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# “Nationwide” Injunctions are Really “Universal” Injunctions and They Are Never Appropriate

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## **“Nationwide” Injunctions are Really “Universal” Injunctions and They Are Never Appropriate**

Howard M. Wasserman†

### Introduction

Recent constitutional litigation has challenged the validity of laws, regulations, and policies from the Obama and Trump Administrations regulating immigration and immigration-adjacent matters. Plaintiffs have brought pre-enforcement lawsuits seeking to enjoin responsible federal officials from enforcing the challenged laws, regulations, and policies. Consider:

- The Fifth Circuit enjoined enforcement of President Obama’s Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”) program, a decision affirmed by an evenly divided eight-person Supreme Court.<sup>1</sup>
- The Fourth and Ninth Circuits enjoined enforcement of President Trump’s third Executive Order limiting travel to the United States by nationals of certain majority-Muslim countries and heightening review procedures for admitting refugees from certain countries,<sup>2</sup> which the Supreme Court agreed to review during the April sitting of October Term 2017.<sup>3</sup> This followed decisions by both courts enjoining enforcement of prior orders on the same issues.<sup>4</sup>
- District judges in the Northern District of California and in the Northern District of Illinois enjoined enforcement of Department of Justice regulations stripping “sanctuary cities” of federal funds from law-enforcement grant programs.<sup>5</sup> The Seventh Circuit affirmed the latter decision.<sup>6</sup>
- A district judge in the Western District of Washington enjoined enforcement of regulations requiring immigration attorneys to either appear and assume full representation or refrain from giving legal advice to *pro se* parties to immigration proceedings.<sup>7</sup>

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<sup>1</sup> *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015), *aff’d by evenly divided Court*, *United States v. Texas*, 136 S. Ct. 2271 (2016).

<sup>2</sup> *IRAP IV*, 883 F.3d 233 (4th Cir. 2014); *Hawaii v. Trump*, 878 F.3d 662, 674 (9th Cir. 2017) (*Hawaii III*).

<sup>3</sup> *Trump v. Hawaii*, 138 S. Ct. 923 (2018).

<sup>4</sup> *Hawaii v. Trump*, 859 F.3d 741, 789 (9th Cir. 2017) (*Hawaii I*), *vacated as moot*, *Hawaii v. Trump*, 874 F.3d 1112 (9th Cir. 2017); *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 604 (4th Cir. 2017) (*IRAP II*), *vacated as moot*, *Trump v. Int’l Refugee Assistance*, 138 S. Ct. 353 (2017); *Washington v. Trump*, 847 F.3d 1151, 1156 (9th Cir. 2017).

<sup>5</sup> *Chicago v. Sessions*, 264 F. Supp. 3d 933, 951 (N.D. Ill. 2017); *Santa Clara v. Trump*, 250 F. Supp. 3d 497, 540 (N.D. Cal. 2017); *see also Chicago v. Sessions*, 2017 WL 4572208, at \*1 (N.D. Ill. 2017).

<sup>6</sup> ***Chicago v. Sessions*, \_\_\_ F.3d \_\_\_, \_\_\_ (7th Cir. 2018).**

<sup>7</sup> *Nw. Immigrant Rights Project v. Sessions*, 2017 WL 3189032, at \*7 (W.D. Wash. 2017).

• District judges in the Eastern District of New York<sup>8</sup> and Northern District of California<sup>9</sup> enjoined enforcement of Trump Administration regulations rescinding the Deferred Action for Childhood Arrivals (“DACA”) program, which provided discretionary relief for removal for certain undocumented individuals who arrived as children.

Regardless of the correctness of the constitutional and statutory analysis in these cases,<sup>10</sup> a distinct problem involves the remedies imposed. Each of these courts issued or affirmed injunctions protecting or purporting to protect not only the named plaintiffs, but all persons. The injunctions prohibited or purported to prohibit enforcement of the challenged laws, regulations, and policies not only against the named plaintiffs, but against all persons everywhere who might be subject to enforcement of those laws.<sup>11</sup>

These broad injunctions are problematic in two respects.

One problem involves nomenclature. Courts have labeled these “nationwide” or even “worldwide”<sup>12</sup> injunctions. But the problem with these injunctions is that they prohibit government officials from enforcing the challenged laws, regulations, and policies against the universe of persons who might be subject to enforcement, regardless of whether they were parties to the lawsuit producing the injunction. These injunctions are better described as “universal,”<sup>13</sup> a term that suggests something about the scope of the injunction with respect to who is protected and from what. “Nationwide” speaks more to where protected persons enjoy those protections.

The second problem is that by any name courts should not issue such broad injunctions, certainly not as frequently, automatically, and seemingly unthinkingly as they have been in immigration cases. Although the Supreme Court and lower courts have issued or affirmed such injunctions in the past,<sup>14</sup> issuance of universal

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<sup>8</sup> *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 407 (E.D.N.Y. 2018).

<sup>9</sup> *Regents of Univ. of California v. U.S. Dep’t of Homeland Security*, 279 F. Supp. 3d 1011, 1037 (N.D. Cal. 2018).

<sup>10</sup> For scholarship considering the constitutional issues, see generally, *e.g.*, Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L & POL. 213, 219 (2015); Josh Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, 103 GEO. L.J. ONLINE 96, 97 (2015); Ming H. Chen, *Beyond Legality: The Legitimacy of Executive Action in Immigration Law*, 66 SYRACUSE L. REV. 87, 88 (2016); Adam B. Cox and Christina M. Rodriguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 107 (2015); Stella Burch Elias, *Immigrant Covering*, 58 WM. & MARY L. REV. 765, 769 (2017); Christopher N. Lasch, et al, *Understanding “Sanctuary Cities”*, 58 B.C. L. REV. \_\_\_\_ (forthcoming 2018); Earl Maltz, *The Constitution and the Trump Travel Ban*, \_\_\_\_ LEWIS & CLARK L. REV. \_\_\_\_ (2018).

<sup>11</sup> Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 419 (2017); see *IRAP IV*, 883 F.3d at 272-73; *Batalla Vidal*, 279 F. Supp. 3d at 437; *Chicago*, 264 F. Supp. 3d at 951; *Santa Clara*, 250 F. Supp. 3d at 539.

<sup>12</sup> *Hawaii v. Trump*, 878 F.3d 662, 701, (9th Cir. 2017) (*Hawaii III*)

<sup>13</sup> Thanks to Tobias Wolff for suggesting the better term. Bray uses “national” injunction to capture the same idea of an injunction protecting beyond the plaintiffs. Bray, *supra* note 11, at 419 n.5.

<sup>14</sup> DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 436 (4th ed. 2010); Bray, *supra* note 11, at 437–45.

injunctions has accelerated in recent years,<sup>15</sup> even as courts<sup>16</sup> and commentators<sup>17</sup> insist that they should not be routine. Courts and commentators offer a variety of reasons for issuing universal injunctions, from facial unconstitutionality<sup>18</sup> to the constitutional demand for uniform immigration<sup>19</sup> law<sup>20</sup> to judicial economy and rule-of-law considerations that would be undermined if federal law were not enforced against some and enforced against others.<sup>21</sup> None of these justifications withstands scrutiny. Universal injunctions remain inconsistent with the historic scope of courts' equity powers, as informed by Article III of the Constitution.<sup>22</sup> They raise concerns for manipulative litigant behavior. And they are ungrounded in the needs of the cases—nothing about these cases or the challenged laws, regulations, and policies requires an injunction barring enforcement against all persons who might be subject to the law.

As Samuel Bray argues, 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.”<sup>23</sup> Douglas Laycock similarly argues that “the court in an individual action should not globally prohibit a government agency from enforcing an invalid regulation; the court should order only that the invalid regulation not be enforced against the individual plaintiff.”<sup>24</sup> And as the Supreme Court stated in *Doran v. Salem Inn*,<sup>25</sup> “neither declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs, and the State is free to prosecute others who may violate the statute.”<sup>26</sup>

These scope-of-injunction concerns arise in constitutional litigation challenging local,<sup>27</sup> state,<sup>28</sup> and federal<sup>29</sup> laws. The present immigration and immigration-adjacent controversies discussed in this volume offer an appropriate opportunity to consider the problem of the universal injunction, what proper injunctions should

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<sup>15</sup> Bray, *supra* note 11, at 437.

<sup>16</sup> *Id.*

<sup>17</sup> Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. Rev. \_\_\_\_ (forthcoming 2018).

<sup>18</sup> *Chicago v. Sessions*, 2017 WL 4572208 at \*2; *Santa Clara*, 250 F. Supp. 3d at 507.

<sup>19</sup> U.S. CONST. art. I, § 8, cl. 4 (empowering Congress “to establish an uniform Rule of Naturalization”).

<sup>20</sup> *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 605 (4th Cir. 2017) (*IRAP II*); *Texas v. United States*, 809 F.3d 134, 187–88 (5th Cir. 2015).

<sup>21</sup> *Chicago v. Sessions*, 2017 WL 4572208 at \*4.

<sup>22</sup> U.S. CONST. art. III.

<sup>23</sup> Bray, *supra* note 11, at 469.

<sup>24</sup> *Id.* at 276.

<sup>25</sup> *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 922 (1975).

<sup>26</sup> *Id.* at 931.

<sup>27</sup> *Steffel v. Thompson*, 415 U.S. 452, 460 (1974).

<sup>28</sup> *Strawser v. Strange*, 105 F. Supp. 3d 1323, 1330 (S.D. Ala. 2015); Josh Blackman and Howard M. Wasserman, *The Process of Marriage Equality*, 43 HASTINGS CONST. L.Q. 243, 244 (2016); Howard M. Wasserman, *Crazy in Alabama: Judicial Process and the Last Stand Against Marriage Equality in the Land of George Wallace*, 110 NW. U. L. REV. ONLINE 1, 4–5 (2015).

<sup>29</sup> *See, e.g.*, *Panama Refining Co. v. Ryan*, 293 U.S. 388, 433 (1935); Bray, *supra* note 11, at 433–35.

look like, and how constitutional litigation and adjudication should proceed under appropriately scoped judicial decrees, generally and in this class of actions. This Paper focuses on six sets of federal laws, regulations, and policies governing or related to immigration that have been subject to constitutional challenge in the past decade and that have produced universal (although labeled nationwide) injunctions barring enforcement of the law against all persons.

Part I considers litigation in six areas of immigration or immigration-adjacent laws, regulations, and policies. Part II considers the nomenclature problem and explains why the phrase “universal injunction,” rather than “nationwide injunction,” better captures what courts have been doing. Part III argues that universal injunctions are inappropriate as a matter of equitable principle, judicial decisionmaking, and Article III of the Constitution, while considering and rejecting the arguments courts and commentators have offered for such orders. Part IV considers the appropriate scope of injunctions in the six immigration and immigration-adjacent areas and how litigation would proceed under properly scoped injunctions.

## **I. Injunctions in Immigration and Immigration-Adjacent Controversies**

This Paper focuses on federal laws, regulations, and policies touching on immigration and immigration-adjacent matters because that is the focus of this volume and because these laws have been the targets of the highest-profile universal injunctions in the past several years. Although the cases described below label the injunctions “nationwide,” I will use the more-accurate “universal injunction.” For present purposes, I remain agnostic to whether the courts were correct in declaring these laws, regulations, and policies constitutionally or statutorily invalid. My focus is on the appropriate scope of the injunctive remedy upon a declaration of constitutional invalidity of the challenged laws, regulations, and policies.

### *A. DAPA*

The litigation that started the recent wave of universal injunctions against federal immigration laws involved the Deferred Action for Parents of Americans and Lawful Permanent Residents<sup>30</sup> (“DAPA”) program under President Obama, an extension of the Deferred Action for Childhood Arrivals (“DACA”).<sup>31</sup> The basic idea was that certain qualified individuals—primarily childhood arrivals and parents of U.S. citizens or lawful permanent residents meeting additional conditions—who

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<sup>30</sup> SEC. JEH CHARLES JOHNSON, U.S. DEP’T OF HOMELAND SEC., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents* (2014).

<sup>31</sup> SEC. JANET NAPOLITANO, U.S. DEP’T OF HOMELAND SEC., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (2012).

otherwise lack lawful immigration status in the United States would have their removals deferred (or moved lower on the removal priority list) as a matter of executive discretion and would become eligible for certain state and federal benefits.<sup>32</sup>

Texas and 25 other states sued in the Southern District of Texas, alleging that DAPA violated the Administrative Procedure Act<sup>33</sup> and the President's constitutional obligation to "take Care that the Laws be faithfully executed."<sup>34</sup> The district court preliminarily enjoined enforcement of DAPA in any state—that is, the Department of Homeland Security could not defer removal or accord status benefits to persons anywhere in the United States.<sup>35</sup> The Fifth Circuit affirmed.<sup>36</sup> As to the scope of the injunction, the court of appeals stated that partial implementation of DAPA outside the 26 plaintiff states would undermine the uniform and unified immigration law demanded by the Constitution and intended by Congress.<sup>37</sup> It also would render the injunction ineffective, because DAPA beneficiaries from non-protected states remained free to move about the country and enter protected states such as Texas.<sup>38</sup>

An eight-member Supreme Court affirmed the decision, including the universal injunction, by an evenly divided Court.<sup>39</sup>

### *B. Travel Ban*

The highest-profile use of universal injunctions has been in the wave of federal litigation over President Trump's "travel bans."

In March 2017, Trump issued Executive Order No. 13780, entitled "Protecting the Nation from Foreign Terrorist Entry into the United States."<sup>40</sup> The order imposed a 90-day ban on travel to the United States for nationals of six majority-Muslim nations, ordered federal agencies to review procedures for granting visas for nationals of those nations, and ordered review of procedures for refugee

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<sup>32</sup> *Texas v. United States*, 809 F.3d 134, 146–49 (5th Cir. 2015).

<sup>33</sup> *Id.* at 149–50.

<sup>34</sup> U.S. CONST. art. I, § 8, cl. 4.

<sup>35</sup> *Texas*, 809 F.3d at 146.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 187–88.

<sup>38</sup> *Id.* at 188.

<sup>39</sup> *United States v. Texas*, 136 S. Ct. 2271, 2272 (2016). The case was argued in spring 2016, during the fourteen-month period between the February 2016 death of Justice Scalia and the April 2017 confirmation of Justice Gorsuch as his successor. Eric J. Segall, *Eight Justices Are Enough: A Proposal to Improve the United States Supreme Court 2* (Ga. State Univ. College of Law), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2900555](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2900555).

<sup>40</sup> Exec. Order No. 13780 of Mar. 6, 2017, Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 13209, 13209 (Mar. 9, 2017) (to be codified in 3 C.F.R. (2018)).

admissions.<sup>41</sup> Several lawsuits followed, challenging the validity of the order on First Amendment, equal protection, and statutory grounds.

The States of Washington and Minnesota sued in the Western District of Washington. They argued that the order harmed the teaching and research missions of their universities by restricting students, faculty, and other visiting scholars and dignitaries who are nationals of the targeted countries and who are unable to study and work at those institutions.<sup>42</sup> The district court granted a temporary restraining order, and the Ninth Circuit denied the government's motion to stay the order pending appeal, including its universal scope.<sup>43</sup> The State of Hawaii and an individual sued in the District of Hawaii; Hawaii claimed similar injury to its universities, while the individual plaintiff claimed injury from the order preventing his Syrian-national mother-in-law from visiting the United States.<sup>44</sup>

Three organizations and six individuals filed a separate action in the District of Maryland. The individual plaintiffs were U.S. citizens or lawful permanent residents whose family members would be prevented or delayed from entering the United States.<sup>45</sup> The International Refugee Assistance Project<sup>46</sup> (“IRAP”) and HIAS, Inc.<sup>47</sup> assist refugees in resettling in the United States. The Middle East Studies Association of North America is an organization of students and scholars of Middle East studies, whose academic work would be limited by being unable to interact with students and scholars from the targeted nations.<sup>48</sup> The district court enjoined all enforcement and the Fourth Circuit affirmed, identifying three reasons for universality of the injunction—that plaintiffs are dispersed throughout the country, the need for uniform immigration law, and the unique nature of the Establishment Clause violation and the “message” of exclusion the order sent to plaintiffs and non-plaintiffs alike.<sup>49</sup>

The Supreme Court granted certiorari in *Hawaii* and *IRAP* and stayed the preliminary injunctions pending appeal, to the extent they prevented enforcement with respect to nationals lacking “any bona fide relationship with a person or entity in the United States.”<sup>50</sup> It left the injunctions in effect “with respect to respondents and those similarly situated.”<sup>51</sup> The second executive order expired by its terms in

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<sup>41</sup> *Id.* This order revoked the first executive order, issued in January, which sparked its own wave of emergency litigation. *Cf.* W. Bradley Wendel, *Sally Yates, Ronald Dworkin, and the Best View of the Law*, 115 MICH. L. REV. ONLINE 78, 78 (2017).

<sup>42</sup> *Washington v. Trump*, 847 F.3d 1151, 1159 (9th Cir. 2017).

<sup>43</sup> *Id.* at 1166–67.

<sup>44</sup> *Hawaii v. Trump*, 859 F.3d 741, 789 (9th Cir. 2017) (*Hawaii I*).

<sup>45</sup> *International Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 548 (D. Md. 2017) (*IRAP III*).

<sup>46</sup> *Id.* at 548–49.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 549.

<sup>49</sup> *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 604–05 (4th Cir. 2017) (*IRAP II*).

<sup>50</sup> *Trump v. International Refugee Assistance Project*, 582 U.S. 1, 9 (2017) (granting certiorari).

<sup>51</sup> *Id.*

fall 2017, prompting the Court to dismiss the appeals as moot, to vacate the lower court’s judgments, and to order dismissal of the actions as moot.<sup>52</sup>

In September 2017, Trump issued Proclamation 9645, entitled “Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats.”<sup>53</sup> This third travel order identified eight countries (two of which—North Korea and Venezuela—are not majority-Muslim) whose nationals should not be allowed entry to the United States.

The district court in *Hawaii* again enjoined enforcement.<sup>54</sup> The Ninth Circuit again affirmed a universal injunction, emphasizing the need for uniformity in immigration policy and that any application of the Proclamation to others beyond the plaintiffs would violate federal law.<sup>55</sup> But the court rejected a “worldwide injunction” protecting foreign nationals lacking a credible claim of a bona fide relationship with a person or entity in the United States.<sup>56</sup>

In *IRAP*, the district court enjoined enforcement of the Proclamation and again imposed the injunction universally, emphasizing the special problems of a law that violates the Establishment Clause with a message of ostracism that affects everyone, beyond the plaintiffs.<sup>57</sup> The Fourth Circuit largely affirmed as to the six majority-Muslim countries, but not as to North Korea and Venezuela. It required that IRAP and other resettlement-organization plaintiffs similarly show a bona fide relationship with potential refugee clients that is “formal, documented, and formed in the ordinary course, rather than for the purpose of evading the travel restrictions.”<sup>58</sup> The universal scope was appropriate because plaintiffs are scattered throughout the country, making piecemeal injunction relief difficult; Congress has an interest in uniform immigration law; and enjoining enforcement of a regulation issued in violation of the Constitution only as to the plaintiff “would not cure its deficiencies.”<sup>59</sup>

The Supreme Court granted cert in *Hawaii*,<sup>60</sup> while leaving the *IRAP* petitions untouched, likely awaiting resolution of *Hawaii*. The Court ordered the parties to brief the scope of the injunction. Arguments in April 2018 included a brief exchange on scope-of-injunction, with Justice Gorsuch questioning counsel for Hawaii about the “really new development where a district court asserts the right to strike down a – a federal statute with regard to anybody anywhere in the world.”<sup>61</sup>

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<sup>52</sup> *Trump v. Hawaii*, 138 S.Ct. 377, 377 (2017).

<sup>53</sup> Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,161 (Sept. 27, 2017).

<sup>54</sup> *Hawaii v. Trump*, 878 F.3d 662, 673 (9th Cir. 2017).

<sup>55</sup> *Id.* at 701–02.

<sup>56</sup> *Id.*

<sup>57</sup> *International Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 632 (D. Md. 2017) (*IRAP III*).

<sup>58</sup> *IRAP IV*, 883 F.3d 233, 272–73 (4th Cir. 2018) (en banc) (quoting *Trump*, 137 S. Ct. at 2088).

<sup>59</sup> *Id.* at 273.

<sup>60</sup> *Trump v. Hawaii*, 138 S. Ct. 923 (2018).

<sup>61</sup> **Oral argument in *Trump v. Hawaii***



### C. “Sanctuary Cities”

The Department of Justice imposed new conditions on federal programs providing grants to state, county, and municipal law enforcement. The regulations would require withholding of federal funds to “sanctuary cities” that failed or declined to assist the federal government in enforcing immigration laws, especially by notifying federal agencies of the identity and location of persons within those cities unlawfully present in the United States and by declining to continue to hold persons detained on state and local charges for additional periods to allow federal immigration officials to take them into immigration detention.<sup>62</sup>

The County of Santa Clara and the City and County of San Francisco challenged the funding restrictions in the Northern District of California, arguing that the funding restrictions violated separation of powers, the Tenth Amendment, and Fifth Amendment due process.<sup>63</sup> The district court preliminarily,<sup>64</sup> then permanently,<sup>65</sup> enjoined DOJ officials from enforcing the restrictions or stripping state and local law-enforcement agencies of federal funds. The district court enjoined the defendants from enforcing the regulations as to all funding of all state and local governments; it emphasized the facial unconstitutionality of the regulations and that the violations were not limited to Santa Clara and San Francisco, but applied to all jurisdictions nationwide.<sup>66</sup>

The City of Chicago filed a similar action in the Northern District of Illinois, challenging the threat to withhold funds from one grant. That court also enjoined enforcement universally, finding “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.”<sup>67</sup>

In denying a motion to stay the injunction pending appeal, the district court offered the first comprehensive analysis and justification for a universal injunction, emphasizing several points. The City made a facial challenge to the federal laws and regulations at issue, so the government’s power and the constitutional violation would be the same as to all entities nationwide.<sup>68</sup> The district court cited cases issuing or affirming universal injunctions in immigration cases, with the Supreme Court at least tacitly validating the practice.<sup>69</sup> Judicial economy counseled against requiring other jurisdictions to file their own lawsuits to obtain injunctions barring enforcement as to them (with the decision in *Chicago* serving as at-least persuasive authority), especially because 37 cities and counties had submitted amicus briefs in

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<sup>62</sup> *Chicago v. Sessions*, 264 F. Supp. 3d 933, 937–38 (N.D. Ill. 2017); *Santa Clara v. Trump*, 250 F. Supp. 3d 497, 509–11 (N.D. Cal. 2017).

<sup>63</sup> *Santa Clara v. Trump*, 250 F. Supp. 3d at 507.

<sup>64</sup> *Id.* at 508–09.

<sup>65</sup> *Santa Clara v. Trump*, 2017 WL 5569835 at \*17 (N.D. Cal. 2017).

<sup>66</sup> *Id.*; *Santa Clara*, 250 F. Supp. 3d at 539.

<sup>67</sup> *Chicago v. Sessions*, 264 F. Supp. 3d at 951.

<sup>68</sup> *Chicago v. Sessions*, 2017 WL 4572208, at \*2 (N.D. Ill. 2017).

<sup>69</sup> *Id.*

support of Chicago.<sup>70</sup> The court recognized recent scholarship raising concerns with the practice; it acknowledged that a universal injunction should not be the default approach, but should be limited to extraordinary cases.<sup>71</sup> But this was the extraordinary case, given concerns for federal uniformity, the unfairness resulting from enforcement against some municipalities and not others, and concerns for the rule of law.<sup>72</sup>

A divided panel of the Seventh Circuit affirmed, offering a similarly comprehensive defense of universal injunctions.<sup>73</sup> While agreeing that universal injunctions “should be utilized only in rare circumstances”<sup>74</sup> and that they were “a powerful remedy that should be employed with discretion,”<sup>75</sup> the majority justified the universal injunction in this case because it presented “essentially a facial challenge to a policy applied nationwide” and the format of the policy rendered individual relief ineffective in providing full relief.<sup>76</sup> Although the panel was unanimous in declaring the funding regulations constitutionally invalid and enjoining DOJ from stripping funds from Chicago, Judge Manion criticized the universality of the injunction as a “gratuitous application of an extreme remedy.”<sup>77</sup>

#### *D. Regulating Attorneys in Immigration Proceedings*

The Executive Office of Immigration Review (“EOIR”), part of DOJ, enforces regulations of attorneys practicing in immigration proceedings. One regulation required attorneys to file a notice of appearance when the attorney engaged in “practice” or “preparation” in a proceeding, the latter including incidental advice, activities, or preparation, even those activities outside full representation.<sup>78</sup> The effect of the regulation was that attorneys must appear and undertake full legal representation in cases, whereas attorney and advocacy groups often provided limited assistance for parties otherwise proceeding *pro se*.<sup>79</sup>

The Northwest Immigrant Rights Project (“NWIRP”) provides legal services in immigration proceedings in Washington, sometimes appearing as counsel and sometimes advising *pro se* litigants. It received a cease-and-desist letter from EOIR,

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<sup>70</sup> *Id.* at \*3.

<sup>71</sup> *Id.* at \*4.

<sup>72</sup> *Id.* at \*4–5.

<sup>73</sup> **Chicago v. Sessions**, \_\_\_ F.3d \_\_\_ (7th Cir. 2018).

<sup>74</sup> *Id.* at \_\_\_ (slip op. at 26)

<sup>75</sup> *Id.* at \_\_\_ (slip op. at 29).

<sup>76</sup> *Id.* at \_\_\_ (slip op. at 30).

<sup>77</sup> *Id.* at \_\_\_ (slip op. at 42 (Manion, J., concurring in the judgment in part and dissenting in part)).

<sup>78</sup> *Nw. Immigrant Rights Project v. Sessions*, 2017 WL 3189032, at \*1 (W.D. Wash. 2017).

<sup>79</sup> *Id.* *Northwest Immigrant Rights Project*<sup>79</sup> (“NWIRP”) illustrates the distinction. The injunction was properly and appropriately nationwide in that by prohibiting the federal government from enforcing the attorney regulations on NWIRP, the district court necessary prohibited enforcement of the regulations against NWIRP anywhere in the United States it may attempt to provide legal services in immigration proceedings. NWIRP works in Washington,<sup>79</sup> at \*1–2.

ordering it to stop providing any assistance in any proceedings without appearing and providing full representation, something NWIRP alleged it lacked resources to do.<sup>80</sup> NWIRP filed suit in the Western District of Washington, alleging that the regulations violated the First Amendment, by interfering with communications between NWIRP and parties to immigration proceedings, and the Tenth Amendment, by infringing on the state power to regulate attorneys.<sup>81</sup> The court preliminarily enjoined enforcement of the cease-and-desist letter and the regulations pursuant to which the letter issued. It recognized EOIR's stated intention to enforce the regulations to other attorneys and applied the injunction to "any other similarly situated non-profit organizations who, like NWIRP, self-identify and disclose their assistance on *pro se* filings."<sup>82</sup>

#### *E. Abortion Access for Detained Undocumented Unaccompanied Minors*

This is the class of immigration-adjacent litigation that did not produce an unwarranted universal injunction, but instead proceeded according to appropriate remedial procedures. Plaintiffs challenged policies of the Office of Refugee Settlement (an agency in the Department of Health and Human Services) refusing to allow unaccompanied undocumented minors in Health and Human Services (HHS) detention to terminate pregnancies.<sup>83</sup> A lawsuit filed by a guardian ad litem produced two district court injunctions compelling HHS to permit three girls (identified as J.D., J.R., and J.P.) to obtain abortions.<sup>84</sup> The judge expressly prohibited HHS officials from interfering or retaliating against the three girls for obtaining abortions, but made no mention of, and did not extend the order to, other, similarly situated detainees.<sup>85</sup>

The district then certified a class action under Federal Rule of Civil Procedure 23(b)(2) of "all pregnant, unaccompanied immigrant minor children (UCs) who are or will be in the legal custody of the federal government" and granted a class-wide preliminary injunction.<sup>86</sup>

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<sup>80</sup> *Id.* at \*2.

<sup>81</sup> *Id.* at \*2–6.

<sup>82</sup> *Id.* at \*7.

<sup>83</sup> *Garza v. Hargan*, 874 F.3d 735, 737 (D.C. Cir. 2017) (en banc) (order denying stay); *id.* at 736 (Millett, J., concurring); *id.* at 743 (Henderson, J., dissenting); *see also* Marty Lederman, *Lawless and Cruel: The HHS Abortion Scandal That's Flying Under the Radar*, BALKINIZATION (Dec. 22, 2017), <https://balkin.blogspot.com/2017/12/lawless-and-cruel-hhs-abortion-scandal.html> [hereinafter Lederman, *Lawless and Cruel*]; Marty Lederman, *The SG's Remarkable Cert. Petition in Hargan v. Garza, the "Jane Doe" Abortion Case*, BALKINIZATION (Nov. 8, 2017), <https://balkin.blogspot.com/2017/11/the-sgs-remarkable-cert-petition-in.html> [hereinafter Lederman, *The SG's Remarkable Cert. Petition*]; Michael C. Dorf, *The Troublingly Widening Gyre of Complicity Claims*, VERDICT: JUSTICIA (Nov. 1, 2017), <https://verdict.justia.com/2017/11/01/troublingly-widening-gyre-complicity-claims>.

<sup>84</sup> *Garza v. Hargan*, 2017 WL 6462270, at \*2–3 (D.D.C. 2017); *Garza v. Hargan*, 2017 WL 4707287, at \*1 (D.D.C. 2017).

<sup>85</sup> *Garza*, 2017 WL 4707287 at \*1.

<sup>86</sup> *Garza v. Hargan*, \_\_\_ F. Supp. 3d \_\_\_, 2018 WL 1567600, \*1 (D.D.C. 2018).

## F. *DACA Rescission*

In 2012, the Department of Homeland Security created DACA, a program permitting certain individuals without lawful immigration status who entered the United States as children to obtain contingent discretionary relief from deportation and authorization to work legally in the United States. In 2017, DHS announced a gradual end to DACA.<sup>87</sup>

In the Northern District of California, five groups of plaintiffs filed non-class actions. The plaintiffs were the President and Regents of the University of California, four states, a city, a county, a union, and several individual DACA recipients; they argued the rescission violated the APA. The district agreed the new order was invalid and ordered DHS to “maintain the DACA program on a nationwide basis.”<sup>88</sup> It insisted that the scope of the injunction was appropriate given the strong interest in uniform immigration law and the problem of DACA rescission affecting every state and territory of the United States. “Limiting relief to the States in suit or the Individual Plaintiffs would result in administrative confusion and simply provoke many thousands of individual lawsuits all over the country.”<sup>89</sup>

A different group of plaintiffs filed suit in the Eastern District of New York. Plaintiffs included individuals and fifteen states and the District of Columbia, alleging violations of Equal Protection and Due Process and the APA. The district court enjoined DACA rescission “on a universal or ‘nationwide’ basis,” using the terms synonymously.<sup>90</sup> It insisted it did not do so “lightly” and recognized commentary criticizing the practice.<sup>91</sup> It emphasized the strong federal interest in uniform immigration law, as well as how impractical it would be to issue a narrower injunction that sufficiently protected plaintiffs’ interest, in light of the ability of people to move from state to state and job to job.<sup>92</sup>

A third action was brought in the District of the District of Columbia by two sets of plaintiffs, one led by Princeton University and one of its graduates (a DACA recipient) and one led by the NAACP and two labor unions.<sup>93</sup> The court rejected the government’s argument that any remedy should be limited to the plaintiffs, citing *Texas* and the need for uniform immigration law.<sup>94</sup> Rather than enjoining

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<sup>87</sup> *Regents of Univ. of California v. United States Dep’t. of Homeland Security*, 279 F. Supp. 3d 1011, 1022-23, 1025-26 (N.D. Cal. 2018); *Batalla Vidal v. Nielson*, 279 F. Supp. 3d 401, 407, 413-16 (E.D.N.Y. 2018); *Batalla Vidal v. Duke*, \_\_\_ F. Supp. 3d \_\_\_, 2017 WL 5201116, \*2-4 (E.D.N.Y. 2017).

<sup>88</sup> *Regents*, 279 F. Supp. 3d at 1048.

<sup>89</sup> *Id.* at 1049.

<sup>90</sup> *Batalla Vidal*, 279 F. Supp. 3d at 437.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 438.

<sup>93</sup> *NAACP v. Trump*, \_\_\_ F. Supp. 3d \_\_\_, \_\_\_ (D.D.C. 2018) (slip op. at 14).

<sup>94</sup> *Id.* at \_\_\_ (slip op. at 49).

enforcement of the rescission regulation, the court vacated the order rescinding DACA as lacking sufficient reasoned explanation, but stayed the vacatur to give the department a chance to offer a fuller and proper justification for the order.<sup>95</sup>

## II. Universal (Not Nationwide)

The first problem with these broad injunctions involves nomenclature, in labeling them “nationwide” injunctions rather than “universal” injunctions.

The scope of an injunction involves two distinct considerations—“who” and “where.” “Who” refers to the persons protected and bound by the injunction—who enjoys the blanket of the court’s power, who can return to court to enforce the injunction if it is disobeyed, and who is bound to act or refrain from acting in some respect.<sup>96</sup> “Where” refers to the “territorial breadth” or geographic scope of the order, where the injunction and court’s enforcement power can find those protected or bound by an injunction. In the context of pre-enforcement constitutional litigation at issue, “where” means the place in the country the government is barred from enforcing the law; “who” means against what persons it is barred from enforcing the challenged law and against what persons it remains free from judicial decree to enforce the challenged law.

Courts conflate these distinct aspects in describing the central choice as between nationwide relief and relief limited to the plaintiffs.<sup>97</sup> One judge in the Northern District of California erroneously framed the issue as whether the injunction “should be issued only with regards to the plaintiffs and should not apply nationwide.”<sup>98</sup> The Seventh Circuit spoke of “relief limited in geographic scope” producing multiple litigation,<sup>99</sup> misunderstanding that multiple litigation (involving new parties) derives from the limited “who” of an individual injunction, not from the broader “where.” At the same time, the terms should not be used interchangeably or synonymously.<sup>100</sup>

It is “inapt”<sup>101</sup> to describe these injunctions as nationwide or to justify them on the conclusion that plaintiffs “established injury that reaches beyond the geographical bounds” of the judicial district or state.<sup>102</sup> Both framings speak to the injunction’s where. So understood, all injunctions are and should be nationwide and should reach beyond the geographical bounds of the issuing judicial district. All injunctions should protect the plaintiff against defendants’ unconstitutional or unlawful conduct throughout the nation, wherever the plaintiff may be or should

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<sup>95</sup> *Id.* at \_\_\_ (slip op. at 49, 52-53).

<sup>96</sup> Bray, *supra* note 11, at 419 n.5.

<sup>97</sup> **NAACP v. Trump**, \_\_\_ F. Supp. 3d \_\_\_, \_\_\_ (D.D.C. 2018) (slip op. at 49); *Hawaii v. Trump*, 859 F.3d 741, 788 (9th Cir. 2017) (*Hawaii I*).

<sup>98</sup> *Santa Clara v. Trump*, 250 F. Supp. 3d 497, 539 (N.D. Cal. 2017).

<sup>99</sup> **Chicago v. Sessions**, \_\_\_ F.3d \_\_\_, \_\_\_ (7th Cir. 2018) (slip op. at 25).

<sup>100</sup> *Batalla Vidal v. Nielson*, 279 F. Supp. 3d 401, 407, 413-16 (E.D.N.Y. 2018).

<sup>101</sup> Bray, *supra* note 11, at 419 n.5.

<sup>102</sup> *Regents of Univ. of California v. United States Dep’t. of Homeland Security*, 279 F. Supp. 3d 1011, 1049 (N.D. Cal. 2018).

go. That is, government officials are and should be prohibited from enforcing the constitutionally defective law or regulation against the protected party wherever the protected party may be or should go. Rights are violated by threatened enforcement of a constitutionally defective law wherever the rights-holder goes, and the injunction protecting her against those rights violations protects her wherever she goes.

The significant feature of the injunctions in these immigration cases is that they prohibit enforcement of the challenged law, regulation, or policy against the universe of people who might be subject to enforcement of the challenged law, regulation or policy, whether parties to the constitutional litigation or otherwise. The injunctions attempt to prohibit government officials from enforcing the challenged laws against the universe of all persons and entities, not only the named plaintiffs. Justice Gorsuch recognized the problem as injunctions “not limited to relief for the parties at issue” striking down “a federal statute with regard to anybody anywhere in the world.”<sup>103</sup> The appropriate term for such injunctions reaching a broad “who” is “universal,” because they purport to bar enforcement against the universe of people, parties or otherwise, against whom the challenged law might be enforced.

Because “nationwide” and “universal” address different aspects of the scope of a judicial order, they are not synonymous or interchangeable—an injunction can be both nationwide and universal. Injunctions are nationwide in protecting the named plaintiffs against enforcement of the constitutionally defective laws throughout the nation, wherever the plaintiffs are or go; that is proper and unremarkable. This is consistent with *Califano v. Yamasaki*,<sup>104</sup> where the Supreme Court approved application of an injunction that protected a plaintiff class spread throughout the country, because the entire class was before the court and the court’s equitable powers allowed it to protect those before it, regardless of their location.<sup>105</sup> Injunctions are nationwide because injunctions should be nationwide, at least where plaintiffs are persons who may move around the country and might be subject to the challenged law, regulation, or policy throughout the nation. Injunctions become universal (although courts have not used the term) in purporting to protect the universe of people from enforcement of the constitutionally defective laws, regulations, and policies.

*NWIRP*<sup>106</sup> illustrates the distinction. By prohibiting the federal government from enforcing the attorney regulations against NWIRP, the district court necessarily prohibited enforcement of the regulations against NWIRP anywhere in the United States it may attempt to provide legal services in immigration proceedings. NWIRP works in Washington,<sup>107</sup> so the injunction obviously prohibits enforcement in proceedings held there. But if NWIRP began providing legal

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<sup>103</sup> **Argument in *Trump v. Hawaii* at 72-73.**

<sup>104</sup> 442 U.S. 682 (1979).

<sup>105</sup> *Id.* at 702, 706.

<sup>106</sup> *Nw. Immigrant Rights Project v. Sessions*, 2017 WL 3189032 at \*7 (W.D. Wash. 2017).

<sup>107</sup> *Id.* at \* 1.

services in immigration proceedings in Oregon or Texas or Florida or Maine, the injunction would bar enforcement of the regulations in those proceedings. The protection that the injunction afforded to NWIRP against enforcement applied wherever NWIRP was and wherever it might otherwise be subject to enforcement. This made the injunction properly and appropriately nationwide. The problem is that the district court extended the “who” of the injunction, purporting and intending to protect other immigration attorneys and representation organizations against enforcement of those regulations. It prohibited enforcement of the challenged regulations not only against NWIRP, but against all other attorneys and representation organizations.<sup>108</sup>

*Chicago v. Sessions*<sup>109</sup> similarly wielded the wrong nomenclature. The injunction should protect Chicago nationwide, ensuring it retains its federal funding everywhere it goes—although that has no practical effect because the City of Chicago, unlike NWIRP, cannot leave the Northern District of Illinois. But the district court made, and the Seventh Circuit affirmed, an extended “who” by purporting and intending to protect other sanctuary cities from losing their funding to DOJ regulations.

Bray recognizes that it is more appropriate to speak of the scope of an injunction in terms of universality than nationwide, but expresses concern that universality may fail to capture “the distinctive fact that these injunctions constrain the national government, as opposed to state governments.”<sup>110</sup> But universality—enjoining the defendant’s constitutionally defective conduct with respect to the universe of prospective enforcement targets—remains the central idea and central problem, regardless of the source of the challenged law. The difference between a universal injunction prohibiting enforcement of a federal law and a universal injunction prohibiting enforcement of a state law is the size of the universes against whom enforcement is proscribed. But the concept remains appropriate.

In *Koontz v. Watson*, the District of Kansas declared constitutionally invalid a Kansas law requiring all persons who contract with the state to certify that they are not involved in boycotts of Israel.<sup>111</sup> The plaintiff, a teacher hired to conduct teacher-training programs, alleged that the law violated the First Amendment and the court agreed. The injunction prohibited the state from enforcing any statute, law, policy, or practice requiring independent contractors to declare that they are not participating in a boycott of Israel and prohibited the state “from requiring any independent contractor” to certify that they are not participating in a boycott of Israel as a condition of contracting with the state.<sup>112</sup> That injunction was universal—prohibiting enforcement of any state laws against any potential contractors with the state, regardless of who those contractors are, where they are, what they are contracting for, and what laws they are subject to.

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<sup>108</sup> *Id.* at \* 7.

<sup>109</sup> *Chicago v. Sessions*, 264 F. Supp. 3d 933, 937–38 (N.D. Ill. 2017), *aff’d* \_\_\_ F.3d \_\_\_ (7th Cir. 2018).

<sup>110</sup> *Id.* at 419 n.5.

<sup>111</sup> *Koontz v. Watson*, \_\_\_ F. Supp. 3d \_\_\_, \_\_\_, 2018 WL 617894, \*1 (D. Kan. 2018).

<sup>112</sup> *Id.* at \*14.

An injunction prohibiting enforcement of a state law should be as nationwide as an injunction prohibiting enforcement of federal law—it should protect the plaintiff against enforcement of the constitutionally defective state law everywhere she is or goes in the United States. This is less of a practical problem with state laws because of constitutional and prudential limits on extraterritorial application of state laws. But that renders a nationwide injunction unnecessary; it does not render the terminology inapplicable. If a court enjoins Florida from enforcing a law prohibiting flag-burning against the plaintiff, the injunction prohibits Alabama from enforcing that law anywhere the plaintiff might burn a flag. Limits on extraterritorial application of Florida’s flag-burning law also prohibit that prosecution.

While calling beyond-the-plaintiff injunctions “nationwide” is inappropriate, universality is not the only available term to capture the real issue of “who.” Bray uses “national” to describe an injunction protecting the “nation” of persons against enforcement.<sup>113</sup> Justice Gorsuch, perhaps sarcastically, called it a “cosmic injunction.”<sup>114</sup> Michael Morley frames the issue around the “orientation” of the injunction. A plaintiff-oriented injunction “vindicates the plaintiffs’ rights, but otherwise leaves the underlying statute or regulation undisturbed.”<sup>115</sup> A defendant-oriented injunction allows a single judge in one case “to completely prohibit the defendant agency or official from enforcing the challenged provision against anyone throughout the state or nation,” the equivalent of a universal injunction.<sup>116</sup>

With the proper terms in mind, it should be clear that the problem with the injunctions in these immigration and immigration-adjacent cases has not been their nationwide scope, in protecting prevailing plaintiffs everywhere. The point of contention and controversy has been their universality in protecting a universe of people beyond the plaintiff.

Part III turns to that problem.

### III. Never Appropriate, By Any Label

By any label, courts should not issue the universal injunctions they have in these cases, which prohibit defendant federal officials from enforcing the challenged laws, regulations, and policies against the universe of any person anywhere who may be subject to enforcement, beyond the named plaintiffs in those cases. They certainly should not issue as frequently, unthinkingly, and automatically as they have been. “Universal” injunctions were not unheard-of prior

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<sup>113</sup> Bray, *supra* note \_\_\_, at 419 n.5.

<sup>114</sup> **Oral argument at 73.**

<sup>115</sup> Michael T. Morley, *DeFacto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 Harv. J. Law & Pub. Pol’y 487, 500 (20\_\_).

<sup>116</sup> *Id.*; Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. Rev. 611, 616 (2017).



to *Texas v. United States* and these cases; the practice traces to the 1960s and '70s.<sup>117</sup> But their issuance has accelerated in recent years.<sup>118</sup>

Whatever courts have done descriptively, universal injunctions are normatively inappropriate. As Bray argues, 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.”<sup>119</sup> Laycock agrees that the power to issue injunctions that protect beyond the plaintiffs in individual actions is “rather doubtful.”<sup>120</sup> He similarly proposes that “the court in an individual action should not globally prohibit a government agency from enforcing an invalid regulation; the court should order only that the invalid regulation not be enforced against the individual plaintiff.”<sup>121</sup> The Supreme Court endorsed this limited scope for injunctions in *Doran v. Salem Inn*,<sup>122</sup> stating that “neither declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs, and the State is free to prosecute others who may violate the statute.”<sup>123</sup>

This Part offers the scholarly case against universal injunctions and shows the problems with the judicial justifications for universal injunctions in these cases.

#### A. Equitable Principles and the Scope of Injunctions

Two competing principles guide courts in defining the proper scope of an injunction. First, the “scope of injunctive relief is dictated by the extent of the [constitutional] violation established”<sup>124</sup> and the injunctive remedy should be commensurate with and match the constitutional violation.<sup>125</sup> Second, “injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.”<sup>126</sup> Courts in these immigration cases have justified universal injunctions by reference to both the remedy-matches-the-violation<sup>127</sup> and the no-more-burdensome<sup>128</sup> principles.

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<sup>117</sup> DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 436 (4th ed. 2010); Bray, *supra* note 11, at 437–45.

<sup>118</sup> Bray, *supra* note 11, at 437.

<sup>119</sup> Bray, *supra* note 11, at 469.

<sup>120</sup> LAYCOCK, *supra* note 117, at 275.

<sup>121</sup> *Id.* at 276.

<sup>122</sup> *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 922 (1975).

<sup>123</sup> *Id.* at 931.

<sup>124</sup> *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

<sup>125</sup> *Hills v. Gautreaux*, 425 U.S. 284, 293–94 (1976).

<sup>126</sup> *Califano*, 442 U.S. at 702; *see also* *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 778 (1994).

<sup>127</sup> *Chicago v. Sessions*, 2017 WL 4572208 at \*2; *Santa Clara v. Trump*, 250 F. Supp. 3d 497, 539 (N.D. Cal. 2017).

<sup>128</sup> *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 605 (4th Cir. 2017) (*IRAP II*); *Chicago*, 2017 WL 4572208 at \*2.

### 1. Conceptualizing constitutional litigation

Whether either stated principle supports a universal injunction depends on how courts conceptualize constitutional litigation, what is before a court in constitutional litigation, and what the court is asked to do in resolving the case. The trend towards universal injunctions reflects a conceptual shift in that judicial understanding.

Historically, constitutional litigation sought anti-suit injunctions, in which a plaintiff sought federal-court orders directing public officials to halt enforcement of the challenged law in a judicial proceeding initiated against the federal plaintiffs.<sup>129</sup> The court declares the constitutional validity of the challenged law, but as an incident of preventing or remedying the wrong to the individual<sup>130</sup> and only to the extent the government defendants threatened to enforce the law against the plaintiff.<sup>131</sup> Kevin Walsh describes pre-enforcement constitutional action as an “in personam litigation in which the court is asked to decide the respective rights and duties of persons under law. If the plaintiff’s pre-enforcement challenge is successful, the remedy issued runs against the defendant as a person.”<sup>132</sup> If a law or regulation is (in the language of *Marbury v. Madison*,<sup>133</sup>) “repugnant” to the Constitution, a court must refuse to apply it as a rule of decision.<sup>134</sup> A court issuing an anti-suit injunction prohibits public officials from initiating an enforcement proceeding, thereby prohibiting the challenged law or regulation from serving as the rule of decision in that underlying proceeding.

Conceptualizing constitutional rights and litigation this way, a court should not make the injunction universal because the point of the action is not the declaration of the law’s constitutional validity, but halting enforcement of the challenged law as to the plaintiff.<sup>135</sup> The paradigm constitutional case for this model is *Ex Parte Young*,<sup>136</sup> which recognized preemptive constitutional actions by potential enforcement defendants (the railroad and its officers) against executive officials (the state attorney general) to halt enforcement of constitutionally defective laws against it.<sup>137</sup>

Either scope-of-injunction principle supports limiting injunctions to the plaintiffs. Consider *Chicago v. Sessions*. DOJ threatened to deny federal law-enforcement funds to Chicago, pursuant to federal regulations, because Chicago operates as a sanctuary jurisdiction and refuses to aid federal enforcement of immigration laws. Chicago obtains complete relief if the injunction prohibits DOJ from enforcing those regulations and from denying funds to Chicago; Chicago’s

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<sup>129</sup> See Bray, *supra* note 11, at 449–50.

<sup>130</sup> *Id.* at 451; Frost, *supra* note \_\_\_\_, at m.44-45.

<sup>131</sup> Bray, *supra* note \_\_\_\_, at 451.

<sup>132</sup> Walsh, *supra* note 205, at 1725.

<sup>133</sup> 5 U.S. (1 Cranch.) 137 (1803).

<sup>134</sup> Bray, *supra* note \_\_\_\_, at 451.

<sup>135</sup> *Id.* at 449–50; Walsh, *supra* note 205, at 1725.

<sup>136</sup> *Ex parte Young*, 209 U.S. 123, 123 (1908).

<sup>137</sup> *Virginia Office for Prot. and Advocacy v. Stewart*, 563 U.S. 246, 247 (2010).

relief does not lose complete relief and its relief does not become less than complete if DOJ denies funds to San Francisco or Santa Clara. Similarly, the constitutional violation is the denial of funds to Chicago pursuant to the regulations, not the regulations themselves; an injunction prohibiting enforcement of the regulations and denial of funds to Chicago matches and remedies, and is commensurate with, the constitutional violation in the case.

But federal courts and litigants have adopted a new conception of constitutional rights and constitutional litigation. On this conception, the court's power is directed not to protecting an individual or entity against enforcement of a constitutionally defective law or regulation, but to attacking the defective law or regulation itself. Judges see themselves as "invalidating" or "striking down" or "setting aside" or "nullifying" or "blocking" unconstitutional laws, acting against the constitutionally defective law itself to eliminate and render it non-existent.<sup>138</sup> The challenged law or regulation is treated as a *res* on which the court acts for all purposes and all persons.<sup>139</sup>

If the court's determination of constitutional invalidity "obliterates" the law, a universal injunction has "relentless logic,"<sup>140</sup> offering a remedy that logically must benefit all persons and purposes from an entirely invalid law. If a law as a thing is unconstitutional, it is undeserving of any respect, and continued enforcement to anyone, anywhere, would suggest the law retains that respect. If the constitutional violation is the very existence of the law, then only a universal injunction is commensurate with and matches that violation.

Courts issuing universal injunctions in these immigration cases rely on this newer conception of constitutional litigation. Courts target the "legal issues" raised in the case, considering the laws challenged and the constitutional flaws in those laws, all of which apply nationwide and not limited to the particular plaintiff.<sup>141</sup> The legal problems in denying sanctuary cities funding were not restricted to Chicago, because the authority impermissibly wielded by the Attorney General in denying (or threatening to deny) funding would be the same in Chicago as in another jurisdiction.<sup>142</sup> A limited injunction could not resolve the constitutional defects of the funding regulations themselves.

In rejecting the government's argument for a non-universal injunction in *Chicago*, the court insisted that a narrower injunction would "allow the Attorney General to impose what this Court has ruled are likely unconstitutional conditions across a number of jurisdictions" and to "continue enforcing likely invalid

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<sup>138</sup> Bray, *supra* note 11, at 451–52; Bruhl, *supra* note 176, at 552; Fallon, *As-Applied and Facial Challenges*, *supra* note 205, at 1339; Frost, *supra* note \_\_\_, at m.40; Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, \_\_\_ Va. L. Rev. \_\_\_ (forthcoming 2018) (m. 4-6).

<sup>139</sup> Walsh, *supra* note 205, at 1725.

<sup>140</sup> Bray, *supra* note \_\_\_, at 452.

<sup>141</sup> *Chicago v. Sessions*, \_\_\_ F.3d \_\_\_, \_\_\_ (7th Cir. 2018) (slip op. at 30-31); *Chicago v. Sessions*, 2017 WL 4572208 at \*2.

<sup>142</sup> *Chicago*, \_\_\_ F.3d at \_\_\_ (slip op. at 34); *Chicago v. Sessions*, 264 F. Supp. 3d 933, 951–52 (N.D. Ill. 2017).

conditions” against other cities and counties.<sup>143</sup> *Santa Clara* similarly insisted that the “constitutional violations” it found in the funding regulations “apply equally to all states and local jurisdictions.”<sup>144</sup> The Fourth Circuit in *IRAP II* stated that enjoining the federal government only as to the plaintiffs “would not cure the constitutional deficiency, which would endure” in all other applications of the executive order.<sup>145</sup> In *IRAP IV*, the same court insisted that because “we find that the Proclamation was issued in violation of the Constitution, enjoining it only as to Plaintiffs would not cure its deficiencies,” which “endure” in all other applications of the executive order.<sup>146</sup>

This conception, Jonathan Mitchell argues, sees judicial review as a writ of erasure. A “judicial pronouncement of unconstitutionality has canceled or blotted out a duly enacted statute.”<sup>147</sup> Non-enforcement of a statute becomes suspension or revocation.<sup>148</sup>

It is not clear when the conceptual shift occurred,<sup>149</sup> although it can be tied to two developments. Bray points to enactment of the Declaratory Judgment Act<sup>150</sup> in 1934 as changing the constitutional understanding; by allowing courts to “declare” rights, it encouraged judges to think of litigation as a challenge to the law itself.<sup>151</sup> A second change is the expansion of *Ex Parte Young*<sup>152</sup> beyond antisuit injunctions<sup>153</sup> to all lawsuits seeking “relief properly characterized as prospective” from enforcement of constitutionally defective laws, regardless of the form of that enforcement.<sup>154</sup> Pre-enforcement injunctive actions seek to halt not only judicial proceedings to enforce the challenged law (such as the threatened criminal prosecution in *Young*),<sup>155</sup> but non-judicial enforcement actions by non-judicial actors, such as a county clerk denying a marriage license to a same-sex couple<sup>156</sup> or Marshals shackling defendants during criminal proceedings<sup>157</sup> or DOJ denying a

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<sup>143</sup> *Chicago v. Sessions*, 2017 WL 4572208, at \*3 (N.D. Ill. 2017).

<sup>144</sup> *Santa Clara v. Trump*, 250 F. Supp. 3d 497, 539 (N.D. Cal. 2017).

<sup>145</sup> *IRAP II*, 857 F.3d 554, 605 (4th Cir. 2017).

<sup>146</sup> *IRAP IV*, 883 F.3d 233, 273 (4th Cir. 2018).

<sup>147</sup> **Mitchell**, *supra* note \_\_\_, at 5.

<sup>148</sup> *Id.* at 12.

<sup>149</sup> Bray, *supra* note \_\_\_, at 450.

<sup>150</sup> 28 U.S.C. §§ 2201-2202.

<sup>151</sup> Bray, *supra* note \_\_\_, at 450.

<sup>152</sup> 209 U.S. 123 (1908).

<sup>153</sup> John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989, 990, 1014-15 (2008); *Virginia Office for Protection and Advocacy v. Stewart*, 563 U.S. 247, 262 (2011) (Kennedy, J., concurring).

<sup>154</sup> *VOPA*, 563 U.S. at 256-57.

<sup>155</sup> *Young*, 209 U.S. at 128-29; Harrison, *supra* note \_\_\_, at 992; Barry Friedman, *The Story of Ex parte Young: Once Controversial, Now Canon*, in *FEDERAL COURTS STORIES* 247, 260-61 (Vicki C. Jackson and Judith Resnik, eds. 2010).

<sup>156</sup> *Miller v. Davis*, 123 F. Supp. 3d 924, 933-34 (E.D. Ky. 2015).

<sup>157</sup> Transcript of Oral Argument at 16-18, *United States v. Sanchez-Gomez*, (No.17-312), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2017/17-312\\_h315.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/17-312_h315.pdf).

sanctuary municipality federal funds.<sup>158</sup> The prospective relief no longer is about stopping a discrete judicial proceeding involving enforcement of a law against discrete parties; it is about eliminating the challenged law itself.

Frost frames the dueling conceptions of constitutional litigation in terms of dueling conceptions of the judicial role—between resolving disputes between parties and declaring the meaning of the law for everyone. She argues that critics of universal injunctions view the primary judicial role as resolving individual disputes, with the law-declaration power as incidental to that primary role.<sup>159</sup> The newer conception of constitutional litigation conforms to a shifted focus to the law-declaration role.

## 2. *In Defense of the Traditional Conception*

The traditional conception, and the particularized, non-universal injunctions the traditional conception supports, represents a more appropriate approach to constitutional litigation for three reasons. It better describes what happens in constitutional litigation, it is more consistent with Article III limits on the jurisdiction of federal courts, and it better controls litigant behavior.

### a. *Describing Constitutional Litigation*

The traditional conception better describes what happens in constitutional litigation.

One way to see this is by imagining these constitutional issues resolved not in preemptive actions initiated by the right-holders enjoining enforcement, but in a government-initiated enforcement action. Government enforces the challenged law by initiating an enforcement proceeding against the rights-holder, who raises the constitutional validity of the law being enforced as a defense to enforcement liability. If the court agrees that the law is constitutionally invalid, it dismisses the action or otherwise resolves the proceeding in favor of the rights-holder. The court's order dismissing the enforcement action speaks to the rights-holding defendant, but does not speak to or affect other people. Nor does it affect the law itself, which remains undisturbed.<sup>160</sup> This is *Marbury*—understanding that a law or regulation is repugnant to the Constitution, the court refuses to apply it as rule of decision in that proceeding, leaving no valid law to be applied and requiring dismissal of the proceeding.<sup>161</sup>

Consider, again, the attorney regulations in *NWIRP*. If *NWIRP* continues to advise *pro se* litigants without filing the required notice of appearance, EOIR would institute a disciplinary proceeding against *NWIRP* within the immigration court. *NWIRP* would defend in the proceeding by arguing that the attorney regulations

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<sup>158</sup> *Chicago*, 264 F. Supp. 3d at 937–38; *Santa Clara*, 250 F. Supp. 3d at 509–11.

<sup>159</sup> Frost, *supra* note \_\_\_\_, at 44–45.

<sup>160</sup> Bray, *supra* note \_\_\_\_, at 452.

<sup>161</sup> *Id.* at 451; Mitchell, *supra* note \_\_\_\_, at \_\_\_\_ (m.59).

are repugnant to the First Amendment and cannot form the basis for disciplining it, based on the same arguments as in the preemptive suit in federal court. And if the body hearing the attorney-disciplinary action agrees that the regulations are constitutionally invalid, it would find in favor of NWIRP and resolve the disciplinary proceeding in its favor, finding no constitutionally valid regulation to use as the rule of decision. But that remedy, even if based on a finding of a constitutional defect in the regulations, protects only NWIRP, no other attorneys or representative organizations. It follows that the preemptive federal injunctive action NWIRP files to prohibit EOIP from commencing future disciplinary proceedings against it should produce an injunctive remedy that similarly protects only NWIRP.

A second way to see this is to identify the precise constitutional violation. The violation is neither the enactment nor existence of an unconstitutional law, regulation, or policy; the violation is the enforcement or threatened enforcement of that law, regulation, or policy against particular persons. Describing the remedy as “striking down the law”<sup>162</sup> or “declaring the law unconstitutional” does not accurately describe the results or effects of litigation. A law declared constitutionally invalid does not disappear—it remains in the United States Code and Congress is not compelled to repeal or amend it. The court’s judgment prevents enforcement of the law by those executive officers charged with carrying out legislative directives,<sup>163</sup> with enforcement requiring a particular target. It follows that an injunction preventing that enforcement against the target remedies the constitutional violation, without having to do more.

Mitchell labels this the “writ-of-erasure fallacy,” defined as “the assumption that a judicial pronouncement of unconstitutionality has canceled or blotted out a duly enacted statute, when the court’s ruling is in fact more limited in scope and leaves room for the statute to continue to operate.”<sup>164</sup> Judges, politicians, and the public regard “judicially disapproved statutes” as legal nullities, although they remain on the books and continue to operate as law, a mindset that “has needlessly truncated the scope and effect of many federal and state statutes.”<sup>165</sup> Instead, “[a]ll a court can do is decline to enforce the statute and enjoin the executive from enforcing it.”<sup>166</sup> The injunction is “nothing more than a judicially imposed non-enforcement policy.”<sup>167</sup> Mitchell’s proper conception of the effect of judicial review can merge with the party-specific narrowness of ordinary litigation to produce

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<sup>162</sup> Frost, *supra* note \_\_\_\_, at m40.

<sup>163</sup> *Cf.* Franklin v. Massachusetts, 505 U.S. 788, 828-29 (1992) (Scalia, concurring in part and concurring in the judgment).

<sup>164</sup> Mitchell, *supra* note \_\_\_\_, at \_\_\_\_ (m.5).

<sup>165</sup> *Id.* at \_\_\_\_ (m.40).

<sup>166</sup> *Id.* at \_\_\_\_ (m.59).

<sup>167</sup> *Id.* at \_\_\_\_ (m.58).

particularized, non-universal injunctions, stopping the executive from enforcing as to particular persons, not as to the universe.<sup>168</sup>

*b. Article III Limits*

The traditional conception and non-universal, particularized injunctive relief better conforms to limits on the power of federal courts.

Federal courts possess power under Article III to decide “case[s]” and “controvers[ies],”<sup>169</sup> which means power to decide cases or controversies for particular parties to a particular legal dispute.<sup>170</sup> Courts do not decide general or abstract legal issues to provide remedies for people not before the court.<sup>171</sup> Morley frames this around standing. A plaintiff has Article III standing to obtain injunctive relief only by showing that she suffers ongoing, impending, or substantially likely harm, usually from the threatened enforcement of the challenged law against her.<sup>172</sup> The existence of a law, without a credible threat of enforcement of that law against her, is insufficient to confer standing.<sup>173</sup> Threats of enforcement to persons other than the plaintiff are insufficient to confer standing on that plaintiff.<sup>174</sup> Nor are generalized threats of enforcement as to the public as a whole that are not specific or unique to the plaintiff.<sup>175</sup>

Universal injunctions become possible because of what Aaron-Andrew Bruhl derides as the “one good plaintiff” rule—courts adjudicate, and provide a broad equitable remedy in, multi-party actions so long as one plaintiff can show standing, without determining standing for every plaintiff.<sup>176</sup> They do so believing that an injunctive applies to everyone, so is necessary to find only one person with standing. The Fourth Circuit proceeded to the constitutional merits of the challenge to the travel after finding that one individual plaintiff had standing, deeming it unnecessary to consider standing of other plaintiffs, such as IRAP or the scholarly association.<sup>177</sup> The Fifth Circuit in *Texas v. United States* similarly stopped its standing inquiry with Texas.<sup>178</sup> Bruhl argues that courts would be more constrained in issuing remedies if they were more constrained in thinking about standing. If

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<sup>168</sup> **Mitchell takes no explicit position on the question of against whom the non-enforcement policy applies or against whom the executive is barred from enforcing the challenged law.**

<sup>169</sup> U.S. CONST. art. III, § 2.

<sup>170</sup> *Bray*, *supra* note 11, at 471–72.

<sup>171</sup> *Id.*

<sup>172</sup> Morley, *DeFacto Class Actions*, *supra* note **Error! Bookmark not defined.**, at 523–25; *see, e.g.*, *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014); *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983).

<sup>173</sup> *Susan B. Anthony List*, 134 S. Ct. at 2342; *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979).

<sup>174</sup> *Lyons*, 461 U.S. at 105.

<sup>175</sup> *U.S. v. Richardson*, 418 U.S. 166, 176 (1974).

<sup>176</sup> Aaron-Andrew P. Bruhl, *One Good Plaintiff is Not Enough*, 67 DUKE L.J. 481, 500 (2017).

<sup>177</sup> *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 586 (4th Cir. 2017) (*IRAP II*).

<sup>178</sup> *Texas v. United States*, 809 F.3d 134, 151 (5th Cir. 2015); Bruhl, *supra* note 176, at 511–12.

judges consider the standing of every plaintiff, they may better consider how to protect the interests of the plaintiffs without going beyond that scope to protect the universe of similarly situated persons.<sup>179</sup>

Standing law reveals two things. The constitutional problem is not the existence of a constitutionally defective law, but the threat of enforcement of that constitutionally defective law against particular persons. Having identified a plaintiff with standing, the court cannot grant relief “that would not prevent likely, impending, or ongoing harm to the plaintiff herself.”<sup>180</sup> That limitation includes relief that goes beyond preventing harm to the plaintiff by attempting to prevent harm to people not before the court, where unnecessary to prevent harm to the plaintiff.

*Califano v. Yamasaki*<sup>181</sup> assumes this party specificity, which lower courts have ignored in issuing universal injunctions in immigration cases. Courts quote *Califano* for the complete-relief principle, that an injunction should be no more burdensome than necessary to accord complete relief.<sup>182</sup> But the oft-quoted sentence describing the complete-relief requirement ends with three oft-ignored words—“to the plaintiffs.”<sup>183</sup> A court must ensure that the plaintiff obtains complete relief, but need not ensure that anyone else obtains complete relief. And the failure to accord relief beyond the plaintiff does not deprive the plaintiff of complete relief. *Califano* relied on the traditional conception of an injunction that stops enforcement as to the parties, not the new conception of providing freedom for the universe from a constitutionally defective law. Those three words in *Califano* were intentional and essential to the Court’s conception of constitutional litigation and cannot be disregarded as the lower courts have.<sup>184</sup>

Amanda Frost argues that Article III does not necessarily limit courts’ adjudicatory or remedial authority to the plaintiffs, pointing to the mootness doctrine of “capable of repetition yet evading review.”<sup>185</sup> A case is not moot (or mootness will be excepted) when, although the named plaintiff is not presently harmed or threatened with future harm, the injury is reasonably likely to reoccur in the future and the claim is so transitory that the injury would cease of its own force before litigation (including all appeals) could be completed.<sup>186</sup> Common applications of capable-of-repetition include in constitutional challenges to holiday-

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<sup>179</sup> Bruhl, *supra* note 176, at 552.

<sup>180</sup> Morley, *DeFacto Class Actions*, *supra* note **Error! Bookmark not defined.**, at 524.

<sup>181</sup> 442 U.S. 672 (1979).

<sup>182</sup> Trump v. IRAP, 137 S. Ct. 2080, 2090 (2017) (Thomas, J., concurring in part and dissenting in part); *IRAP III*, 265 F. Supp. 3d 570, 632 (D. Md. 2017).

<sup>183</sup> *Califano*, 442 U.S. at 702; cf. *Chicago v. Sessions*, 2017 WL 4572208 at \*2 (quoting *Califano* without the three final words).

<sup>184</sup> Trump v. IRAP, 137 S. Ct. 2080, 2090 (2017) (Thomas, J., concurring in part and dissenting in part).

<sup>185</sup> Frost, *supra* note \_\_\_\_, at m.41.

<sup>186</sup> *Turner v. Rogers*, 564 U.S. 431, 439-40 (2011); *Spencer v. Kemna*, 523 U.S. 1, 17 (1998).



season religious displays (the holiday season lasts approximately one month)<sup>187</sup> and to laws restricting abortion (the pregnancy ends within, at most, nine months).<sup>188</sup> Courts hear these cases despite potential mootness, because they otherwise would never have an opportunity to adjudicate and resolve important constitutional issues arising in these time-sensitive contexts.

For a case to not be moot under this doctrine, the injury must be capable of repetition as to the plaintiff, through a showing that she will be subjected to the challenged unlawful conduct in the future.<sup>189</sup> The plaintiff must show that she will encounter the constitutionally invalid religious display in the future or that she might become pregnant and seek an abortion (and be injured by potential enforcement of the abortion restriction) in the future. That a non-party might be injured through enforcement of the same abortion restriction or the erection of the religious display in the future does not avoid mootness. The court's Article III jurisdiction remains bound to future enforcement or threatened enforcement against this plaintiff, not against the universe of non-party individuals who might be subject to future enforcement. If one plaintiff brings an individual action challenging a seasonal religious display then moves out of the state, the court would find the case moot, even though the government may erect the display the following year, causing constitutional injury to non-parties offended by the display. One of those non-parties would have to establish standing and join or file a new lawsuit challenging the future display.

Finally, neither of the explanations discussed above justifies the shift in conception of constitutional litigation from injuries caused by individualized enforcement of the law to injuries caused by the existence of the law itself.<sup>190</sup> To the extent the shift derives from the creation of the declaratory judgment, it misunderstands that remedy. The Declaratory Judgment Act empowers courts to "declare the rights and other legal relations of any interested party;" it permits determinations of the rights of interested parties to the federal litigation, rather than permitting free-standing declarations of rights in the abstract. The statute speaks of parties, which has a known meaning in litigation, rather than persons, which might consider people beyond the parties. Declaratory judgments also do not place the law itself before the court, but the rights and relations of particular people with respect to that law.

In *Doran v. Salem Inn*,<sup>191</sup> the Court endorsed particularized, non-universal remedies as to both injunctive and declaratory relief, showing that the declaratory judgment remedy operates to protect parties against enforcement of the challenged law, as does the injunctive remedy.<sup>192</sup> And the Court has emphasized that

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<sup>187</sup> *Chabad Lubavitch of Vermont v. City of Burlington*, 936 F.3d 109, 111 (2d Cir. 1991); *American Humanist Ass'n v. Baxter Cty.*, 143 F. Supp. 3d 816, 822 (W.D. Ark. 2015).

<sup>188</sup> *Roe v. Wade*, 410 U.S. 113, 125 (1973).

<sup>189</sup> *Spencer*, 523 U.S. at 17; *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983).

<sup>190</sup> *Supra* notes and accompanying text

<sup>191</sup> 422 U.S.922 (1975).

<sup>192</sup> *Id.* at 931.

injunctions and declaratory judgments have the same practical effect.<sup>193</sup> If injunctions are limited to protecting the plaintiffs and do not prohibit enforcement of the challenged laws against non-parties, then declaratory judgments must be similarly limited. Declaratory relief is narrower than injunctive relief in not imposing an immediate prohibition on the defendant's conduct, but relying on the persuasive force of the judgment to convince state officials to rethink the law and its enforcement.<sup>194</sup> Declaratory judgments are famously a "milder alternative" to the "strong medicine" of the injunction.<sup>195</sup> If the stronger injunction controls government officials only as to the plaintiffs, the milder declaratory remedy should not carry a broader "who" in its scope.

As to the expansion of *Ex Parte Young* beyond antisuit injunctions, these cases still involve threatened enforcement of a law against particular individuals. All that has changed is that enforcement occurs in a non-judicial context—the couple seeking a marriage license, the defendant shackled without cause, or the municipality denied federal funds. That the enforcement mechanism is administrative rather than judicial does not change that the focus remains on the risk or threatened enforcement as to an identifiable individual.

### *c. Litigant Behavior*

The prospect that one district judge can enjoin enforcement of a law as to the universe of targets also promotes forum-shopping and plaintiff-shopping. Those opposed to the target laws, regulations, and policies seek the right plaintiffs and the right court to take-out the law in all applications in one judicial shot. When Texas and other Republican-led states sought to challenge immigrant-friendly policies of the Obama Administration, Texas took the lead and filed suit in the Southern District of Texas, with review in the Fifth Circuit. Beneficiaries of those policies went to federal court in New York for a ruling that the policies remained enforceable in other states. Opponents of the Trump Administration's immigration-restricting policies found plaintiffs with family or associates seeking entry to the United States and focused their litigation efforts in Hawaii, Washington, and California, with review in the Ninth Circuit, or Maryland, with review in the Fourth Circuit. It is neither an accident nor a surprise that Austin, Texas did not challenge the sanctuary-city restrictions in the Fifth Circuit.<sup>196</sup>

Forum- or plaintiff-shopping is not inherently problematic. But universal injunctions make it risk-free and asymmetrical, allowing plaintiffs to, in Bray's

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<sup>193</sup> *Id.* (quoting *Samuels v. Mackell*, 401 U.S. 66, 73 (1971)).

<sup>194</sup> *Steffel v. Thompson*, 415 U.S. 452, 470-71 (1974).

<sup>195</sup> *Id.* at 466-67; *but see* Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 *Duke L.J.* 1091, 1093-94 (2014) (questioning the "mildness thesis").

<sup>196</sup> Bray, *supra* note 11, at 457-60.

words, “shop ’til the statute drops.”<sup>197</sup> If Court I declares the law constitutionally valid, that decision has no preclusive effect on non-parties to that action; a different plaintiff can file a separate challenge to the same law in Court II,<sup>198</sup> subject to some precedential effect (depending on what court addressed the challenged law in Court I).<sup>199</sup> If Court I declares the challenged law invalid and issues a universal injunction, it ends the game<sup>200</sup>—the challenged law is unenforceable against anyone anywhere, unless the universal injunction is reversed on appeal. Non-parties need not take the extra steps of joining the action and expanding the injunction or obtaining their own injunctions.<sup>201</sup> For efficiency’s sake, challengers will find the right plaintiffs and the right court and halt enforcement as quickly as possible. But they incur no cost (other than the risk of ongoing enforcement) if they guess wrong and must take a second bite at the apple.

### 3. *Non-Universality in every court*

The impropriety of universal injunctions (or the demand for particularized injunctions) does not vary by court. Universal injunctions are inappropriate because a court should not prohibit government from enforcing the challenged laws, regulations, or policies beyond the named plaintiffs. They therefore are inappropriate whether issued by one district judge in the Western District of Washington, issued by a three-judge district court, affirmed by a panel of a regional court of appeals, affirmed by an en banc court of appeals, or affirmed by a unanimous Supreme Court. This is not about “a single judge sitting on an island in the Pacific” halting enforcement of federal law through lawless individual action, as Attorney General Jeff Sessions complained about *Hawaii*’s injunction of enforcement of the travel restriction.<sup>202</sup> Universal injunctions would be as improper if the Supreme Court were granted original jurisdiction to issue them at the outset or if all constitutional challenges to federal laws were adjudicated by three-judge

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<sup>197</sup> *Id.* at 460.

<sup>198</sup> *Id.*; Carroll, *supra* note **Error! Bookmark not defined.**, at 2020; Morley, *DeFacto Class Actions*, *supra* note **Error! Bookmark not defined.**, at 532.

<sup>199</sup> Blackman and Wasserman, *supra* note **Error! Bookmark not defined.**, at 244; Bray, *supra* note 11, at 465; Morley, *DeFacto Class Actions*, *supra* note **Error! Bookmark not defined.**, at 533.

<sup>200</sup> Bray, *supra* note 11 at 460; Carroll, *supra* note **Error! Bookmark not defined.**, at 2020–21; Morley, *DeFacto Class Actions*, *supra* note **Error! Bookmark not defined.**, at 532.

<sup>201</sup> Blackman and Wasserman, *supra* note **Error! Bookmark not defined.**, at 256–57.

<sup>202</sup> Dep’t of Justice, *Attorney General Sessions Delivers Remarks at the Heritage Foundation’s Legal Strategy Forum* (Oct. 26, 2017), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-heritage-foundation-s-legal-strategy-forum>; Charlie Savage, *Jeff Sessions Dismisses Hawaii as “an Island in the Pacific,”* N.Y. TIMES (Apr. 20, 2017), [https://www.nytimes.com/2017/04/20/us/politics/jeff-sessions-judge-hawaii-pacific-island.html?\\_r=0](https://www.nytimes.com/2017/04/20/us/politics/jeff-sessions-judge-hawaii-pacific-island.html?_r=0).

district courts (as they were prior to 1976<sup>203</sup>), as some have proposed.<sup>204</sup> No court, regardless of place in the judicial hierarchy or number of members, should issue a universal injunction protecting beyond the plaintiffs.

Rejecting universal injunctions by any court does not mean that a federal judgment declaring a law, regulation, or policy constitutionally defective and enjoining its enforcement has no effect beyond the named plaintiffs. The effect derives from the precedential force of the court's opinion analyzing the validity of the law—the decision of Court I, declaring the attorney regulations invalid as to NWIRP, serves as precedent for Court II considering the validity of those regulations if the federal government seeks or threatens to enforce against them against attorneys other than NWIRP. Precedential force varies by court—a district court decision granting the injunction has only persuasive force for the next court, a regional court of appeals decision affirming the injunction has binding force on district courts within its circuit and persuasive force elsewhere; and a Supreme Court affirmance has binding force on all courts in all districts and circuits.<sup>205</sup>

Supreme Court affirmance of a non-universal party-specific injunction by a district court does not render that injunction universal or extend it to prohibit enforcement of the challenged law against non-plaintiffs to that action. The effect is similar, of course. Supreme Court affirmance means all future enforcement efforts must fail and all pre-enforcement actions to enjoin enforcement must succeed, because all courts are bound by the Court's pronouncement that the challenged law is constitutionally defective and not enforceable.<sup>206</sup> But the affirmance resolves the question as a matter of the law of precedent, the effect of one ruling on a second action involving enforcement against people who were not party to first case. It is not a function of the law of judgments or as an injunction prohibiting enforcement against those non-parties.

Universal injunctions from lower courts elide these distinctions between precedent and judgment and between binding and persuasive precedent. By passing on the constitutional question and enjoining government officials from enforcing the challenged law against the universe of potential targets, the lower court resolves the legal issue for the country, something only the Supreme Court can do.<sup>207</sup> And the Supreme Court does this not as a matter of a single universal injunction, but as

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<sup>203</sup> *Cf.* Shapiro v. McManus, 136 S. Ct. 450, 453 (2015).

<sup>204</sup> Tim Ryan, *Republicans Seek to Limit Courts' Nationwide Injunctions*, COURTHOUSE NEWS (Dec. 1, 2017), <https://www.courthousenews.com/republicans-seek-to-limit-courts-nationwide-injunctions/>.

<sup>205</sup> Blackman & Wasserman, *supra* note **Error! Bookmark not defined.**, at 250–51; Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 923 n.31 (2011) [hereinafter Fallon, *Fact and Fiction*]; Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1339 (2000) [hereinafter Fallon, *As-Applied and Facial Challenges*]; Kevin C. Walsh, *Judicial Departmentalism: An Introduction*, 58 WM. & MARY L. REV. 1713, 1727–28 (2017).

<sup>206</sup> Blackman & Wasserman, *supra* note **Error! Bookmark not defined.**, at 252–53; Walsh, *supra* note 205, at 1715, 1727–28.

<sup>207</sup> *Chicago v. Sessions*, \_\_\_ F.3d \_\_\_, \_\_\_ (7th Cir. 2018) (Manion, J., concurring in the judgment in part and dissenting in part) (slip op. at 44).

a matter of precedent established in one decision involving one set of parties, to be applied in future litigation involving other parties.

This responds to Frost’s argument that critics of universality prefer the dispute-resolution model of the judicial role over the competing law-declaration focus.<sup>208</sup> Particularity or non-universality is warranted not because dispute resolution is more important than law declaration or that law-declaration is incidental to dispute resolution. Rather, both judicial roles are essential, but operate in distinct spheres. Dispute resolution operates in the instant case, resolving the dispute between the parties, as by enjoining government officials from enforcing the challenged law against the plaintiffs. Law declaration operates through precedential effect in subsequent litigation involving different enforcement efforts against different parties.

### *B. Expanding the Scope of the Injunction by Expanding the Scope of Litigation*

Universal injunctions—injunctions that prohibit enforcement of the challenged laws, regulations, and policies beyond the named plaintiffs—are impermissible. But that does not mean constitutional must be atomized to single rights-holder/plaintiffs or that judgments cannot have broader effects. The solution is not to extend the court’s remedial authority beyond the plaintiffs. The solution is to expand the who of the litigation, thereby expanding the permissible who of the injunction, whether formally or in practice. This allows a judgment and injunctive remedy to have broader effects than protecting one individual, while keeping the court’s remedial focus on the parties to litigation.

Each method of expanding the litigation has limitations, drawbacks, and difficulties. Each is more complicated, more difficult to establish, and takes longer than allowing the court to avoid intermediate steps and issue universal injunctions in individual lawsuits. But the difficulty of satisfying the requirements of these procedures or the risk of delays does not warrant ignoring them or adopting a new procedure (universal injunctions) that obviates established litigation processes.

#### *1. Class Actions*

A court can certify an injunctive class under Federal Rule of Civil Procedure 23(b)(2), where “the party opposing the class” has “acted or refused to act on grounds that apply generally to the class,” so “that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.”<sup>209</sup> In pre-enforcement actions, government officials oppose the class, their actions in enforcing or threatening to enforce the challenged law, regulation, or policy injure

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<sup>208</sup> Frost, *supra* note \_\_\_\_, at m.44-45; *supra* notes \_\_\_\_ and accompanying text.

<sup>209</sup> Fed. R. Civ. P. 23(b)(2); Bray, *supra* note 11, at 464 n.278; Morley, *DeFacto Class Actions*, *supra* note **Error! Bookmark not defined.**, at 649–50; Morley, *Nationwide Injunctions*, *supra* note **Error! Bookmark not defined.**, at 624 n.49.

the class generally, and an injunction prohibiting enforcement against the class protects the class. A class-wide injunction is not a universal injunction. Rather, it protects the plaintiff, because the plaintiff is the class, which assumes an identity and legal status independent of the representative individual plaintiff.<sup>210</sup> The district court took this step in the litigation challenging hurdles to abortion access for detained undocumented unaccompanied pregnant minors, certifying a class of “all pregnant, unaccompanied immigrant minor children (UCs) who are or will be in the legal custody of the federal government” and granted a class-wide preliminary injunction.<sup>211</sup>

The Supreme Court enacted the current version of FRCP 23(b)(2) in 1966 to achieve two goals related to constitutional litigation.

The class mechanism ensures that courts can issue broad indivisible relief where appropriate. It responded to Massive Resistance to *Brown*, in which courts and school districts admitted named African-American plaintiffs into all-white schools, but without altering the basic structure or operation of the school system and without benefitting non-party African-American students.<sup>212</sup> By certifying a class of prospective African-American students wishing to attend integrated schools, the court could issue an injunction compelling broader structural changes, a remedy benefitting all class members as parties to the case.<sup>213</sup> This injunction is not universal, because it does not protect beyond the plaintiffs to the case. Rather, the rule expands who is a party before the court and therefore who is and may be properly protected by a particularized injunction.<sup>214</sup> The court may narrow the scope and effect of the injunction by narrowing the scope of the class.<sup>215</sup>

Rule 23(b)(2) also broadens the preclusive effect of the judgment, eliminating the asymmetrical or one-way preclusion plaguing universal injunctions in individual actions.<sup>216</sup> Prior to 1966, non-parties retained control over how an injunction might affect them.<sup>217</sup> If the court awarded relief, a non-party could opt-in to the class after the fact, reaping the benefits of the injunction. If the court did not award relief, the non-party could remain out of the case, unbound by preclusion and free to file a new lawsuit.<sup>218</sup> Under amended 23(b)(2), the identities of all potential class members must be clear and in the case when the court certifies the class, subjecting individual members to the full preclusive effect of the decision. Dissenting from

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<sup>210</sup> *Iowa v. Sosna*, 419 U.S. 393, 399 (1975).

<sup>211</sup> *Garza v. Hargan*, \_\_\_ F. Supp. 3d \_\_\_, 2018 WL 1567600, \*1 (D.D.C. 2018).

<sup>212</sup> Carroll, *supra* note **Error! Bookmark not defined.**, at 858–59; Marcus, *supra* note **Error! Bookmark not defined.**, at 680–81.

<sup>213</sup> Carroll, *supra* note **Error! Bookmark not defined.**, at 859–60; Marcus, *supra* note **Error! Bookmark not defined.**, at 693–95.

<sup>214</sup> *Sosna*, 419 U.S. at 399; Morley, *DeFacto Class Actions*, *supra* note **Error! Bookmark not defined.**, at 541.

<sup>215</sup> Morley, *Nationwide Injunctions*, *supra* note **Error! Bookmark not defined.**, at 650.

<sup>216</sup> *Id.* at 554.

<sup>217</sup> *Id.* at 535.

<sup>218</sup> *Id.* at 500–01; Bray, *supra* note \_\_\_, at 475–76; Marcus, *supra* note **Error! Bookmark not defined.**, at 672–74.

universality in *Chicago*, Judge Manion explained that the universal injunction bound the government from denying funds to any sanctuary jurisdiction, but if Chicago had lost, any other sanctuary jurisdiction could have filed its own action, unbound by the earlier judgment.<sup>219</sup> The class mechanism eliminates that “one-way ratchet,” by binding all municipalities in the class to the same extent the judgment binds the government.<sup>220</sup>

Allowing universal injunctions in non-class cases renders Rule 23(b)(2) superfluous.<sup>221</sup> If a single plaintiff bringing an individual suit can obtain an injunction barring enforcement of the challenged law as to everyone in the world, no plaintiff would pursue a class action. Not having to certify the class removes an issue the plaintiff must litigate. And the lone plaintiff (and her attorneys) can seek relief, knowing that others remain free to bring future actions if this one is unsuccessful in halting enforcement of the law.

The incentive to avoid Rule 23 grows because certifying classes can be unwieldy and difficult, especially for broad and disparate groups in which members may be affected by the same law in different ways.<sup>222</sup> Class certification is time-consuming,<sup>223</sup> while TROs and preliminary injunctions are issued in fast-moving, even emergent situations. Courts have cut back on aggregate litigation in recent years,<sup>224</sup> although Carroll criticizes retrenchment as a “myopic” application of fears of unwieldy aggregated-damages class actions to the different context of civil rights injunctions.<sup>225</sup> But the difficulty of litigating class actions does not justify circumventing that rule by allowing individual litigation to provide effective class-wide relief.<sup>226</sup> Moreover, there is no disconnect between the urgency of preliminary relief from threatened enforcement of a constitutionally defective law and the slowness of class certification, because courts can issue class-wide preliminary injunctive relief, prohibiting enforcement of the challenged law against the putative class, even before formally certifying the class.<sup>227</sup>

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<sup>219</sup> *Chicago v. Sessions*, \_\_\_ F.3d. \_\_\_, \_\_\_ (7th Cir. 2018) (Manion, J., concurring in the judgment in part and dissenting in part) (slip op. at 46.

<sup>220</sup> *Id.*

<sup>221</sup> Bray, *supra* note 11, at 464–65; Morley, *DeFacto Class Actions*, *supra* note **Error! Bookmark not defined.**, at 540.

<sup>222</sup> Bray, *supra* note 11, at 476; Carroll, *supra* note **Error! Bookmark not defined.**, at 846 n.8, 849–50; Frost, *supra* note \_\_\_, at m.18-20; Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56, 59–60 (2017).

<sup>223</sup> Frost, *supra* note \_\_\_, at m18-19.

<sup>224</sup> Carroll, *supra* note **Error! Bookmark not defined.**, at 846; Frost, *supra* note \_\_\_, at 19-20; Malveaux, *supra* note 222, at 59–60.

<sup>225</sup> Carroll, *supra* note **Error! Bookmark not defined.**, at 845, 850–51.

<sup>226</sup> Bray, *supra* note 11, at 477.

<sup>227</sup> *Rodriguez v. Providence Community Corr., Inc.*, 155 F.3d 758, 766-67 (M.D. Tenn. 2015); *Planned Parenthood of Kansas v. Mosier*, 2016 WL 3597457, \*26 (D. Kan. 2016), *aff'd in part and rev'd in part*, 882 F.3d 1205 (10th Cir. 2018); Newberg on Class Actions § 4.30.

While *Califano* approved a nationwide class (and thus an injunction protecting all members of the class),<sup>228</sup> Morley argues that such classes should be presumptively avoided. He prefers circuit-wide classes, which who is protected through class-wide relief, while leaving the government the opportunity to relitigate in other cases (whether individual or class actions) in other regional circuits.<sup>229</sup>

## 2. Associational Standing

The plaintiff in a constitutional case might be an entity suing on behalf of its members who are adversely affected by the challenged law, regulation, or policy.<sup>230</sup> An injunction issued in an associational standing case does not create or justify a universal injunction. The injunction runs in favor of the association and its members, carrying the same scope as the individuals suing on their own behalf.<sup>231</sup>

Association standing creates something like a practical class action of all association members. Having an entity sue on behalf of its members expands the scope of the injunction, because the entity may have thousands of members spread across the country or the world, all of whom enjoy the protections of the injunction by virtue of being members of the protected plaintiff-organization. An individual avails herself of the injunction's protections against future enforcement by showing membership in the association.

But the doctrine imposes additional requirements, which makes it less an obvious end-run around than purely universal injunctions in individual cases. Associational standing requires that members of the association would have had individual standing, that the interests protected in the action are “germane” to the association's purposes, and that the claim and injunctive remedy do not require individual participation.<sup>232</sup>

Associational standing has been present, but not resolved, in these immigration cases. One plaintiff in *IRAP* was the Middle East Studies Association, suing on behalf of members whose academic work would be limited by being unable to interact with students and scholars from the targeted nations.<sup>233</sup> The Fourth Circuit did not resolve the organization's standing, having found standing for a different plaintiff (an individual) sufficient to proceed with the action.<sup>234</sup> Assuming individuals can show membership in the Association, associational standing seems present—affected members would have standing and protecting the ability of its

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<sup>228</sup> 442 U.S. 682, 702-03 (1979).

<sup>229</sup> Morley, *Nationwide Injunctions*, *supra* note **Error! Bookmark not defined.**, at 650–53.

<sup>230</sup> Morley, *DeFacto Class Actions*, *supra* note **Error! Bookmark not defined.**, at 542; *see, e.g.*, *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 342–43 (1977); *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

<sup>231</sup> Morley, *DeFacto Class Actions*, *supra* note **Error! Bookmark not defined.**, at 539, 544–45.

<sup>232</sup> *Hunt*, 432 U.S. at 343.

<sup>233</sup> *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 578 (4th Cir. 2017) (*IRAP II*).

<sup>234</sup> *Id.* at 586.



members to interact with students and scholars is germane to that organization's purposes.

### 3. *Third-Party Standing*

An individual plaintiff, whether a person or organization, may assert third-party standing.<sup>235</sup> The person or entity claims an injury from defendant's conduct and sues to vindicate the constitutional rights of other persons with whom the plaintiff has a business, professional, or other close relationship and where it is not feasible for individual right-holders to sue on their own behalf.<sup>236</sup> Permissible relationships for third-party standing include businesses suing on behalf of potential customers,<sup>237</sup> medical professionals suing on behalf of patients,<sup>238</sup> and lawyers and advocates suing on behalf of clients.<sup>239</sup> Hawaii, Washington, and Minnesota proceeded on third-party standing on behalf of students, teachers, and scholars who would study and work at universities there, but were prevented from doing so by the travel order.<sup>240</sup> IRAP and HIAS sued on behalf of the refugees who they would help resettle but who were barred by the travel order from entering the United States.<sup>241</sup>

An injunction granted to one plaintiff asserting third-party standing may produce an expansive injunction in several respects. The scope of the injunction varies with the scope of the plaintiff's base of clients or customers. It may be difficult to determine the plaintiff's clients or customers; Hawaii argued that a universal injunction was appropriate because it could not identify the individuals who might apply to work or study at its universities as to come within the injunction's protections against enforcement of the travel order.<sup>242</sup> The injunction becomes universal because Every refugee who might be subject to enforcement of the challenged travel ban is a potential IRAP client; every student and scholar might be a potential student or faculty member at a Hawaiian university.

This uncertainty affects judicial enforcement of an existing injunction, not its scope when entered. The injunction could be written to protect the plaintiff (IRAP or Hawaii), then leave to later enforcement efforts whether the person targeted for future enforcement of the challenged law is connected to the named plaintiff and thus protected by the injunction. In other words, if the government attempts to enforce the travel ban against an individual, Hawaii can argue to the court that the

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<sup>235</sup> *Kowalski v. Tesmer*, 543 U.S. 125, 129–30 (2004).

<sup>236</sup> *Id.* at 130; *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 720 (1990).

<sup>237</sup> *Craig v. Boren*, 429 U.S. 190, 195 (1976).

<sup>238</sup> *Griswold v. Connecticut*, 381 U.S. 479, 480–81 (1965).

<sup>239</sup> *Triplett*, 494 U.S. at 720; *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989); *but see Kowalski*, 543 U.S. at 131–33.

<sup>240</sup> *Hawaii v. Trump*, 859 F.3d 741, 789 (9th Cir. 2017) (*Hawaii I*); *Washington v. Trump*, 847 F.3d 1151, 1159 (9th Cir. 2017).

<sup>241</sup> *International Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 548–49 (D. Md. 2017) (*IRAP III*).

<sup>242</sup> *Hawaii v. Trump* 878 F.3d 662, 701 (9th Cir. 2017) (*Hawaii III*).

individual is a potential student protected by the injunction and that enforcement of the travel ban against her is inconsistent with the injunction. But it is unnecessary for the injunction protecting Hawaii to also protect Washington, Minnesota, or another state and the students and scholars whom those states wish to bring to their universities. IRAP can do the same as to a refugee denied entry, but it is unnecessary for the injunction protecting IRAP to also protect other refugee-resettlement organizations and their potential clients.

The idea of “bona fide relationship” performs some analytical work here. In granting certiorari as to the injunction prohibiting enforcement of the second travel order, the Supreme Court stayed the injunction except as to “foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States.”<sup>243</sup> The Ninth Circuit applied the same standard to narrow the injunction barring enforcement of the third EO, rejecting a “worldwide” injunction as to all nationals of the affected countries.<sup>244</sup> The Fourth Circuit did the same as to the injunction protecting IRAP and its potential refugee clients.<sup>245</sup>

Where a court enjoins enforcement of the challenged law as to an entity asserting third-party standing, it can demand a “bona fide relationship” between that plaintiff and any rights-holders seeking the protections of the injunction. Enforcing an injunction protecting IRAP or Hawaii, the court overseeing the injunction must decide whether a foreign national subject to possible enforcement of the travel ban has a “credible claim of a bona fide relationship” specifically with IRAP or with Hawaii or another plaintiff. If she has such a relationship, the existing injunction protects her (as someone on whose behalf the plaintiffs had sued) and enforcement of the EO is prohibited. If she does not have such a relationship, the injunction does not protect her and the federal government can enforce the travel ban to bar person from entering the country, subject to a new or expanded injunction protecting her or an organization with which she has that credible claim of a bona fide relationship.

#### *4. Incidental Benefits and Spillover Effects*

An injunction’s “who” may expand in practice when relief accorded to the named plaintiffs in an individual action incidentally inures to the benefits of other persons similarly situated. Maureen Carroll describes this as a “system-wide” remedy that provides relief as broad as the challenged government policy or practice.<sup>246</sup> Morley describes this in terms of indivisibility of rights and remedies.<sup>247</sup> Divisible rights belong to the plaintiffs alone and can be remedied by a limited

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<sup>243</sup> *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017).

<sup>244</sup> *Hawaii III*, 878 F.3d at 701.

<sup>245</sup> *IRAP IV*, 883 F.3d 233, 272 (4th Cir. 2018).

<sup>246</sup> Carroll, *supra* note **Error! Bookmark not defined.**, at 2030.

<sup>247</sup> Morley, *DeFacto Class Actions*, *supra* note **Error! Bookmark not defined.**, at 492.

injunction protecting the plaintiffs alone.<sup>248</sup> With indivisible rights, the rights of one person cannot be separated from the rights of others, thus a remedy benefitting one person must benefit other people similarly situated.<sup>249</sup>

One example might be school desegregation—an individual African-American plaintiff having shown a constitutional violation of being prevented to attend a white public school, the court might order integration of the public schools by requiring schools to reform their admission policies for all African-American students.<sup>250</sup> But history shows that such system-wide relief is not inherent to school desegregation—courts enjoined school officials to admit individuals without ordering system-wide relief, prompting the expansion of injunctive class actions.<sup>251</sup>

A better example involves claims challenging prison conditions. Protecting one plaintiff prisoner by ordering government officials to remove raw sewage from the prison floors benefits other prisoners, since the prison cannot clean sewage as to one prisoner and not others; eliminating overcrowding for one prisoner effectively eliminates overcrowding for other prisoners held in less-crowded prisons. Another example is legislative redistricting—an injunction remedying a constitutionally invalid district will order the government to draw a new district, a remedy benefitting all voters whose rights were infringed by the previous, constitutionally infirm district.<sup>252</sup> A final example involves challenges to public religious displays—the injunction protects one plaintiff from the offense of having to come across a display of the Ten Commandments in the courthouse by ordering government to remove the display, benefitting non-parties who also might be offended, since government cannot remove the display for one person and not others.

Laycock offers a related situation in which government officials cannot distinguish plaintiffs from non-plaintiffs. The court enjoined overly aggressive practices in enforcing a state motorcycle helmet law.<sup>253</sup> An individual patrol officer could not know whether the motorcyclist against whom he was enforcing the law had been a plaintiff, was protected by the injunction, and placed the officer in danger of violating the court order; the court therefore properly enjoined the forbidden practices as to all motorcyclists in the state.<sup>254</sup> But this seems a rare situation, one that could be addressed by establishing a 23(b)(2) class of motorcyclists in the state and obtaining a class-wide injunction.

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<sup>248</sup> *Id.* at 524–25.

<sup>249</sup> Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843, 846 (2016); David Marcus, *Flawed But Noble: Desegregation Litigation and its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 667 (2011); Morley, *Nationwide Injunctions*, *supra* note **Error! Bookmark not defined.**, at 616–17; Morley, *DeFacto Class Actions*, *supra* note **Error! Bookmark not defined.**, at 524.

<sup>250</sup> Morley, *Nationwide Injunctions*, *supra* note **Error! Bookmark not defined.**, at 616.

<sup>251</sup> Carroll, *supra* note **Error! Bookmark not defined.**, at 858–59; Marcus, *supra* note 124, at 680–81. See *supra* notes 172, 173, 174 and accompanying text.

<sup>252</sup> Morley, *Nationwide Injunctions*, *supra* note **Error! Bookmark not defined.**, at 616.

<sup>253</sup> Laycock, *supra* note 117, at 276 (discussing *Easyriders Freedom F.I.G.H.T v. Hannigan*, 92 F.3d 1486 (9th Cir. 1996)).

<sup>254</sup> *Id.*

One point of confusion is between these incidental spillover benefits to non-parties and considerations of public interest that are required in the injunction analysis. Frost argues that if the court must account for concerns of non-party members of the public in deciding whether to grant an injunction, the court also can protect non-party members of the public in the injunction.<sup>255</sup> In deciding whether to issue an injunction, the court considers the public interest and balances the equities.<sup>256</sup> This analysis is concerned with potential conflicts between the injunction protecting the named party and the broader public, with the goal of balancing the interests of the individual plaintiff and against the possible competing interests of the public at large. But accounting for countervailing public interests in deciding whether to issue the injunction is different from protecting the public at large by mandating spillover in the injunction itself.

Frost offers an example of a challenge to a voter-ID law, in which a non-party may believe that the absence of a voter-ID requirement abridges her right to vote, but would lack Article III standing to bring such a claim.<sup>257</sup> But the injunction analysis accounts for the competing concerns Frost raises. In balancing the equities and determining whether an injunction prohibiting enforcement of a voter-ID law is in the public interest, the district court accounts for the negative externalities upon voters who would be protected by the ID law (the people the government sought to protect by enacting the law in the first instance). That is different from extending the benefits of the injunction to everyone similarly situated (rather than adverse to) the plaintiff.

Courts also should not assume that only a broad injunction is sufficient. Court may order general remedies—ordering defendant officials to “remedy constitutionally deficient prison conditions” or “cease enforcing the challenged law”—and leave to officials the discretion of how to achieve that obligation. If the government believes a narrower change sufficient to satisfy the injunction, it can pursue that narrower option. The only requirement is that any remedy protect the named plaintiffs. And no one can complain that the injunction does not protect others.

Granting incidental or spillover benefits to non-parties does not make the injunction universal or expand the “who” the injunction protects. Unlike the named plaintiff, the non-party cannot enforce the injunction if the government acts inconsistent with the court’s order and the government cannot be held in contempt for its actions as to non-parties. If a non-party believes government officials have failed to make sufficient progress in redressing the constitutional violations, she cannot move the court to act and push the defendants. Only the plaintiff can enforce the injunction, and if the party is satisfied with the pace of the defendant’s compliance, a non-party can do nothing about that. Others may benefit from the litigation decisions the plaintiff makes, but the decisions are the plaintiff’s to make. To gain direct protection and the right to ask the court to enforce, non-parties must

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<sup>255</sup> Frost, *supra* note \_\_\_\_, at m.31.

<sup>256</sup> Winter v. NRDC, 555 U.S. 7, 20 (2008).

<sup>257</sup> Frost, *supra* note \_\_\_\_, at m.31.

obtain their own injunctions (using the first decision for some precedential value) prohibiting enforcement of the challenged laws, regulations, or policies as to them.

##### 5. *Voluntary Compliance as to Non-Parties*

Government officials, enjoined from enforcing the challenged law as to the named plaintiffs, may go further than the injunction and cease enforcing the law against other persons.<sup>258</sup> They may do so for many reasons—convenience, agreement with the decision, or belief that the precedential force of the decision ensures that later courts will agree that the law is constitutionally invalid and enjoin or reject future enforcement against a different group of rights-holders.<sup>259</sup> State and local officials may do so out of cost concerns—a defeat in future constitutional litigation arising from actual or threatened enforcement against others may result in awards of attorney’s fees.<sup>260</sup> This represents the other sphere for law declaration<sup>261</sup>--the declaration of law in the course of issuing the injunction may prompt government officials to cease all enforcement efforts against all persons, even if the injunction does not compel them to do so.

Voluntary compliance played a substantial role in marriage-equality litigation, before and after the Supreme Court decided the constitutional question. Having been enjoined from enforcing same-sex-marriage bans and having been compelled to issue marriage licenses to plaintiff couples, officials in many states went further, voluntarily issuing marriage licenses to all same-sex couples.<sup>262</sup> That has not happened with respect to immigration and immigration-adjacent matters, reflecting the Trump Administration’s understandable desire to fight these to the end, as well as the stages in which much these cases stand. Government officials are not required to comply beyond the named plaintiffs, and executive officials do not violate the Constitution or their oaths by refusing to voluntarily comply or by waiting for new injunctions.<sup>263</sup>

What constitute “the end” of this process is unclear. The popular perception is that the end is a Supreme Court determination of the constitutional validity of the law; once the Court speaks to the validity of the travel ban or the sanctuary-city regulations, the government will cease all enforcement against all persons. But, as noted above, the judgment of the Supreme Court in a case arising from an individual injunction (as opposed to a class injunction or an injunction protecting a broad group of an association’s members or clients) does not compel this.<sup>264</sup> Assuming some form of departmentalism in which judicial understandings of the Constitution do not preempt the popular branches from adopting their own

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<sup>258</sup> Blackman & Wasserman, *supra* note **Error! Bookmark not defined.**, at 254–55.

<sup>259</sup> *Id.* at 256–60.

<sup>260</sup> 42 U.S.C. § 1988(b); Blackman & Wasserman, *supra* note \_\_\_\_, at 258–59, 265.

<sup>261</sup> Frost, *supra* note \_\_\_\_, at 44–45; *supra* notes \_\_\_\_ and accompanying text.

<sup>262</sup> *Id.* at 262–67; Blackman & Wasserman, *supra* note **Error! Bookmark not defined.**, at 262–67.

<sup>263</sup> Blackman & Wasserman, *supra* note **Error! Bookmark not defined.**, at 267–69.

<sup>264</sup> *Supra* notes \_\_\_\_ and accompanying text.

understandings of the Constitution,<sup>265</sup> the executive could rely on his constitutional conclusions that the law remains valid and enforceable against others, at least until a new or expanded injunction prohibits enforcement against that next group of rights-holders. In following a Supreme Court decision and declining to enforce the challenged law as to non-plaintiffs, the executive engages in a form of voluntary compliance.

Universal injunctions reflect lower-court impatience with the process of precedent and voluntarily compliance, issued on the belief that non-parties should be as protected as parties from enforcement of the challenged law.<sup>266</sup> But there is no obvious reason for that, at least under the traditional conception of constitutional defects being about enforcement against a target rather than the enactment or existence of the law itself. Courts granting universal injunctions assume the government will not question the scope of the injunction because officials voluntarily comply as to all non-parties similarly situated.<sup>267</sup> Plaintiffs remain protected against enforcement by the judgment, regardless of what else government officials do as to other rights-holders. Any value or need to protect non-parties against enforcement of constitutionally suspect laws<sup>268</sup> derives from government's voluntary decisions not to enforce. Universal injunctions, overbroad as to "who," deprive executive officials of that choice and relieve rights-holders of the obligation to take the additional step of commencing new litigation.

### *C. Trying, and Failing, to Defend Universal Injunctions*

Despite the arguments described above, universal injunctions are becoming common and routine.<sup>269</sup> During argument in *Trump v. Hawaii*, Justice Gorsuch questioned Hawaii's counsel about "this troubling rise of this nationwide injunction, cosmic injunction . . . not limited to relief for the parties at issue or even a class action." And counsel admitted to sharing Gorsuch's impulse about the overbroad remedy.<sup>270</sup>

Courts in these immigration and immigration-adjacent actions have been unhesitant and unrepentant in issuing such injunctions. And they have done so with little or no explanation or justification, beyond listing singular reasons. Only in *Chicago v. Sessions*, where the district court denied to stay a universal injunction<sup>271</sup>

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<sup>265</sup> Blackman & Wasserman, *supra* note **Error! Bookmark not defined.**, at 252–53; Gary Lawson and Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1269–70 (1996); Walsh, *supra* note 205, at 1715; Wasserman, *supra* note **Error! Bookmark not defined.**, at 7–8.

<sup>266</sup> Frost, *supra* note \_\_\_\_, at m.17-18.

<sup>267</sup> LAYCOCK, *supra* note 117, at 275.

<sup>268</sup> Frost, *supra* note \_\_\_\_, at m.17-18.

<sup>269</sup> Bray, *supra* note 11, at 444–45.

<sup>270</sup> Oral argument in *Trump v. Hawaii* at 72-73.

<sup>271</sup> *Chicago v. Sessions*, 2017 WL 4572208, at \*4 (N.D. Ill. 2017).

and the court of appeals affirmed the universal injunction,<sup>272</sup> did the courts offer detailed support for the practice. No justification withstands close scrutiny. All either fail to support the universal injunction or prove too much, making universality the default in all challenges to the validity of all federal laws, regulations, and policies, despite insistence to the contrary.

This part considers, and rejects, the reasons offered by courts in these classes of immigration and by commentators supporting the practice.

### 1. *Supreme Court Approval*

The Supreme Court approved the practice of universal injunctions in concept, at least implicitly. The Court affirmed the Fifth Circuit by an evenly divided Court in *Texas v. United States*, including the universal scope of the injunction.<sup>273</sup> In a *per curiam* opinion granting certiorari and staying the universal preliminary injunctions against the second travel ban, the Court allowed the injunction to continue to protect the plaintiffs “and those similarly situated.”<sup>274</sup> Both appear to accept universality (as narrowed in some respects) and protection for non-parties. The district court in *Chicago* cited the Fourth Circuit in *IRAP II* (on the second travel ban) in supporting the universal injunction against the sanctuary-city funding regulations.<sup>275</sup>

There are reasons to doubt the force of these decisions. At a minimum, they do not resolve the issue.

An affirmance by an evenly divided Court carries limited precedential force, depriving *Texas* of meaningful authority for the practice.<sup>276</sup> *Trump v. IRAP* was a *per curiam* opinion resolving a petition for certiorari and motion for stay pending appeal, without full merits briefing as to the scope of the injunction and without explanation or analysis of whether an injunction could or should protect beyond the plaintiffs. The Court never reached the merits of the constitutional challenge, dismissing the appeal and vacating the injunction as moot when the ban lapsed by its own terms in September 2017, meaning the Court never had an opportunity to consider the scope of the injunction on its merits.<sup>277</sup> If the court did approve of universal injunctions in these cases, it did so without considering or explaining why.

And the Court was not unanimous on the point. Justice Thomas dissented in part for himself and Justices Alito and Gorsuch. Citing *Califano*'s complete-relief principle and emphasizing that relief should run “to the plaintiffs,” Thomas argued that “a court's role is ‘to provide relief’ only ‘to claimants ... who have suffered, or

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<sup>272</sup> *Chicago v. Sessions*, \_\_\_ F.3d \_\_\_ (7th Cir. 2018).

<sup>273</sup> *United States v. Texas*, 136 S. Ct. 2271, 2272 (2016).

<sup>274</sup> *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017).

<sup>275</sup> *Chicago v. Sessions*, 2017 WL 4572208 at \*2.

<sup>276</sup> *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 n.7 (1987); *Neil v. Biggers*, 409 U.S. 188, 192 (1972).

<sup>277</sup> *Trump v. Hawaii*, 138 S. Ct. 377, 377 (2017).

will imminently suffer, actual harm.”<sup>278</sup> Courts act to protect parties from future injuries from enforcement of challenged laws and regulations, not to issue orders benefitting the universe of affected non-parties.

## 2. *Equal Protection and the Rule of Law*

Courts insist that particularized, plaintiff-only non-universal injunctions raise equal protection and rule-of-law problems, by prohibiting enforcement of federal law against some persons or entities (parties to the suit and the injunction) while permitting enforcement of the same law against other people or entities (non-parties not protected by the injunction). The district court in *Chicago* explained that “[a]ll similarly-situated persons are entitled to similar outcomes under the law, and as a corollary, an injunction that results in unequal treatment of litigants appears arbitrary.”<sup>279</sup> Leaving the federal government free to administer the funding regulations, which were declared invalid as to Chicago, against other states and cities “flies in the face of the rule of law and the role of the courts to ensure the rule of law is enforced.”<sup>280</sup> The Fourth Circuit framed this in terms of the “message” of the law—allowing continued enforcement of the travel ban against similarly situated non-plaintiffs sends the “message” that non-plaintiffs “are outsiders, not full members of the political community.”<sup>281</sup>

The short answer to the equal protection argument is that parties and non-parties are not similarly situated and so are not entitled to similar outcomes. “Because the plaintiff is the one who took the initiative and sued, it is the plaintiff who is protected. Others can receive the same protection if they take the same action by bringing their own suits (invoking the authority of the earlier decision).”<sup>282</sup> Stated differently, “X (whether rich or poor) had to sue the government to win, and now Y (whether rich or poor) also has to sue the government to win.”<sup>283</sup> Were Y to sue the government and obtain her own injunction prohibiting enforcement of the challenged law against her, Y and X become similarly situated—and any differential treatment disappears, because both are protected by an injunction against future enforcement of the challenged law. Concretely, if Chicago obtains an injunction protecting its funding but New York City does not, there is no equal protection problem in stripping New York City of funds but not Chicago, because the cities are not similarly situated. When New

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<sup>278</sup> *Trump v. IRAP*, 137 S. Ct. 2080, 2090 (2017) (Thomas, J., concurring in part and dissenting in part).

<sup>279</sup> *Chicago v. Sessions*, 2017 WL 4572208 at \*4.

<sup>280</sup> *Id.*

<sup>281</sup> *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 605(4th Cir. 2017) (*IRAP II*).

<sup>282</sup> Bray, *supra* note 11, at 474.

<sup>283</sup> Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 54 (1993); see also Morley, *DeFacto Class Actions*, *supra* note **Error! Bookmark not defined.**, at 548–49.



York City obtains its own injunction protecting its funding, the cities become similarly situated and treated the same—neither can be stripped of its funding.

The longer answer is that the equal-protection argument misapprehends judicial review, the structure of the federal courts, and the nature of constitutional judicial decisionmaking.

Constitutional review has been delegated, at least in part,<sup>284</sup> to federal courts, which resolve constitutional questions in the course of resolving concrete legal disputes between discrete parties.<sup>285</sup> Federal-court decisionmaking is distributed among three levels of a hierarchical structure. The two lower tiers are geographically dispersed and its precedential effect is geographically limited—a court of appeals creates binding precedent for itself and all district courts within its circuit, while a district court creates persuasive authority but has no binding effect, even within its district.<sup>286</sup> Only the Supreme Court at the top of the hierarchy has nationwide precedential reach, but its original jurisdiction is limited.<sup>287</sup>

Temporary disuniformity of federal law is inherent in multiple federal courts performing constitutional review in discrete factual situations.<sup>288</sup> It constitutes a feature rather than a bug in a system that relies on “percolation” of issues in lower courts. Multiple district and circuit judges have the opportunity to express their views. And the process achieves a balanced result, either through lower-court consensus that obviates Supreme Court resolution or lower-court disagreement that gives the Supreme Court a fuller legal and factual record with which to work when it ultimately resolves the legal question.<sup>289</sup> Either approach yields ultimate uniformity of federal law, albeit at the cost of temporary disuniformity as multiple cases in multiple courts wend through the judicial process in mu.<sup>290</sup>

Universal injunctions short-circuit that percolation process by allowing one district court (with affirmance by one circuit panel) to halt all enforcement against all persons, as a matter of a single judgment. This allows one lower court to make

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<sup>284</sup> Cf. Blackman & Wasserman, *supra* note **Error! Bookmark not defined.**, at 252–53; Lawson and Moore, *supra* note \_\_\_\_, 1269–70; Walsh, *supra* note 205, at 1715; Wasserman, *supra* note **Error! Bookmark not defined.**, at 7–8.

<sup>285</sup> Bray, *supra* note 11, at 461–62; Frost, *supra* note \_\_\_\_, at m 44-46; *supra* notes \_\_ and accompanying text.

<sup>286</sup> Bray, *supra* note \_\_\_\_, at 465; Fallon, *As-Applied and Facial Challenges*, *supra* note 205, at 1339–40; Fallon, *Fact and Fiction*, *supra* note 205, at 923 n.31.

<sup>287</sup> U.S. Const. art. II, § 1, cl.2; 28 U.S.C. § 1251 (2012); *see generally* Marbury v. Madison, 5 U.S. 137, 138 (1803). The state plaintiffs in *Hawaii v. Trump*, *Washington v. Trump*, and *Texas v. United States* could have framed the cases to create a controversy between the United States and a state for original jurisdiction under § 1251(b)(2). But (b)(2) jurisdiction is concurrent; district courts had jurisdiction over the actions because the states’ claims arose under federal law. *See* 28 U.S.C. § 1331 (2012). Supreme Court practice has been to decline original jurisdiction over such cases, pushing the state plaintiffs to district court and the ordinary review process.

<sup>288</sup> Bray, *supra* note 11, at 461; Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1605–06 (2008).

<sup>289</sup> Bray, *supra* note 11, at 46.

<sup>290</sup> *Id.*

law for the nation.<sup>291</sup> This compels the Supreme Court to resolve the matter on review of a single case rather than a broader record of multiple lower-court analyses. More problematically, some faster-moving immigration cases been resolved at the stage of a preliminary-injunction (or a temporary restraining order treated as a preliminary injunction).<sup>292</sup> Because orders granting preliminary injunctions are immediately and automatically appealable,<sup>293</sup> cases move through the system, and to the Supreme Court, in a preliminary posture and without a full record.<sup>294</sup> When an evenly divided eight-Justice Court could not agree in *Texas*, the Fifth Circuit decision became governing law for all persons in all places, never having gotten beyond the preliminary-injunction stage.

Ultimate uniformity of federal law remains distinct from the universal “who” of a single injunction. A uniform determination that a law, regulation, or policy is constitutionally invalid produces multiple injunctions barring enforcement as to the named plaintiffs, but not non-parties. The final decision serves as binding precedent, establishing that any future enforcement effort against unprotected non-parties will fail, given binding precedent establishing the invalidity of the law to be enforced.<sup>295</sup> The result is uniformity in litigation outcomes—the challenged law cannot be enforced—through multiple court orders.

Universal injunctions also become subject to demagogic criticism from elected officials displeased with a ruling, as when Attorney General Jeff Sessions decried that one “judge sitting on an island in the Pacific can issue an order that stops the president of the United States” from enforcing federal immigration law.<sup>296</sup> Sessions would have lobbed the same criticism at a particularized injunction limited to Hawaii and to the plaintiffs in the case. And he would have lobbed the same criticism at a similar decision from a nine-justice Supreme Court affirming the injunction and the constitutional defects in the law. But giving the injunction broader effect than it should have lends force to criticisms of overreaching federal judges.

Criticizing temporary disuniformity on rule-of-law grounds also fails to give content to the concept of rule of law. It cannot begin and end with uniformity, but must account for additional ideas—including equitable, constitutional, and practical limitations on the scope of courts’ remedial authority, limitations on the

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<sup>291</sup> *Chicago v. Sessions*, \_\_\_ F.3d \_\_\_, \_\_\_ (7th Cir. 2018) (Manion, J., concurring in the judgment in part and concurring in the judgment) (slip op. at 44).

<sup>292</sup> *IRAP IV*, 883 F.3d 233, 255 (4th Cir. 2018); *Hawaii v. Trump*, 878 F.3d 662, 672 (9th Cir. 2017); *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 936-37 (N.D. Ill. 2017).

<sup>293</sup> 28 U.S.C. § 1292(a)(1).

<sup>294</sup> *Id.* at 462; Frost, *supra* note 288, at 1575–76, 1578–79.

<sup>295</sup> Rule-of-law values do not require the government to cease enforcement against everyone in the face of Supreme Court precedent declaring the challenged law constitutionally invalid. *See* Blackman & Wasserman, *supra* note **Error! Bookmark not defined.**, at 253–54. I leave that issue aside for present purposes, although plan to return to it in future work.

<sup>296</sup> Charlie Savage, *Jeff Sessions Dismisses Hawaii as “an Island in the Pacific,”* N.Y. TIMES (Apr. 20, 2017), [https://www.nytimes.com/2017/04/20/us/politics/jeff-sessions-judge-hawaii-pacific-island.html?\\_r=0](https://www.nytimes.com/2017/04/20/us/politics/jeff-sessions-judge-hawaii-pacific-island.html?_r=0).

precedential effect of decisions from lower courts, courts' positions in the judicial hierarchy,<sup>297</sup> and other problems arising from universal injunctions. The rule of law also includes the power of the executive to engage in and act on its constitutional interpretation, including enforcing laws it believes constitutional when not otherwise prohibited from doing so by a properly scoped, non-universal injunction.<sup>298</sup> An injunction that undercuts presidential power undercuts a component of the rule of law.

### 3. *Uniform Immigration Law*

The Constitution empowers Congress to “establish a uniform Rule of Naturalization.”<sup>299</sup> The Fifth Circuit justified the universal injunction in *Texas* because an injunction limited to the 26 plaintiff states would result in “[p]artial implementation” of DAPA, contrary to the Framers’ intent in Article I and Congress’ intent in enacting current immigration statutes.<sup>300</sup> The Fourth Circuit adopted that idea in affirming universal injunctions against the second and third travel bans,<sup>301</sup> as did district courts enjoining DACA rescission.<sup>302</sup>

The uniformity argument fails in several respects. The Fifth Circuit relied on language from *Arizona v. United States*<sup>303</sup> demanding uniformity and unification of the legislative regime governing immigration. But *Arizona* involved federal preemption of a state’s laws implicating the immigration system (the challenged state law made certain immigration violations state crimes and authorized local law enforcement to stop and search persons suspected of being unlawfully present<sup>304</sup>); the preemption power arose from the need to ensure uniformity and to prevent state law from creating federal disuniformity.<sup>305</sup> Uniformity-through-preemption was inapplicable to the situation in *Texas*, in which federal regulation provided the sole statutory rule (DAPA), but courts were in the midst of ruling on individual challenges to the validity of enforcing that rule as to plaintiffs.

The Fifth Circuit’s take on the uniformity requirement would render ordinary litigation impossible for constitutional challenges to immigration laws, because even temporary disuniformity created by lower-court splits and particularized, non-universal injunctions would become constitutionally unacceptable. Only the Supreme Court could decide constitutional challenges to immigration laws, but it

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<sup>297</sup> *Chicago*, \_\_\_ F.3d at \_\_\_ (slip op. at 44).

<sup>298</sup> Blackman & Wasserman, *supra* note **Error! Bookmark not defined.**, at 252–54; Walsh, *supra* note 205, at 1728; Wasserman, *supra* note **Error! Bookmark not defined.**, at 8.

<sup>299</sup> U.S. CONST. art. I, § 8, cl.4.

<sup>300</sup> *Texas v. United States*, 809 F.3d 134, 188 (2015).

<sup>301</sup> *IRAP IV*, 883 F.3d 233, 272-73 (4th Cir. 2018) (en banc); Int’l Refugee Assistance Project v. Trump, 857 F.3d 554, 605 (4th Cir. 2017) (*IRAP II*).

<sup>302</sup> *Regents of Univ. of California v. United States Dep’t. of Homeland Security*, 279 F. Supp. 3d 1011, 1049 (N.D. Cal. 2018); *Batalla Vidal v. Nielson*, 279 F. Supp. 3d 401, 438 (E.D.N.Y. 2018).

<sup>303</sup> *Arizona v. United States*, 567 U.S. 387, 392 (2012).

<sup>304</sup> *Id.* at 393–94.

<sup>305</sup> *Id.* at 394–95.

would have to do so with no opportunity for percolation in the lower courts and limited original jurisdiction. And, in any event, a single Supreme Court decision does not mean a universal injunction, only binding precedent.<sup>306</sup>

A second part of the immigration-law-is-unique argument rests on geographic dispersal of people affected by immigration laws. *IRAP* was brought by six individuals scattered throughout the United States, two immigrant-resettlement organizations on behalf of clients dispersed in the targeted countries, and an academic organization on behalf of its members dispersed around the world.<sup>307</sup> Hawaii sued on behalf of many unknown and dispersed students and scholars the state hoped to bring to its universities.<sup>308</sup> This geographic dispersal necessitated the broad injunction. This continues conflating who and where—the injunctions should protect the plaintiffs (including organizations’ members and clients) wherever they are in the world, but should not protect anyone other than those plaintiffs and their members and clients.

The Fifth Circuit in *Texas* also argued that a “geographically-limited injunction would be ineffective because DAPA beneficiaries would be free to move among states.”<sup>309</sup> Texas established standing based on its program of issuing state-subsidized drivers’ licenses to all persons lawfully within the United States, which would include DAPA beneficiaries able to show lawful presence or employment authorization; Texas would be required to spend millions of dollars subsidizing licenses for people in the United States under an unconstitutional executive policy.<sup>310</sup> Texas therefore could not obtain complete relief from an injunction barring enforcement of DAPA only in Texas, as by prohibiting the grant of lawful status to otherwise-unlawfully present persons in Texas. If the United States could continue to defer removal and accord lawful presence or work authorization to an individual in a non-plaintiff state (such as Illinois or New York), that individual could move to Texas and apply for a subsidized license. Only by eliminating all enforcement of DAPA in all states could a court protect Texas against that monetary injury.

But a universal injunction was not the only way for Texas to avoid that injury. The narrowest effective injunction would have excused Texas from issuing drivers’ licenses to any DAPA recipients, whether in Texas or traveling to Texas from elsewhere; that injunction would have remedied the precise injury that Texas used to get to federal court.<sup>311</sup> A broader, although still non-universal, effective injunction would have prohibited the federal government from deferring removal or according benefits to individuals present in Texas and would have ordered that Texas need not grant nor subsidize drivers’ licenses or other benefits for persons

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<sup>306</sup> *Supra* notes \_\_\_ and accompanying text.

<sup>307</sup> *IRAP II*, 857 F.3d at 577.

<sup>308</sup> *Hawaii v. Trump* 878 F.3d 662, 699 (9th Cir. 2017) (*Hawaii III*).

<sup>309</sup> *Texas v. United States*, 809 F.3d 134, 188 (2015).

<sup>310</sup> *Id.* at 152–53.

<sup>311</sup> Thanks David Marcus for suggesting that the logic behind particularized non-universal injunctions suggests injunctions that remedy the precise injury giving the plaintiff standing, but no further.

claiming the right to the benefit under DAPA, whether present in Texas at the time of the injunction or later moving there. There was no need for the court to enjoin the federal government from exercising DAPA discretion, and according DAPA benefits, outside the twenty-six objecting states.

Counsel for Hawaii in the travel-ban litigation urged the Supreme Court not to resolve scope-of-the-injunction in that case because of its immigration context and congressional power over immigration.<sup>312</sup>

#### 4. *Duplicative and Inconsistent Litigation*

Faced with the prospect of being unable to issue universal injunctions and only being able to protect named plaintiffs, courts have appeared at a loss. The district courts in the sanctuary-cities cases emphasized that other jurisdictions would face the same legal risk of loss of funding and that the federal government claimed the same enforcement authority as to all states, counties, and municipalities receiving federal funds.<sup>313</sup> This was a problem that only a universal injunction could resolve.

Two solutions are obvious. Plaintiffs can file their constitutional cases as Rule 23(b)(2) injunctive class actions and obtain injunctions protecting the class of persons or entities everywhere in the United States, all of whom are parties.<sup>314</sup> Or every individual or organization (or groups of organizations) must file separate lawsuits and obtain separate injunctions barring enforcement of the challenged laws as to them or their members and clients. The earlier injunction and opinion provides some precedential value in the latter actions, depending on how far the first case went in the judicial hierarchy. And the multiple lawsuits allow the percolation on which good judicial decisionmaking depends.

Federal courts have come to regard the latter solution as inefficient and insufficient, the race to issue universal injunctions reflecting impatience with the ordinary judicial processes of particularized judgments, precedent, and percolation of legal issues.<sup>315</sup> The district court in *Chicago* insisted that because 37 counties and cities filed an amicus brief, judicial economy counseled against compelling each to file a separate lawsuit to have a court resolve the same legal issues resolved in that case.<sup>316</sup> The alternative risked a flood of duplicative litigation, as every city or country subject to the funding restrictions must obtain its own injunction.<sup>317</sup> The *Chicago* court also feared the risk of inconsistent judgments, with one court declaring the law invalid and enjoining enforcement as to some cities and another court declaring the law valid and allowing enforcement as to other persons. The

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<sup>312</sup> **Oral Argument in Trump v. Hawaii at 73-74.**

<sup>313</sup> *Chicago v. Sessions*, 2017 WL 4572208, at \*3 (N.D. Ill. 2017); *Chicago v. Sessions*, 264 F. Supp. 3d 933, 951–52 (N.D. Ill. 2017); *Santa Clara v. Trump*, 250 F. Supp. 3d 497, 539 (N.D. Cal. 2017).

<sup>314</sup> *Supra* notes 259, **Error! Bookmark not defined.**–273 and accompanying text.

<sup>315</sup> **Bray, *supra* note 11, at 46.**

<sup>316</sup> *Chicago v. Sessions*, 2017 WL 4572208 at, at \*3.

<sup>317</sup> *Id.*

Seventh Circuit agreed that the “likelihood of widespread, duplicative litigation” and concerns for “judicial economy counseled against requiring” many jurisdiction to file “individual suits to decide anew the narrow legal question in the case.”<sup>318</sup>

Under the traditional conception of constitutional litigation and the way federal constitutional adjudication should function, subsequent litigation involving different plaintiffs does not constitute duplicative litigation. Litigation is about enforcement of the challenged law or regulation against particular plaintiffs. The similarity of legal issues between different cases does not alter that nature of constitutional litigation, so it does not render separate litigation redundant or duplicative. Each act of enforcement of a constitutionally defective law against a different individual is a distinct constitutional violation. Each action to enjoin enforcement against a different individual is a distinct constitutional claim involving the rights of that plaintiff. And each individual will defend her constitutional rights in different ways with different arguments, leading to different analyses and, perhaps, outcomes.<sup>319</sup> Bray captures the point, while acknowledging its overstatement, as “there are no duplicative cases. Even if they both involve the same legal question, your case is your case and my case is my case.”<sup>320</sup>

Any inefficiency is inherent in that limited scope of a court’s equitable powers and in the hierarchically and geographically distributed decisionmaking of the federal system. Efficiency justifies joinder or consolidation of these multiple claims into a single proceeding for efficiency purposes,<sup>321</sup> but it does not turn each plaintiff’s claim into a single claim. These concerns cannot expand the power of a court in a single case or alter the structure and function of the federal judiciary. And the system of percolation understands inconsistency as a benefit, part of what lower courts are supposed to do in moving toward a final, uniform constitutional determination.

Bray argues that allowing universal injunctions creates a more significant problem in the other direction—conflicting injunctions.<sup>322</sup> An injunction issued by one district court does not bind another district or circuit; an injunction affirmed by one circuit does not bind another circuit. That the issuing court labeled or purported to make its injunction universal does not alter this. But it does allow multiple courts to expand their remedial reaches, creating a possible collision. Imagine a case in which Court I enjoins a federal official to do *x*, while another court enjoins the same official to refrain from doing *x*. As neither injunction takes precedence (short of a Supreme Court decision affirming one injunction and

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<sup>318</sup> *Chicago v. Sessions*, \_\_\_ F.3d \_\_\_, \_\_\_ (7th Cir. 2018) (slip op. at 33).

<sup>319</sup> *Id.* at \_\_\_ (Manion, J., concurring in the judgment in part and dissenting in part) (slip op. at 43).

<sup>320</sup> Samuel Bray, *The Seventh Circuit Splits on the Nationwide Injunction*, **THE VOLOKH CONSPIRACY** (Apr. 20, 2018).

<sup>321</sup> Fed. R. Civ. P. 20(a); Fed. R. Civ. P. 42(a); Fed. R. Civ. P. 23; *see* Hall v. Hall, 138 S. C. 1118 (2018).

<sup>322</sup> Bray, *supra* note 11, at 462.

reversing the other), that federal official risks violating an injunction and being held in contempt no matter what she did.<sup>323</sup>

Following the universal injunction barring enforcement of DAPA, individuals filed suit in two other federal districts seeking a declaration that the United States was not bound by the injunction outside of Texas or as to people outside of Texas and an injunction permitting the United States to enforce DAPA (and not deport people) outside of Texas. Courts avoid this “doomsday scenario” through restraint and good luck, both of which can run out.<sup>324</sup> They can avoid it formally by rejecting universal injunctions and limiting all injunctions to protecting the named plaintiffs. Court I’s injunction prohibits enforcement as to the plaintiffs before it, but says nothing about the parties before Court II, whose fate remains to that court’s constitutional determination. Unfortunately, district courts display increasing reluctance to exercise this remedial restraint.

At a minimum, federal officials remain unclear about what they are empowered to do in enforcing federal law. Imagine Court I declares the law constitutionally invalid and issues a universal injunction but Court II declares the law constitutionally valid and allows the government to enforce it against. Enforcing the law, as permitted by Court II, would place him in contempt of Court I. But abiding by the judgment in Court I places that court and its judgment above a contrary judgment from a co-equal court.

##### 5. *Facial Unconstitutionality*

Several courts have imposed universal injunctions due to the purported facial unconstitutionality of the challenged laws, having them unconstitutional in all possible applications, as opposed to declaring them unconstitutional only as applied to the plaintiffs.<sup>325</sup> A limited, particularized, non-universal injunction is inconsistent with the declaration of facial unconstitutionality. Having determined that the challenged law is unconstitutional beyond the plaintiffs, a court cannot allow continued enforcement against other rights-holders.

This misapprehends the meaning and effect of facial unconstitutionality. The declaration of facial unconstitutionality goes to the scope of the court’s constitutional analysis and reasoning, therefore to its precedential effect. If Court I declares the law facially unconstitutional, Court II might use that as precedent to declare the law unconstitutional as to future plaintiffs. A Supreme Court declaration of facial unconstitutionality does the work for Court II—no further analysis is necessary if binding precedent establishes that the law cannot be constitutionally

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<sup>323</sup> *Id.*

<sup>324</sup> *Id.* at 464.

<sup>325</sup> **Chicago v. Sessions**, \_\_\_ F.3d \_\_\_, \_\_\_ (7th Cir. 2018) (slip op. at 30); *Hawaii v. Trump*, 859 F.3d 741, 788 (9th Cir. 2017) (*Hawaii I*); *Santa Clara v. Trump*, 250 F. Supp. 3d at 539.

applied in the new context or to the new parties.<sup>326</sup> But Court I and Court II make those constitutional determinations in the course of enjoining enforcement of the law as to some plaintiffs. A declaration of facial unconstitutionality does not expand the court’s remedial authority or empower it to enjoin the defendant from enforcing against persons outside the case. The court’s order remains limited to the plaintiffs, although the precedential effect of its pronouncement of facial invalidity may be broader.<sup>327</sup>

#### 6. *Narrow Legal Issues*

In affirming a universal injunction barring DOJ from withholding funds from sanctuary cities, the Seventh Circuit emphasized that the challenge involved “purely a narrow issue of law; it is not fact-dependent and will not vary from one locality to another.”<sup>328</sup> Such a narrow question of law lends itself to broader injunctive relief and will not benefit from percolation through additional courts.<sup>329</sup> Some legal issues—such as what constitutes excessive force—benefit from consideration in multiple courts in different factual contexts that inform the legal principle. With legal issues such as the plain meaning of a statute, “the duplication of litigation will have little, if any, beneficial effect.”<sup>330</sup>

The dissent in *Chicago* rejected this approach, because it renders a nationwide injunction appropriate in every statutory interpretation case. The similarity of legal issues does not ensure similarity in litigation or resolution. Different parties engage different arguments on the same legal issues, producing divergent analyses and results, while allowing the strongest arguments to come to the fore, all to the benefit of courts able to identify and draw on the best-reasoned opinions.<sup>331</sup> Each constitutional case involves different parties, arguments, and analyses, even on purely legal, fact-free, issues. Universal injunctions should not preempt the process of courts working through those legal issues.

#### 7. *Proving Too Much*

The district court in *Chicago* insisted that universal injunctions should not be the default approach, but remain an “extraordinary remedy that should be limited by the nature of the constitutional violation and subject to prudent use by the courts.”<sup>332</sup> In affirming, the Seventh Circuit agreed that universal injunctions were a

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<sup>326</sup> Fallon, *As-Applied and Facial Challenges*, *supra* note 205, at 1339–40; Fallon, *Fact and Fiction*, *supra* note 205, at 923 n.31.

<sup>327</sup> Fallon, *As-Applied and Facial Challenges*, *supra* note 205, at 1339–40; Fallon, *Fact and Fiction*, *supra* note 205, at 923 n.31.

<sup>328</sup> *Chicago v. Sessions*, \_\_\_ F.3d \_\_\_, \_\_\_ (7th Cir. 2018) (slip op. at 30).

<sup>329</sup> *Id.* at \_\_\_ (slip op. at 31).

<sup>330</sup> *Id.* at \_\_\_ (slip op. at 31).

<sup>331</sup> *Id.* at \_\_\_ (Manion, J., concurring in the judgment in part and dissenting in part) (slip op. at 43).

<sup>332</sup> *Chicago v. Sessions*, 2017 WL 4572208 at \*4 (N.D. Ill. 2017).



“powerful remedy” to be “employed with discretion” in “rare cases.”<sup>333</sup> Amanda Frost, the strongest scholarly advocate for universal injunctions, argues that the “default should be *against* issuing a nationwide injunction. A single district court judge should not lightly assert control over federal policy for the nation, and should allow her fellow judges to reach their own decisions in cases involving different plaintiffs.”<sup>334</sup>

The increasing use of universal injunctions, including as to the immigration laws discussed, suggests that universality is becoming the default in challenges to the constitutional validity of federal law, at least federal immigration and immigration-adjacent law. Leaving the injunction’s “who” to the prudence of district courts is not working as a limiting principle. Or prudence can only hold for so long and we have reached that point.

The permissible-but-rare defense also proves too much. *Chicago* upheld the universal injunction against the sanctuary-city regulations in light of concerns for uniformity, unfairness of disparate application, and the rule of law,<sup>335</sup> each constituting an “extraordinary” element warranting a universal injunction. But each of those elements is present in every constitutional challenge to every federal law. By its terms, therefore, the argument requires—or at least encourages—a district court to issue a universal injunction to prohibit enforcement of any federal law regulating any federal conduct.

The authority of federal officials to enforce any federal law never varies by jurisdiction—the law and the power to enforce the law is the same nationwide. Judicial economy always favors one lawsuit over multiple lawsuits. There would be a flood of similar lawsuits by everyone affected by every federal law. Federal uniformity and the unfairness of disparate application of federal law are present with respect to every federal law. If the rule of law is undermined by enforcement of a “likely invalid” law to persons other than the named plaintiff protected by the injunction, it is undermined by enforcement of every federal law that one court has declared constitutionally invalid. Despite the court’s rhetorical attempt to limit universal injunctions to extraordinary cases, every case is extraordinary, as the court defined it.

Frost argues that universal injunctions are uniquely necessary in the face of executive action, such as the executive orders and regulations challenged in these immigration cases. She argues that the executive can announce new federal policy at the last minute, making it difficult for plaintiffs to certify a class before the policy takes effect, then can fight class certification; only a universal injunction prevents the executive from controlling litigation to prevent entry of injunctions that protect more than a few individuals at a time.<sup>336</sup> But it is not clear why this concern is greater for federal executive action than for federal legislation; while legislation

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<sup>333</sup> *Chicago v. Sessions*, \_\_\_ F.3d \_\_\_, \_\_\_ (7th Cir. 2018) (slip op. at 26, 29).

<sup>334</sup> Frost, *supra* note \_\_\_, at m3, m48 (emphasis in original).

<sup>335</sup> *Id.*

<sup>336</sup> Frost, *supra* note \_\_\_, at m.46-47.

takes longer to enact than an executive order, the possibilities for manipulative litigation are the same. Moreover, courts can issue preliminary relief to benefit a putative class, even if it has not yet formally certified the class.<sup>337</sup> So the government does not hold exclusive power to avoid broader injunctions protecting a broader group of plaintiffs.

#### IV. The Way Forward

Universal injunctions are generally inappropriate in individual constitutional litigation and should not be issued in the mine run of cases. Universal injunctions are specifically inappropriate in the constitutional litigation challenging the immigration and immigration-adjacent policies discussed here. Even allowing for broader injunctions in some circumstances, these cases do not come within those circumstances—the rights and remedies are divisible, a narrower injunction affords plaintiffs complete relief, a narrower injunction is commensurate with the constitutional violation found in the threatened enforcement of the constitutionally defective laws as to the plaintiffs. Plaintiffs’ use class actions, associational standing, and third-party standing would have allowed for sufficiently broad and protective injunctions prohibiting enforcement of the challenged laws, regulations, and policies, even if those injunctions were not universal and were particularized to the plaintiffs.

This Part briefly describes the appropriate scope of the injunctions that should have issued in these six categories of litigation.

##### *A. Attorney Regulations*

The injunction in *NWTRP* should have prohibited EOIP from enforcing the attorney regulations as to NWIRP, by precluding EOIP from sanctioning NWIRP or NWIRP attorneys for continuing to advise *pro se* litigants without filing a formal appearance. The injunction should be nationwide in protecting NWIRP from enforcement of the regulations in any immigration proceedings anywhere in the country. The injunction need not and should not protect other attorneys or legal-representation organizations. NWIRP’s rights are unaffected by any DOJ promised attempts to enforce the regulations against other attorneys and the particularized injunction is commensurate with the violation of NWIRP’s First Amendment rights from threatened enforcement. Other attorneys or organizations can file their own lawsuits if threatened with enforcement; the district court’s First Amendment decision in *NWTRP* can provide persuasive authority on the constitutional validity of the regulations for use in future litigation.

##### *B. Abortion Access for Detained Undocumented Unaccompanied Minors*

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<sup>337</sup> *Supra* notes \_\_\_\_ and accompanying text.

The district court got the “who” of both injunctions right in *Garza*. The injunctions expressly and appropriately protected the three named plaintiffs and ensured that HHS officials did not stop them from obtaining abortions. The injunctions were properly nationwide, in that they protected the girls wherever they were detained—Texas, where they were, or anywhere in the United States.

The injunctions need not, should not, and did not protect other undocumented unaccompanied in-detention minors from similar HHS efforts to prevent them from terminating pregnancies. The rights and injunctive remedies are divisible. The rights of J.D., J.R., or J.P. protected by the injunctions are not affected by HHS efforts to stop other girls from exercising their reproductive rights and the relief accorded to the three plaintiffs is not less-than-complete if other girls face similar government-imposed hurdles. Other pregnant minor detainees can file their own lawsuits if faced with similar barriers or similar HHS efforts to prevent them from exercising their reproductive freedom.

Wanting a broader injunction to protect all pregnant undocumented unaccompanied minors in HHS detention, the plaintiffs took the appropriate steps by seeking to certify a class action, expanding who qualifies as a plaintiff in the case. The court subsequently certified a 23(b)(2) class, defined as “all pregnant, unaccompanied immigrant minor children (UCs) who are or will be in the legal custody of the federal government.” In other words, the court expanded the “who” of the injunction in the appropriate manner—by using class-action procedure to expand the “who” of the litigation.

### *C. Funding of Sanctuary Cities*

The district courts in *Chicago* and *Santa Clara* should have issued injunctions prohibiting DOJ from denying funding to Chicago and to Santa Clara and San Francisco, respectively. The injunctions cannot and should not prohibit DOJ from denying funding to any other city; neither Chicago’s nor Santa Clara’s rights are affected by DOJ attempts to enforce the funding regulations to other jurisdictions, nor is their relief rendered less than complete if DOJ attempts to strip funds from other municipalities. Other jurisdictions can file their own suits if threatened with enforcement, using the prior decisions as persuasive authority on the constitutional validity of the regulations.

### *D. DAPA and DACA Rescission*

The injunction in *Texas* would have been sufficient had it relieved Texas of the obligation to subsidize drivers’ licenses for any DAPA recipients. Or the injunction could have prohibited enforcement of DAPA in Texas and the twenty-five co-plaintiff states; the order could have prohibited the federal government from deferring removal to the class of immigrants in those states and from conferring federal and state benefits to immigrants in those states. The problem of people moving from other (non-injunction) states into Texas can be addressed by not requiring Texas or the other plaintiff states to provide state benefits, such as

subsidized drivers' licenses, to DAPA recipients. The federal government could continue to provide DAPA benefits to persons in non-objecting states.

The order enjoining DACA rescission similarly should have been limited to the plaintiff DACA recipients and the other entities and organizations bringing the suit on behalf of particular recipients. The government could have proceeded with rescission in other states, at least with respect to recipients who lacked bona fide relationships with some of the plaintiffs.

#### *E. Travel Bans*

These represent the most difficult cases, although particularized, non-universal injunctions were possible.

It is logically possible to enjoin enforcement of the ban to some persons and not others—to allow some refugees or visitors from the targeted nations into the country and not others. And allowing enforcement of the ban to some persons, while prohibiting enforcement as to the named plaintiffs, does not deny the named plaintiffs complete relief.

The difficulty or uncertainty of identifying students and scholars who might come to Hawaii or of identifying IRAP clients in the target nations can be resolved at the enforcement stage. Faced with a future government attempt to prohibit an individual from traveling to the United States, Hawaii or IRAP must show that the targeted individual has a “bona fide” relationship with it that is “formal, documented, and formed in the ordinary course, rather than for the purpose of evading the travel restrictions.”<sup>338</sup> That relationship means attempted enforcement against the person with a bona fide relationship is barred by the injunction and can be halted by a court order enforcing the injunction. If the enforcement target lacks that bona fide relationship, she must seek a new injunction or an extension of the existing injunction. Either way, there is no need to expand the injunction at the point of issuance.

The Supreme Court granted cert in *Hawaii*, including on the scope-of-injunction question, so the issue could be resolved, at least in this unique context, sooner rather than later.

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<sup>338</sup> *IRAP IV*, 883 F.3d 233, 272-73 (4th Cir. 2018) (en banc) (quoting *Trump*, 137 S. Ct. at 2088).