of the nationwide injunction as a remedy by both political parties, as well as the opportunity that the remedy gives for opponents of a policy to forum shop.³⁴

In *Texas v. United States*,³⁵ “the Fifth Circuit[] affirm[ed] [in 2015] . . . a preliminary injunction” that prevented “President Obama’s Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”)” from going into effect.³⁶ The background of the *Texas v. United States* case begins with Deferred Action for Childhood Arrivals (“DACA”). President Obama created DACA to help those who had been brought into the United States under the age of 16 and were under the age of 31 as of the effective date.³⁷ Deferred action gives the government prosecutorial discretion when deciding whether or not to initiate removal proceedings against an unauthorized immigrant present in the United States.³⁸ President Obama’s Immigration

33. Getzel Berger, *Op-Ed: Nationwide Injunctions Are Wrong—Even When They Stop Trump*, L.A. TIMES (May 12, 2017, 4:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-berger-injunctions-lower-federal-courts-judges-20170512-story.html> [<https://perma.cc/AQ2J-CRBZ>]; see also Josh Gerstein, *Conservative Legal Tactic Could Imperil Clinton Agenda*, POLITICO (Sept. 29, 2016, 12:05 PM), <https://www.politico.com/story/2016/09/states-federal-judges-injunctions-government-228234> [<https://perma.cc/SY5D-D3YL>] (“[S]ome liberal legal activists seem reluctant to deplore the conservative states’ tactics. The reason: civil rights and immigrants’ advocates have long visited the courtrooms of federal judges to seek sweeping rulings looking to alter federal policy across the country.”).

34. See *supra* Section II.A.

35. *Texas v. United States*, 86 F. Supp. 3d 591, 646 (S.D. Tex.), *aff’d*, 809 F.3d 134 (5th Cir. 2015).

36. WILSON C. FREEMAN, CONG. RESEARCH SERV., LSB10124, THE TRAVEL BAN CASE AND NATIONWIDE INJUNCTIONS 3 (2018), available at <https://fas.org/sgp/crs/homesecc/LSB10124.pdf> [<https://perma.cc/C3TS-T2KT>].

37. Charles C. Foster, *The Historic Importance of President Barack Obama’s Executive Actions on Immigration*, HOUS. LAW., Mar./Apr. 2015, at 28, 29.

38. Jessica M. Vaughan, *What Is Deferred Action?*, CTR. FOR IMMIGR. STUD. (June 15, 2012), <https://cis.org/Vaughan/What-Deferred-Action> [<https://perma.cc/8DUG-LSUE>].

Accountability Executive Action, announced in November 2014, would broaden DACA to cover more undocumented immigrants and introduced DAPA.³⁹ Under DAPA, it is believed that around 3.6 million undocumented immigrants would have been eligible for deferred action and work authorization.⁴⁰

Twenty-six states filed suit against the United States and Department of Homeland Security officials, asking for an injunction preventing DAPA from going into effect.⁴¹ Less than half of the immigrants that were eligible for DAPA lived in a state that filed suit.⁴² The challengers of DAPA argued that it violated the Administrative Procedure Act (“APA”), the Take Care Clause of the Constitution, and the Immigration and Naturalization Act.⁴³ The District Court found that the states had met their burden for a preliminary injunction in

establish[ing] four elements: “(1) a substantial likelihood of success on the merits; (2) a substantial threat that the [States] will suffer irreparable injury if the injunction is denied; (3) that the threatened injury outweighs any damage that the injunction might cause [Defendants]; and (4) that the injunction will not disserve the public interest.”⁴⁴

Ultimately, a nationwide injunction stopped President Obama’s DAPA plan. The District Court found that due to additional driver’s license costs imposed on Texas as a result of DAPA, Texas had standing and that the Obama Administration’s DAPA plan had violated the APA by not going through the notice and comment procedure required for rulemaking.⁴⁵ The U.S. Court of Appeals for the Fifth Circuit upheld the preliminary injunction on November 9, 2015 after the government appealed the preliminary injunction and was

39. Denise Cartolano, *How the Lone Star State Reached the Entire Nation: The Need to Limit the Nationwide Injunction Against DAPA and DACA in United States v. Texas*, 12 FLA. A&M U. L. REV. 135, 141 (2016).

40. Randy Capps et al., *Deferred Action for Unauthorized Immigrant Parents: Analysis of DAPA’s Potential Effects on Families and Children*, MIGRATION POL’Y INST. (Feb. 2016), <https://www.migrationpolicy.org/research/deferred-action-unauthorized-immigrant-parents-analysis-dapas-potential-effects-families> [<https://perma.cc/RP3D-NCDZ>].

41. *Texas v. United States*, 86 F. Supp. 3d 591, 604 (S.D. Tex.), *aff’d*, 809 F.3d 134 (5th Cir. 2015).

42. Haeyoun Park & Alicia Parlapiano, *Supreme Court’s Decision on Immigration Case Affects Millions of Unauthorized Immigrants*, N.Y. TIMES (June 23, 2016), <https://www.nytimes.com/interactive/2016/06/22/us/who-is-affected-by-supreme-court-decision-on-immigration.html> [<https://perma.cc/MB32-3GVA>].

43. *Texas*, 86 F. Supp. 3d at 614.

44. *Id.* at 646 (second and third alteration in original) (quoting *Jackson Women’s Health Org. v. Currier*, 760 F.3d 448, 452 (5th Cir. 2014)).

45. Cartolano, *supra* note 39, at 144.

affirmed by the U.S. Supreme Court.⁴⁶ Blows like this to President Obama's immigration policies continued on into President Trump's term.⁴⁷

*D. THE TRUMP ADMINISTRATION'S STRUGGLE WITH IMMIGRATION
EXECUTIVE ORDERS AND NATIONWIDE INJUNCTIONS*

This Section will focus on two of the Trump Administration's immigration policies and how nationwide injunctions prevented them. The two immigration policies this Section covers are President Trump's prohibition against sanctuary cities and the travel ban.

President Trump issued Executive Order 13,768, "Enhancing Public Safety in the Interior of the United States," on January 25, 2017.⁴⁸ The Order states that "[s]anctuary jurisdictions across the United States willfully violate Federal Law in an attempt to shield aliens from removal from the United States[, and] . . . that jurisdictions that willfully refuse to comply with 8 U.S.C. § 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants."⁴⁹ Section 1373 stated that "a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual."⁵⁰

President Trump's executive order against sanctuary cities was challenged by plaintiffs asking for declaratory and injunctive relief in six different jurisdictions.⁵¹ In *County of Santa Clara v. Trump*, a challenge brought by the county of Santa Clara and city of San Francisco, District Judge William H. Orrick's opinion stated that "where a law is unconstitutional on its face, and not simply in its application to certain plaintiffs, a nationwide injunction is appropriate."⁵² Judge Orrick determined that the Executive Order violated the Constitution, and that "[t]hese constitutional violations are not limited to San Francisco or Santa Clara, but apply equally to all states and local jurisdictions. Given the nationwide scope of the Order, and its apparent constitutional flaws, a nationwide injunction is appropriate."⁵³ On summary judgment, Judge Orrick granted the Counties' motion to permanently enjoin

46. *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015), *aff'd per curiam*, 136 S. Ct. 2271 (2016).

47. *See infra* Section II.D.

48. Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8799 (Jan. 30, 2017).

49. *Id.* at 8799–801 (referencing 8 U.S.C. § 1373 (2012)).

50. 8 U.S.C. § 1373(a).

51. Christopher N. Lasch et al., *Understanding "Sanctuary Cities,"* 59 B.C. L. REV. 1703, 1717 (2018).

52. *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 539 (N.D. Cal. 2017) (citing *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)).

53. *Id.*

the Executive Order.⁵⁴ The Court of Appeals for the Ninth Circuit disagreed with the scope of the national injunction granted by the lower court.⁵⁵ In an opinion by Chief Judge Sidney R. Thomas, the court reasoned that because “the Counties’ tendered evidence is limited to the effect of the Order on their governments and the State of California[,] . . . the record is not sufficiently developed on the nationwide impact of the Executive Order.”⁵⁶

Despite the prompt filing of challenges against the Executive Order against sanctuary cities, the Department of Justice stated that it would withhold a major federal grant for criminal justice systems in jurisdictions that refused to comply with federal immigration authorities.⁵⁷ This prompted several more parties to file complaints asking for declaratory and injunctive relief.⁵⁸ The City of Chicago filed suit against the Attorney General alleging that the new conditions on the federal grant were unlawful and violated the Constitution.⁵⁹

The District Judge granted the preliminary injunctions against the notice and access conditions placed on the federal grant by the Attorney General and declared that it was “nationwide in scope, there being no reason to think that the legal issues present in this case are restricted to Chicago or that the statutory authority given to the Attorney General would differ in another jurisdiction.”⁶⁰ In an opinion decided on April 19, 2018, the Court of Appeals for the Seventh Circuit upheld the district court’s injunction.⁶¹ The Attorney General appealed the decision and asked for “en banc review only as to the narrow issue of whether the preliminary injunction was properly applied beyond the City of Chicago to encompass jurisdictions nationwide” and the Seventh Circuit, in an order on June 4, 2018, vacated the part of its decision that affirmed the district court’s decision that the preliminary injunction extend nationwide.⁶²

In addition to the Executive Order on sanctuary cities, President Trump issued another major Executive Order, commonly known as the travel ban. President Trump issued Executive Order Protecting the Nation from Foreign Terrorist Entry Into the United States on January 27, 2017.⁶³ This Order

54. *Id.* at 540.

55. *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1244 (9th Cir. 2018).

56. *Id.*

57. Lasch et al., *supra* note 51, at 1717.

58. *Id.*

59. *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 936 (N.D. Ill. 2017).

60. *Id.* at 951.

61. *City of Chicago v. Sessions*, 888 F.3d 272, 293 (7th Cir. 2018).

62. *City of Chicago v. Sessions*, No. 17-2991, 2018 WL 4268817, at *1 (7th Cir. June 4, 2018).

63. Exec. Order No. 13,769, 82 Fed. Reg. 8977, 8977 (Feb. 1, 2017).

suspended visas from being issued to applicants from seven countries, five of which are Muslim-majority inhabited.⁶⁴

The purpose of the travel ban is self-evident in its nickname. President Trump's order contended "that the immigrant and nonimmigrant entry into the United States of aliens from [Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen] . . . would be detrimental to the interests of the United States, and I hereby suspend entry into the United States . . . of such persons for 90 days"⁶⁵ Additionally, the travel ban suspended the United States Refugee Admissions Program for 120 days and indefinitely suspended entry of Syrian refugees into the United States.⁶⁶ As a result of the travel ban, people who were in the middle of traveling to the United States were subject to deportation the moment they arrived.⁶⁷ Thousands of protestors showed up at airports across the country where travelers were being detained and also showed up in front of the White House.⁶⁸

The states of Washington and Minnesota filed a joint motion for a temporary restraining order to enjoin enforcement of certain sections of the Executive Order.⁶⁹ The states "alleged that the Executive Order unconstitutionally and illegally stranded its residents abroad, split their families, restricted their travel, and damaged the State's economy and public universities."⁷⁰ The District Court granted the temporary restraining order on February 3, 2017 finding that it was "necessary until such time as the court can hear and decide the States' request for a preliminary injunction."⁷¹ The Ninth Circuit refused to limit the temporary restraining order's geographic scope as "the Government ha[d] not proposed a workable alternative form of

64. See Rick Gladstone & Satoshi Sugiyama, *Trump's Travel Ban: How It Works and Who Is Affected*, N.Y. TIMES (July 1, 2018), <https://www.nytimes.com/2018/07/01/world/americas/travel-ban-trump-how-it-works.html> [<https://perma.cc/2JSW-8gEK>] (giving a detailed summary of the travel ban and reporting that over 135 million people fall under the umbrella of the ban).

65. Exec. Order No. 13,769, 82 Fed. Reg. at 8978.

66. *Id.* at 8979.

67. See Wesley Lowery & Josh Dawsey, *Early Chaos of Trump's Travel Ban Set Stage for a Year of Immigration Policy Debates*, WASH. POST (Feb. 6, 2018), https://www.washingtonpost.com/national/early-chaos-of-trumps-travel-ban-set-stage-for-a-year-of-immigration-policy-debates/2018/02/06/f5386128-01d0-11e8-8acf-ad2991367d9d_story.html [<https://perma.cc/B7GK-PQWP>] (giving an account of a man from Iraq who boarded a plane to America with a Special Immigrant Visa given to Iraqis who had helped United States troops, only to find out upon arrival that during the flight President Trump had signed Executive Order 13,769).

68. Lauren Gambino et al., *Thousands Protest Against Trump Travel Ban in Cities and Airports Nationwide*, GUARDIAN (Jan. 29, 2017, 7:01 PM), <https://www.theguardian.com/us-news/2017/jan/29/protest-trump-travel-ban-muslims-airports> [<https://perma.cc/WZ5J-FNC2>] (reporting that following the travel ban, protests happened at airports in several cities, marches and demonstrations took place in New York, Boston and Houston, a protest occurred in front of the Statue of Liberty, and protestors descended on the Capitol).

69. *Washington v. Trump*, 847 F.3d 1151, 1157 (9th Cir. 2017).

70. *Id.*

71. *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017).

the TRO that accounts for the nation's multiple ports of entry and interconnected transit system and that would protect the proprietary interests of the States at issue here while nevertheless applying only within the States' borders."⁷²

The Commonwealth of Virginia also filed an action against the travel ban and on February 13, 2017, the United States District Court for the Eastern District of Virginia granted the Commonwealth's motion for a preliminary injunction as to relevant Virginia residents.⁷³ The District Judge declined to expand the scope of the preliminary injunction to apply to all persons, however, stating "the nationwide temporary restraining order entered in the District of Washington provides the broader protection sought by the Commonwealth."⁷⁴

On March 6, 2017, Executive Order 13,769 was then superseded by Executive Order 13,780, "[i]n light of the Ninth Circuit's observation that the political branches are better suited to determine the appropriate scope of any suspensions than are the courts."⁷⁵ The new travel ban took Iraq off of the list of banned countries, limited the number of refugees that the United States would admit, and no longer completely banned Syrian refugees, among other changes.⁷⁶ Six Muslim individuals and three organizations serving or representing Muslim clients or members initiated suit on February 7, 2017, asking for a preliminary injunction against the first Executive Order.⁷⁷ After the new Executive Order was issued, the Plaintiffs filed a motion to enjoin its implementation.⁷⁸

On March 16, 2017, United States District Judge Theodore D. Chuang found that provision 2(c)⁷⁹ of the Executive Order, which banned the travel of citizens of the six designated countries to the United States, was likely

72. *Trump*, 847 F.3d at 1166–67.

73. *Aziz v. Trump*, 234 F. Supp. 3d 724, 739 (E.D. Va. 2017).

74. *Id.* at 738.

75. Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,212 (Mar. 9, 2017).

76. See Bill Ong Hing, *Entering the Trump Ice Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. 253, 258–59 (2018).

77. *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 544 (D. Md. 2017).

78. *Id.* at 548.

79. Section 2(c) states:

To temporarily reduce investigative burdens on relevant agencies during the review period described in [2(a)], to ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, to ensure that adequate standards are established to prevent infiltration by foreign terrorists, and in light of the national security concerns referenced in section 1 of this order, I hereby proclaim . . . that the unrestricted entry into the United States of nationals of [prohibited countries] would be detrimental to the interests of the United States.

Exec. Order No. 13,780, 82 Fed. Reg. at 13,213.

unconstitutional under the Establishment Clause.⁸⁰ Before reaching this conclusion, District Judge Chuang noted that because it was urged that courts not give “unnecessary constitutional rulings,” he addressed the Plaintiffs’ claims that the Executive Order violated the Immigration and Nationality Act first.⁸¹ Ultimately, however, he found that it was the constitutional violation argument that met the first element of the preliminary injunction test by showing that the claim was “likely to succeed on the merits.”⁸² Judge Chuang stated, “Both the Individual Plaintiffs and clients of the Organizational Plaintiffs are located in different parts of the United States, indicating that nationwide relief may be appropriate . . . [and that] an Establishment Clause violation has impacts beyond the personal interests of individual parties.”⁸³ As a result, Judge Chuang issued a preliminary nationwide injunction against enforcement of Section 2(c).⁸⁴

The Government appealed the case to the Fourth Circuit Court of Appeals, which issued an opinion on May 25, 2017.⁸⁵ In the first paragraph of the opinion, Chief Judge Gregory noted that, “Congress granted the President broad power to deny entry to aliens, but that power is not absolute. It cannot go unchecked when, as here, the President wields it through an executive edict that stands to cause irreparable harm to . . . this nation.”⁸⁶

The court went on to say “that vigorous judicial review is” needed when determining if an immigration action has violated the Constitution.⁸⁷ The Fourth Circuit affirmed the lower court’s finding that the plaintiffs met the elements necessary for a preliminary injunction.⁸⁸ The nationwide scope of the preliminary injunction was deemed necessary because “Plaintiffs are dispersed throughout the United States,” Congress has indicated that uniformity is pertinent in enforcement of immigration laws, and “enjoining [Section 2(c)] only as to Plaintiffs would not cure the constitutional deficiency, which would endure in all Section 2(c)’s applications.”⁸⁹

Around the same time as the Fourth Circuit’s decision on Executive Order 13,780, it was also being challenged in the United States District Court

80. *Int’l Refugee Assistance Project*, 241 F. Supp. 3d at 565–66.

81. *Id.* at 553 (quoting *Am. Foreign Serv. Ass’n v. Garfinkel*, 490 U.S. 153, 161 (1989) (per curiam)).

82. *Id.* at 564.

83. *Id.* at 565 (citations omitted).

84. *Id.* at 566.

85. *See generally* *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017) (issuing an opinion affirming in part and vacating in part on the date provided above), *vacated and remanded*, 138 S. Ct. 353 (2017) (mem.).

86. *Id.* at 572.

87. *Id.* at 590.

88. *Id.* at 604.

89. *Id.* at 605.

in the District of Hawaii.⁹⁰ The standard a court requires for it to “issu[e] a temporary restraining order,” the remedy sought by the Plaintiffs in this case, “is substantially identical to the standard for issuing a preliminary injunction.”⁹¹ Ultimately, the District Court found that “[n]ationwide relief is appropriate in light of the likelihood of success on the Establishment Clause claim” and issued a temporary restraining order against “Sections 2 and 6 of the Executive Order across the Nation.”⁹² At the Court of Appeals for the Ninth Circuit, the injunction was upheld almost in its entirety.⁹³ This case and the Fourth Circuit case discussed above were combined for review by the U.S. Supreme Court. By the time the case was appealed to the Supreme Court to review the injunctions placed on Section 2(c) and Section 6, the provision had “expired by its own terms” and was not “a ‘live case or controversy,’” and therefore the judgment was vacated and remanded to be dismissed as moot.⁹⁴

On September 24, 2017, the day Executive Order 13,780 expired, President Trump announced a third travel ban.⁹⁵ Suit was brought by the State of Hawaii, the Muslim Association of Hawaii, and three persons related to individuals affected by the travel ban.⁹⁶ For many of the same reasons that the previous Executive Orders regarding travel bans were halted by injunctions, the District Court judge found the elements were met to grant a temporary restraining order against the third Executive Order.⁹⁷

As this brief history of the caselaw of President Trump’s immigration policy challenges shows, nationwide injunctions made it impossible for the Trump Administration to fully implement its plans. As a result of these suits, nationwide injunctions have been the subject of much of the current political discourse, as the next Part discusses.

III. THE PRESENT DEBATE AND DEMANDS FOR ANSWERS ON NATIONWIDE INJUNCTIONS

This Part gives a brief discussion of the current discourse on the use of nationwide injunctions as a remedy in U.S. courts. First, this Part discusses the comments being made by key entities and persons in the executive, legislative, and judicial branches. Second, this Part highlights the main arguments in favor of nationwide injunctions, specifically as applied in the immigration

90. Nicholas Walter, *The Utility of Rational Basis Review*, 63 VILL. L. REV. 79, 107 (2018).

91. *Hawai’i v. Trump*, 241 F. Supp. 3d 1119, 1134 (D. Haw. 2017).

92. *Id.* at 1140.

93. *Hawaii v. Trump*, 859 F.3d 741, 789 (9th Cir. 2017).

94. *Trump v. Int’l Refugee Assistance*, 138 S. Ct. 353, 353 (2017) (mem.) (quoting *Burke v. Barnes*, 479 U.S. 361, 363 (1987)), *vacated as moot*, 857 F.3d 554 (4th Cir. 2017).

95. Walter, *supra* note 90, at 108.

96. *Hawaii v. Trump*, 265 F. Supp. 3d 1140, 1145 (D. Haw. 2017).

97. *See id.* at 1145 (admonishing the new Executive Order for “suffer[ing] from precisely the same maladies as its predecessor”).

context. Third, this Part provides an overview of arguments against the use of nationwide injunctions as a remedy.

A. *CURRENT POLITICAL LANDSCAPE OF NATIONWIDE INJUNCTIONS*

The constitutionality of nationwide injunctions is currently a major issue of discussion among legal scholars, the press, and politicians.⁹⁸ On October 15, 2018, former Attorney General Jeff Sessions delivered remarks saying, “[F]ederal district court judges are not empowered to fashion immigration policy The Legislative and Executive branches—of federal and state government—are the constitutionally authorized branches to do these things”⁹⁹ Sessions directly addressed nationwide injunctions as a problem, stating that “[a] . . . manifestation of judicial encroachment is that district judges are reaching beyond the parties before them to shut down the entire administration of Executive branch policy nationwide” and that “it is emphatically not the duty of the courts to manage the government or to pass judgment on every policy action the Executive branch takes.”¹⁰⁰ On September 13, 2018, Attorney General Sessions issued a Memorandum stating:

Department litigators defending against cases that carry the potential for issuance of a nationwide injunction should maintain the Department’s considered and longstanding position. Specifically, litigators should, as appropriate, make arguments to

98. See Dan Cadman, *Do Nationwide Injunctions Violate Separation of Powers, and Usurp Other Jurists’ Authority?*, CTR. FOR IMMIGR. STUD. (Sept. 14, 2018), <https://cis.org/Cadman/Do-Nationwide-Injunctions-Violate-Separation-Powers-and-Usurp-Other-Jurists-Authority> [<https://perma.cc/98JT-LF42>] (discussing the recent approval by the House Judiciary Committee of an Act that would prohibit the use of nationwide injunctions by courts and arguing that the constitutionality of nationwide injunctions is an issue that deserves to be answered by the Supreme Court); Zachary D. Clopton, *Arguments About Nationwide Injunctions*, TAKE CARE (July 16, 2018), <https://takecareblog.com/blog/arguments-about-nationwide-injunctions> [<https://perma.cc/7GPW-5PHW>] (commenting on the recent attention to nationwide injunctions and arguing that some of the “arguments about nationwide injunctions are misplaced or overbroad”); Frost, *supra* note 32 (discussing the increase in the number of nationwide injunctions issued in recent years and predicting that the Supreme Court will soon have to address the question of whether or not nationwide injunctions are constitutional); Andrew Kent, *Nationwide Injunctions and the Lower Federal Courts*, LAWFARE (Feb. 3, 2017, 3:02 PM), <https://www.lawfareblog.com/nationwide-injunctions-and-lower-federal-courts> [<https://perma.cc/CYC3-2MKY>] (giving an overview of the debate on nationwide injunctions and predicting that this debate will be ongoing as lower courts continue to use the remedy).

99. Attorney General Jeff Sessions, Remarks to the Heritage Foundation on Judicial Encroachment (Oct. 15, 2018), *available at* <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-heritage-foundation-judicial-encroachment> [<https://perma.cc/5RZX-EAUG>] (stressing that the use of nationwide injunctions was non-existent for well over a hundred years, but that in less than two years, the Trump Administration was met with orders for nationwide injunctions from 27 districts).

100. *Id.*

convey that nationwide injunctions (1) exceed the constitutional limitations on judicial power; (2) deviate from longstanding historical exercise of equitable power; (3) impede reasoned discussion of legal issues among the lower courts; (4) undermine legal rules meant to ensure orderly resolution of disputed issues; (5) interfere with judgments proper to the other branches of government; and (6) undermine public confidence in the judiciary. . . . Under no circumstances should Department litigators make arguments inconsistent with these points, unless with the express authorization of the Deputy Attorney General or the Associate Attorney General, as appropriate.¹⁰¹

Additionally, in response to the immense attention that nationwide injunctions have received as a remedy, the House Judiciary Committee recently passed legislation to amend the U.S. Code in an Act entitled “Injunctive Authority Clarification Act of 2018” that was reintroduced in 2019.¹⁰² If this bill becomes law, it would amend the U.S. Code to include § 2285, titled “Orders purporting to restrain enforcement against non-parties.”¹⁰³ The section states, “No court of the United States . . . shall issue an order that purports to restrain the enforcement against a non-party of any statute, regulation, order, or similar authority, unless the non-party is represented by a party acting in a representative capacity pursuant to the Federal Rules of Civil Procedure.”¹⁰⁴ The result of this bill would be that district judges in non-class action suits could only issue an order affecting the specific parties that are before the court in that particular lawsuit.

Naturally, nationwide injunctions are also a hot topic of discussion for key individuals in the judicial branch. Many people increasingly speculate that the Supreme Court will soon have to address the issue. During the recent Senate hearings for now-Justice Brett Kavanaugh, a senator questioned him about whether there was a textual basis for nationwide injunctions in the Constitution.¹⁰⁵ In response, Justice Kavanaugh stated, “[T]hat is an issue that

101. Memorandum from the Attorney Gen. on Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions to Heads of Civil Litigating Components U.S. Attorneys, *supra* note 10.

102. Press Release, House of Representatives Judiciary Comm., House Judiciary Committee Approves Bill on Nationwide Injunctions (Sept. 13, 2018), *available at* <https://republicans-judiciary.house.gov/press-release/house-judiciary-committee-approves-bill-on-nationwide-injunctions> [<https://perma.cc/gMDE-78PW>] (taking a strong stance against nationwide injunctions as a permissible remedy in U.S. courts).

103. Injunctive Authority Clarification Act of 2019, H.R. 77, 116th Cong. § 2(a) (2019).

104. *Id.*

105. See Alex Swoyer, *Lawmakers Take up Bill to Limit Nationwide Injunctions Against Trump Administration*, WASH. TIMES (Sept. 10, 2018), <https://www.washingtontimes.com/news/2018/sep/10/bill-limit-injunctions-against-obama-admin> [<https://perma.cc/JG3L-MJ6Z>] (discussing

is being contested currently in courts around the country, I think, and as an issue of debate . . . therefore, I think I'd better say nothing about it. I apologize for that, but it is an issue of current debate.”¹⁰⁶

As mentioned previously, Justice Thomas' concurrence in the Supreme Court's opinion in *Trump v. Hawaii*¹⁰⁷ on June 26, 2018, was arguably the catalyst for much of the speculation that the Supreme Court will address the issue of nationwide injunctions sooner rather than later. Justice Thomas reiterated the plenary power doctrine, stating that “the President has *inherent* authority to exclude aliens from the country.”¹⁰⁸ Justice Thomas' concurrence went on to address the increasing use of nationwide injunctions as a remedy:

District courts, including the one here, have begun imposing universal injunctions without considering their authority to grant such sweeping relief. These injunctions are beginning to take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch.

I am skeptical that district courts have the authority to enter universal injunctions. These injunctions did not emerge until a century and a half after the founding. And they appear to be inconsistent with longstanding limits on equitable relief and the power of Article III courts. If their popularity continues, this Court must address their legality.

If district courts have any authority to issue universal injunctions, that authority must come from a statute or the Constitution. No statute expressly grants district courts the power to issue universal injunctions. So the only possible bases for these injunctions are a generic statute that authorizes equitable relief or the courts' inherent constitutional authority. Neither of those sources would permit a form of injunctive relief that is “[in]consistent with our history and traditions.”¹⁰⁹

Justice Thomas focused on the fact that a nationwide injunction is an equitable remedy, noting that equitable remedies were “meaningfully constrained” long ago in the English Courts of Chancery and that it was understood at the time of the drafting of the Constitution that equitable

the House Judiciary Committee's legislation prohibiting nationwide injunctions and the attention the issue has garnered with the Supreme Court).

106. *Id.*

107. *Trump v. Hawaii*, 138 S. Ct. 2392, 2424–29 (2018) (Thomas, J., concurring).

108. *Id.* at 2424.

109. *Id.* at 2425 (alteration in original) (footnote omitted) (citation omitted).

remedies would continue to be limited.¹¹⁰ Ultimately, Justice Thomas argued that because nationwide injunctions are not “consistent with the historical limits on equity and judicial power,” the Supreme Court should step in and declare that it is not an available remedy.¹¹¹

B. *ARGUMENTS IN DEFENSE OF THE USE OF NATIONWIDE INJUNCTIONS*

Arguments for nationwide injunctions have emerged with extra force, especially in response to President Trump’s highly controversial immigration policies. One reason given for why district courts should continue to be allowed to issue nationwide injunctions is that it is an efficient remedy. Another argument in defense of the use of nationwide injunctions is that it can be the only way to ensure the plaintiff(s) before the court are given full relief. Another reason given in support of the use of nationwide injunctions is that they provide for uniformity across the nation.

One obvious argument for nationwide injunctions is that it is an extremely cost efficient and quick remedy.¹¹² Litigation can be incredibly costly. In regard to timeliness, without nationwide injunctions as an option, it may take a very long time for a challenged policy to percolate enough among the lower courts and finally reach the Supreme Court. Once at the Supreme Court level, it is possible that the Supreme Court will just provide the same relief that a nationwide injunction at the lower court level could have done much sooner.¹¹³ Nationwide injunctions speed things along. This desire for efficiency is a weak argument, however. It is valuable for any major topic to percolate among judges and for them to possibly reach differing conclusions, even if this percolation may draw out the process of reaching a uniform decision. When one district judge issues a nationwide injunction, it chills the debate on an immigration issue.¹¹⁴ As a result, the Supreme Court and the rest of the nation thereby miss out on differing viewpoints and issues of contention.¹¹⁵

110. *Id.* at 2426.

111. *See id.* at 2429.

112. Getzel Berger, Note, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. REV. 1068, 1082–83 (2017). To bolster this point, the author says, “If every immigrant impacted by the travel ban had to file an individual suit, their rights could be irreparably damaged in the interim.” *Id.* The main argument against this particular point, however, is that suits may be filed as a class action. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 838–39 (2018) (considering a class action suit brought by detained immigrants challenging statutory provisions of the U.S. Code).

113. *See* Berger, *supra* note 112 (commenting that nationwide injunctions are great for “rights enforcement” because of their swift relief and that the longer it takes to provide a remedy, the larger the number of people that may be negatively affected by the challenged provision or policy).

114. *See* Bray, *supra* note 24, at 461.

115. *See infra* notes 148–52 and accompanying text.

Another argument in defense of nationwide injunctions as a remedy, particularly in the immigration context, is that a nationwide injunction is the only way to make sure the plaintiff is given complete relief.¹¹⁶ The argument is that “a nationwide injunction” is necessary in order to provide complete relief “to . . . a nationwide harm.”¹¹⁷ Proponents of nationwide injunctions have contended that “[i]n cases challenging federal immigration laws and policies, nationwide injunctions are often required to alleviate plaintiffs’ injuries.”¹¹⁸ The 2014 nationwide injunction issued by a Texas District Court judge against Obama’s DAPA plan is an example of this situation.¹¹⁹ The issue in that case was the cost that Texas would have to incur by giving the DAPA recipients driver’s licenses.¹²⁰ Proponents argue that if the injunction had been limited only to Texas, or even only to that circuit, DAPA recipients from other parts of the United States could still travel to Texas and get the driver’s licenses.¹²¹

Moreover, it seems that a nationwide injunction is not always necessary or the only way to ensure complete relief to a plaintiff before the court.¹²² In the DAPA case, the court could have issued a narrower injunction that

would have prohibited the federal government from deferring removal or according benefits to individuals present in Texas and provided that Texas need not grant nor subsidize drivers’ licenses or

116. See FREEMAN, *supra* note 36, at 4 (considering how the Supreme Court’s decision on nationwide injunctions might be affected by “arguments about the constitutional necessity for uniformity with respect to immigration law”); Gregg Costa, *An Old Solution to the Nationwide Injunction Problem*, HARV. L. REV. BLOG (Jan. 25, 2018), <https://blog.harvardlawreview.org/an-old-solution-to-the-nationwide-injunction-problem> [<https://perma.cc/9R5N-NF95>] (discussing nationwide injunctions and that “interests of efficiency and uniformity support the practice”); Liptak, *supra* note 4 (discussing that the District Court judge in Hawaii that “issued a nationwide injunction” against President Trump’s first travel ban “relied on a 2015 appeals court ruling blocking Mr. Obama’s immigration program that said such nationwide injunctions were required to ensure uniformity”).

117. Siddique, *supra* note 22, at 2129.

118. Amanda Frost, Professor of Law, Am. Univ. Wash. Coll. of Law, *The Role and Impact of Nationwide Injunctions by District Courts*, Address Before the United States House of Representatives, Committee on the Judiciary, Subcommittee on the Courts, Intellectual Property and the Internet 5 (Nov. 30, 2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3104789 [<https://perma.cc/9MJX-KTFZ>]. Another example the author gives where “a nationwide injunction” provides necessary complete relief, specifically in the immigration context, is the state of Hawaii’s challenge against President Trump’s travel ban, as discussed in Part I. *Id.* The author argues that “the [nationwide] injunction was essential” there, because “a geographically-restricted injunction is not feasible in the immigration context, because the United States does not restrict travel among the fifty states by a noncitizen lawfully residing in one of them.” *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. Bray, *supra* note 24, at 466–68.

other benefits for persons claiming the right to the benefit under DAPA, whether present in Texas at the time of the injunction or later moving there.¹²³

Rather than being a nationwide injunction, this injunction would not have reached people “with no connection to Texas.”¹²⁴ The U.S. House Committee on the Judiciary received written testimony regarding nationwide injunctions that suggests that uniformity in the immigration context is especially important since it deals with the United States’ foreign policy and international relationships.¹²⁵ As an example of lack of uniformity in immigration law creating mass confusion, the written testimony outlines the consequences of a Massachusetts District Court judge limiting his injunction against President Trump’s second travel ban to a limited geographic area.¹²⁶ As a result, persons traveling from the banned countries were able to land in the airport covered by the injunction and travel to other states where the travel ban had not been enjoined.¹²⁷ Proponents of nationwide injunctions argue that if all persons trying to enter the United States did so through this particular airport, then essentially the travel ban would have been thwarted.¹²⁸ Realizing this, airline officials at other airports were confused as to whether they could allow persons from the banned countries to board flights headed to the Massachusetts airport.¹²⁹

Uniformity as a reason for the use of nationwide injunctions has its drawbacks. As discussed in the next Section, there is a real possibility that two judges in different districts could issue differing opinions on a single immigration policy.¹³⁰ If two judges were to do this, there is currently no policy in play on the correct course of action.¹³¹ Additionally, with the issue of forum shopping, if the injunction is coming from a single judge in a liberal or conservative circuit, then the injunction may not reflect a uniform viewpoint on the issue, which should outweigh the desire for an injunction being carried out uniformly. The court system in the United States is set up so that immediate uniformity is not the goal; instead, the system allows progression toward “*eventual* uniformity.”¹³²

123. Wasserman, *supra* note 26, at 382.

124. *Id.*

125. *See* Frost, *supra* note 118, at 7–8.

126. *See id.* at 8.

127. *Id.*

128. *See id.* (“In the confusion that followed, some foreign nationals entered the United States through Logan Airport and then traveled to other states—rendering the geographic limit on the injunction pointless.”).

129. *Id.*

130. *See infra* notes 144–45 and accompanying text.

131. *See infra* notes 144–46 and accompanying text.

132. Bray, *supra* note 24, at 474.

C. ARGUMENTS AGAINST THE USE OF NATIONWIDE INJUNCTIONS

This Section addresses the arguments against the use of nationwide injunctions. It seems likely that this is the majority view, as evidenced by the House of Representatives proposed legislation,¹³³ Justice Thomas' concurrence,¹³⁴ and the large amount of scholarly and news articles arguing against the remedy's use. The arguments addressed in this Section include: the lack of textual authority for issuing nationwide injunctions; the opportunity that nationwide injunctions give for forum shopping; the issues that may arise from differing injunctions in different circuits; and the chilling effect that nationwide injunctions have on letting policies and regulation percolate among judges and actually play out.

As mentioned in Section III.A's discussion of Justice Thomas' concurring opinion in *Trump v. Hawaii*, one big argument against nationwide injunctions is that they cannot be traced back in history as an accepted equitable remedy.¹³⁵ This argument is bolstered by the fact that they are a recent development, as seen in Part II.¹³⁶ It seems likely that if the question of the constitutionality of nationwide injunctions reaches the Supreme Court soon, this argument will be at the forefront.

Another issue with the use of nationwide injunctions is that the remedy gives persons wanting to oppose a federal policy or regulation the incentive to forum shop.¹³⁷ Forum shopping is defined as “[t]he practice of choosing the most favorable jurisdiction or court in which a claim might be heard.”¹³⁸ During the Obama Administration's efforts to enforce DACA, it is clear that plaintiffs targeted a particular district court judge because it was likely he would rule against President Obama's policy.¹³⁹ The District Judge had

133. Injunctive Authority Clarification Act of 2019, H.R. 77, 116th Cong. (2019); Injunctive Authority Clarification Act of 2018, H.R. 6730, 115th Cong. (2018).

134. *Trump v. Hawaii*, 138 S. Ct. 2392, 2424–29 (2018) (Thomas, J., concurring).

135. See *supra* Section III.A.

136. See *supra* Part II.

137. See Amanda Reilly, *Trump Team Goes to War Against Lower Court Injunctions*, E&E NEWS: GREENWIRE (June 19, 2018), <https://www.eenews.net/stories/1060085093> [<https://perma.cc/H64D-9ECF>] (reporting that one senator at the House Judiciary Committee hearing on the use of nationwide injunctions stated, “Republicans go to the 5th Circuit. They go down to Texas, where they consider they’re going to get more conservative judges The liberals go out to the West Coast”).

138. *Forum-shopping*, BLACK'S LAW DICTIONARY (11th ed. 2019) (giving as an example “[a] plaintiff . . . fil[es] suit in a jurisdiction with a reputation for high jury awards or by filing several similar suits and keeping the one with the preferred judge”).

139. See generally Chuck Lindell, *Did Paxton File DACA Lawsuit in Brownsville to Game the System?*, STATESMAN, <https://www.statesman.com/news/20180511/did-paxton-file-daca-lawsuit-in-brownsville-to-game-the-system> [<https://perma.cc/ZWP5-WSL2>] (last updated Sept. 25, 2018, 1:31 PM) (giving an in-depth overview of Texas Attorney General Ken Paxton's history with forum shopping, paying particular attention to the decision to challenge DACA with Texas District Judge Andrew Hanen).

already ruled against one of President Obama's similar immigration policies, so it made sense for the Texas Attorney General to travel 350 miles to file the suit.¹⁴⁰ On the flip side, since "the Trump administration is in power, liberal lawyers are seeking relief at the more liberal-leaning courts, such as the [Ninth] Circuit Court of Appeals."¹⁴¹ It seems bizarre that a single district judge, with likely very different views from other district judges, in different parts of the nation, can make a decision for the whole country, but this is what nationwide injunctions allow.¹⁴² Additionally, a host of issues can arise from judges issuing different injunctions. An example of this almost creating mass confusion in the immigration context occurred during the Obama Administration.¹⁴³ When the Texas District Judge issued the nationwide injunction against DACA, plaintiffs in Illinois and New York filed suits asking that the injunction not apply to them.¹⁴⁴ It seemed like a real possibility in the New York case that the judge would issue his own ruling conflicting with the Texas order.¹⁴⁵ A lawyer for the Department of Justice was asked how this situation would be handled and responded, "What we would do in that circumstance is something we are still figuring out."¹⁴⁶ While this issue has not demanded immediate attention, it does seem probable that if nationwide injunctions continue as a remedy, the issue of conflicting injunctions will become a very real problem sooner rather than later.¹⁴⁷

140. *Id.*; Tal Kopan, *Texas Lawsuit Brings DACA Déjà Vu*, CNN: POL. (May 2, 2018, 4:19 PM), <https://www.cnn.com/2018/05/02/politics/daca-lawsuit-judge-hanen-ken-paxton-deja-vu/index.html> [<https://perma.cc/H5AH-W6YP>].

141. Ariane de Vogue, *Judges Turn to Extreme Remedy to Block Trump Administration*, CNN: POL. (Oct. 17, 2017, 3:04 PM), <https://www.cnn.com/2017/10/17/politics/judges-trump-administration/index.html> [<https://perma.cc/3X5H-XN48>] (discussing the Republican party's past practice of filing with the Fifth Circuit Court of Appeals, in addition to the forum shopping taking place during the Trump Administration).

142. See Cartolano, *supra* note 39, at 152; see also Jonathan H. Adler, *The Last Nationwide Injunction of 2016*, WASH. POST (Dec. 31, 2016, 6:06 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/31/the-last-nationwide-injunction-of-2016> [<https://perma.cc/6WKB-A643>] (commenting that the ability for one district judge to issue a nationwide injunction allows that judge to hold a very significant amount of influence over the country).

143. Bray, *supra* note 24, at 462–63.

144. *Id.*

145. See *id.* (giving an example outside of the immigration context in a case where several judges went back and forth giving conflicting orders on the sale of stock of a major railroad company).

146. Josh Blackman, *Dueling Cosmic Injunctions, DACA and Departmentalism*, LAWFARE (May 22, 2018, 8:20 AM), <https://www.lawfareblog.com/dueling-cosmic-injunctions-daca-and-departmentalism> [<https://perma.cc/AVH5-VKPA>].

147. Matthew Erickson, Note, *Who, What, and Where: A Case for a Multifactor Balancing Test as a Solution to Abuse of Nationwide Injunctions*, 113 NW. U. L. REV. 331, 341 (2018); see Nicholas Bagley & Samuel Bray, *Judges Shouldn't Have the Power to Halt Laws Nationwide*, ATLANTIC (Oct. 31, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/end-nationwide-injunctions/574471> [<https://perma.cc/LD3H-GBMX>] (predicting that conflicting injunctions may become

Lastly, a major argument against nationwide injunctions is that they have a chilling effect on letting several judges voice their own opinions on the policy or regulation at issue.¹⁴⁸ One of the great purposes of federal courts is that a single issue can be thought through by several different judges and the Supreme Court can consider those decisions before coming to its own conclusion.¹⁴⁹ A great point made on this disadvantage is that “[a] world of national injunctions is one in which the Supreme Court will tend to decide important questions more quickly, with fewer facts, and without the benefit of contrary opinions by lower courts.”¹⁵⁰ If cases are not allowed to percolate among districts, then it risks the chance of being addressed by the Supreme Court too quickly, thus not allowing the Court to consider lower courts take on the issue.¹⁵¹ Conversely, nationwide injunctions can slow the process of an issue reaching the Supreme Court because the remedy makes it less likely for circuit splits to happen. One disadvantage of having fewer circuit splits is that the major points of contention on a certain topic are less obvious for the Supreme Court to see.¹⁵²

IV. NATIONWIDE INJUNCTIONS SHOULD NOT BE ALLOWED AS A REMEDY IN THE IMMIGRATION CONTEXT

This Part contends that the United States should disallow the use of nationwide injunctions by limiting the application of injunctions to the plaintiff(s) before the court. Both the legislative and judicial branches can implement this change. This Part also discusses the use of a class action lawsuit as a possible remedy, as well as the idea of requiring congressional approval for any new major rules.

Nationwide injunctions that reach individuals who are not parties before the court should not be used as a remedy in the immigration context. An injunction against a policy or regulation should only be provided to the plaintiff(s) before the court.¹⁵³ Unlike nationwide injunctions, an injunction

an issue soon in regards to the continuing enforcement of the Obama Administration’s Affordable Care Act).

148. Bray, *supra* note 24, at 461.

149. Samuel Bray, *The Case Against National Injunctions, No Matter Who Is President*, LAWFARE (Feb. 4, 2017, 4:00 PM), <https://www.lawfareblog.com/case-against-national-injunctions-no-matter-who-president> [<https://perma.cc/SF42-QF2C>]; Charles A. Michael, *Citing Virtues of “Inter-Court Dialogue,” Judge Oetken Refuses to Transfer EPA Case to Texas Court Considering Similar Issues*, LEXOLOGY (May 30, 2018), <https://www.lexology.com/library/detail.aspx?g=0766f575-b4f5-4d2e-a186-28d784f99b79> [<https://perma.cc/UQR5-7NRT>].

150. Bray, *supra* note 24, at 462.

151. Erickson, *supra* note 147, at 341–42.

152. *Id.*

153. See Bray, *supra* note 24, at 469–74 (arguing that the nationwide injunctions brought against both the Obama and Trump administrations’ immigration plans could have instead been much more limited in scope and more directed towards the particular plaintiffs and issue the

that only affects parties to the suit is well rooted in history and law.¹⁵⁴ As Professor Samuel L. Bray has proposed, “[a] federal court should give an injunction that protects the plaintiff vis-à-vis the defendant, wherever the plaintiff and the defendant may both happen to be. The injunction should not constrain the defendant’s conduct vis-à-vis nonparties.”¹⁵⁵ Keeping the injunction limited in scope to the parties of the suit is also the best course of action in terms of policy because it maintains the balance of powers in immigration law. A single district court judge should not be able to overpower the executive and legislative branches.

The federal government could disallow the use of nationwide injunctions by only allowing injunctions to be provided to the plaintiff(s) before the court in two ways. One implementation mechanism is to adopt the Injunctive Authority Act of 2019.¹⁵⁶ If passed, the Act would amend the U.S. Code to keep “federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty, unless the nonparty is represented by a party in a class action lawsuit.”¹⁵⁷ If this Bill does not pass, then the Supreme Court should grant certiorari to address this issue once an active case arises and ultimately hold that injunctions should only be issued to the parties in the suit before the court.

Limiting the injunction to only the parties before the court also combats the chilling effect that nationwide injunctions have had on issues being able to percolate among judges, as discussed in Part III.¹⁵⁸ Since a district court judge would only be able to partially stop a policy or law from going in effect, different parts of the United States could see the policy play out. As mentioned in Section III.C, this is desirous for the Supreme Court, because it allows the Court to more fully consider both sides of an issue.¹⁵⁹ Allowing

suits had been filed in regards to); Siddique, *supra* note 22, at 2135 (arguing that courts can and should be more specific in their determinations of injuries alleged and persons affected when issuing injunctions to “ensure that defendants and nonparties are not unnecessarily burdened while still fully vindicating a plaintiff’s rights”).

154. See FED. R. CIV. P. 17(a)(1) (“An action must be prosecuted in the name of the real party in interest.”).

155. See Bray, *supra* note 24, at 469.

156. Injunctive Authority Clarification Act of 2019, H.R. 77, 116th Cong. (2019).

157. Cong. Research Serv., *H.R. 77—Injunctive Authority Clarification Act of 2019*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/77> [<https://perma.cc/3JPZ-JBW6>] (bill summary).

158. See Katherine B. Wheeler, *Why There Should Be a Presumption Against Nationwide Preliminary Injunctions*, 96 N.C. L. REV. 200, 210–11 (2017) (“Narrowing the scope [of an injunction] alleviates the issue of nonparties being affected by the preliminary injunction, a concern that runs parallel to those raised by third-party standing, and it prevents district court judges from interfering with the development of law in other circuits.”).

159. See Tom S. Clark & Jonathan P. Kestel, *The Supreme Court and Percolation in the Lower Courts: An Optimal Stopping Model*, 75 J. POL. 150, 151 (2013) (suggesting that the Supreme Court pays attention to what lower courts decide on a single issue to help inform its own decision on

different district judges to come to different conclusions is also supported by Supreme Court precedent set forth in the immigration case, *United States v. Mendoza*.¹⁶⁰ In *United States v. Mendoza*, the majority stated:

A rule allowing nonmutual collateral estoppel against the Government in such cases would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari. Indeed, if nonmutual estoppel were routinely applied against the Government, this Court would have to revise its practice of waiting for a conflict to develop before granting the Government's petitions for certiorari.¹⁶¹

Additionally, keeping the injunction limited to only the plaintiff(s) before the court in the suit would help with the issue of forum shopping in the immigration context.¹⁶² Potential plaintiffs could no longer choose a “liberal” or “conservative” court and rely on their ruling to halt a new immigration policy or regulation nationwide, as seen in the past two presidents’ administrations.¹⁶³

If many persons are being negatively affected by an immigration policy, regulation or law, then the correct course of action is a class action lawsuit.¹⁶⁴ The use of class action suits to obtain a remedy for many plaintiffs has a clear textual basis in the Federal Rules of Civil Procedure.¹⁶⁵ Class actions are to be used when “the class is so numerous that joinder of all members is

the topic, and that with more conflict among lower courts’ decisions comes better information for the Supreme Court to consider).

160. *United States v. Mendoza*, 464 U.S. 154, 157–61 (1984) (determining that nonmutual collateral estoppel does not apply in litigation against the government); see Bray, *supra* note 24, at 475 (arguing that differing conclusions on a legal issue between courts is desirable and that “[t]he possibility that the federal government would apply a rule in some circuits but not others was blessed in *United States v. Mendoza*”); see also Hans von Spakovsky, *The Role and Impact of Nationwide Injunctions by District Courts*, HERITAGE FOUND. (Jan. 17, 2018), <https://www.heritage.org/testimony/the-role-and-impact-nationwide-injunctions-district-courts> [<https://perma.cc/JH73-GA59>] (suggesting that when the Supreme Court allows for nationwide or “global injunctions,” it is not following its own precedent set in *United States v. Mendoza*).

161. *Mendoza*, 464 U.S. at 160 (citations omitted).

162. Andrew D. Bradt & Zachary D. Clopton, *MDL v. Trump: The Puzzle of Public Law in Multidistrict Litigation*, 112 NW. U. L. REV. 905, 918 (2018).

163. *Id.* at 918–19.

164. See von Spakovsky, *supra* note 160 (arguing that class actions are the more appropriate course of action over a nationwide injunction and that when federal courts use nationwide injunctions they “are, in essence, evading compliance with federal law”).

165. See FED. R. CIV. P. 23(b) (allowing for three types of class action suits to be brought if certain prerequisites are satisfied).

impracticable” and “there are questions of law or fact common to the class.”¹⁶⁶ An example of a class action suit being used to represent a large number of persons affected by immigration law is seen in the Supreme Court case *Jennings v. Rodriguez*.¹⁶⁷ In keeping with the plenary power doctrine in immigration law, if the constitutionality of an immigration policy or law is challenged, it is much more appropriate for the judicial branch to step in for interpretation in regards to a class of plaintiffs than as to plaintiffs and nonparties as well. The biggest downside to this course of action is that it takes more time than a nationwide injunction.¹⁶⁸ However, as discussed in Section III.C, time to allow a policy to actually play out and develop facts is often a good thing.¹⁶⁹

Lastly, Professor Samuel L. Bray suggests that “Congress could expressly require that ‘major rules’ receive congressional approval or be subject to heightened procedures.”¹⁷⁰ This Part contends that Professor Bray’s solution for “[t]he regulatory-disruption objection” discussed in Part III, is especially appropriate in the immigration context regarding immigration law.¹⁷¹ For an example of what this might look like, the Congressional Review Act is a law that requires new rules by federal agencies to be submitted to Congress before the rule goes into effect.¹⁷² Congress can then pass a joint resolution of disapproval within 60 days and the rule will not go into effect.¹⁷³

It is true that the “major rules” solution does not give much of a solution for controversial executive orders, since “[t]he legislative body is not required to approve any executive order, nor can it overturn an order.”¹⁷⁴ However, through litigation, the Supreme Court can eventually address the constitutionality of controversial executive orders, even in the immigration

166. FED. R. CIV. P. 23(a)(1)–(2).

167. *Jennings v. Rodriguez*, 138 S. Ct. 830, 838–39 (2018).

168. See Amanda Frost, *The Hidden Constitutional Threat in Trump’s Travel-ban Lawsuit*, WASH. POST (Apr. 24, 2018, 6:50 PM), https://www.washingtonpost.com/opinions/the-hidden-constitutional-threat-in-trumps-travel-ban-lawsuit/2018/04/24/cf24441a-472c-11e8-8b5a-3b1697adcc2a_story.html [<https://perma.cc/9BP9-F6G2>] (arguing for nationwide injunctions, but conceding that through a class action “the Supreme Court would eventually have addressed the constitutionality of that first executive order . . . rendering a nationwide injunction unnecessary”).

169. See *supra* Section III.C.

170. See Bray, *supra* note 24, at 477 (footnotes omitted) (contending that a legislative solution to irreversible damage from complex regulatory systems is preferable to the judicial branch providing the solution through the use of nationwide injunctions).

171. *Id.* at 476.

172. 5 U.S.C. § 801(a)(1)(A) (2012).

173. *Id.* §§ 801(b)(1), 802(a).

174. See Mark Koba, *Executive Orders Coming? Here’s How They Work*, CNBC, <https://www.cnbc.com/2014/01/28/executive-orders-what-they-are-and-how-they-work.html> [<https://perma.cc/3NSZ-T9ZK>] (last updated Feb. 13, 2014, 1:26 PM) (explaining that Congress could pass legislation that would stop funding as a way to combat an executive order, but that this is a weak solution because the president can veto that legislation).

context, because despite the plenary power doctrine, it is the Supreme Court's duty to interpret the Constitution.¹⁷⁵ In the meantime, as seen in the first hours of President Trump's travel ban, people can take to the streets and marches to express their views on a controversial executive order. It is likely that without the preliminary nationwide injunctions issued against President Trump's travel bans these protests would have grown vastly in size. There is some value to allowing a controversial policy to play out, so that the effects can really be seen. Moreover, perhaps then officials will be held more accountable for their political decisions later in the democratic process, than they would be if an issue is quickly squashed through a nationwide injunction. In fact, the United States went well over 100 years without a nationwide injunction issued against a presidential policy.

V. CONCLUSION

In conclusion, it seems clear that nationwide injunctions do not have a sound enough basis in our nation's history or tradition to continue in use as an equitable remedy. Immigration law continues to be an extremely controversial topic that is handled very differently depending on which party is in power in the federal government. If nationwide injunctions are allowed, there will most likely always be a district court judge that would rule against an immigration policy, regulation or law, even if every single other district judge does not agree. Courts should stop using nationwide injunctions and adhere to the age-old accepted rule that a remedy may only affect the parties before the court. It is almost certain that this course of action will at some point cause harm to a large number of persons for a much longer period of time than a nationwide injunction would have allowed against an unconstitutional immigration law or policy action. This is a price that must be paid, however, in order to effectively maintain the separation of powers that the Constitution demands.

175. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").