An Appellate Solution to Nationwide Injunctions

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District courts have issued an unprecedented number of nationwide injunctions during the Obama and Trump administrations, provoking criticism from the Supreme Court. This Article proposes a change to the Federal Rules of Civil Procedure that addresses the Justices' concerns without taking the drastic step of eliminating nationwide injunctions entirely. Specifically, this Article recommends amending Rule 65 to allow only the appellate courts to issue injunctive relief that extends beyond the plaintiffs in cases challenging a federal law or policy. In addition to the proposed Rule change, this Article offers a categorization framework for existing proposals addressing nationwide injunctions, classifying them as "Prohibitory Rules," "Inhibitory Standards," or "Inhibitory Rules." The proposal itself takes the form of an Inhibitory Rule.

INTRODUCTION

As early as 1967, Justice Fortas described nationwide injunctions as a "license for mischief."[1] In recent years, the number of nationwide injunctions issued by the federal courts has increased dramatically. District courts have used them to halt the Obama administration's Deferred Action for Parents of Americans (DAPA) program,[2] postpone the Trump travel ban,[3] and keep Deferred Action for Childhood Arrivals (DACA) in place despite the Trump administration's attempts at rescission.[4]

As the frequency of nationwide injunctions has increased, critics and defenders of the practice have weighed in from across the legal landscape. Critics challenge the

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1. Toilet Goods Ass'n v. Gardner, 387 U.S. 167, 183 (1967) (Fortas, J., concurring in part).

2. Texas v. United States, 86 F. Supp. 3d 591 (S.D. Tex.), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (mem.).

3. Hawaii v. Trump, 265 F. Supp. 3d 1140 (D. Haw.), *aff'd in part, vacated in part*, 878 F.3d 662 (9th Cir. 2017), *rev'd and remanded*, 138 S. Ct. 2392 (2018); Int'l Refugee Assistance Project v. Trump, 265 F. Supp. 3d 570 (D. Md. 2017), *aff'd*, 883 F.3d 233 (4th Cir. 2018), *as amended* (Feb. 28, 2018), *cert. granted, judgment vacated*, 138 S. Ct. 2710 (2018).

4. DACA has been the subject of three separate nationwide injunctions halting the rescission. *See* NAACP v. Trump, 298 F. Supp. 3d 209 (D.D.C.), *adhered to on denial of reconsideration*, 315 F. Supp. 3d 457 (D.D.C. 2018); Batalla Vidal v. Nielsen, 279 F. Supp. 3d 401 (E.D.N.Y. 2018), *cert. before judgment granted sub. nom*, McAleenan v. Vidal, 139 S. Ct. 2773; Regents of Univ. of California v. U.S. Dep't of Homeland Sec., 279 F. Supp. 3d 1011 (N.D. Cal.), *aff'd*, 908 F.3d 476 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 2779 (2019). On June 28, 2019, the Court granted certiorari and consolidated the three cases for oral argument, which took place on November 12, 2019. The District Court of Maryland also issued a nationwide injunction limiting the Trump administration's use of DACA recipients' private information in *Casa de Maryland v. U.S. Department of Homeland Security*, 284 F. Supp. 3d 758 (D. Md. 2018). Because of this injunction's more limited nature, it was not consolidated with the other three nationwide injunctions.

constitutionality of nationwide injunctions and highlight their negative effects: forum shopping, disruption of executive policy, and increased risk of conflicting injunctions, to name a few. Proponents of nationwide injunctions emphasize the importance of preventing irreparable harm to affected nonparties, keeping the other branches of government in check, and ensuring uniformity and administrability in applying the law.

The current presidential administration has argued for the wholescale elimination of nationwide injunctions,[5] a view that has garnered sympathy from at least three Justices on the Supreme Court.[6] To this end, legal commentators such as Samuel Bray have proposed what I term "Prohibitory Rules": structural modifications to the judiciary that would completely foreclose the possibility of nationwide injunctions.[7]

However, completely prohibiting nationwide injunctions carries a heavy cost: such a severe restriction on the court's ability to grant equitable relief would unavoidably impose irreparable harm on affected parties in at least some cases.[8] Others have sought less extreme solutions, proposing "Inhibitory Standards" to curb what they believe to be the excessive use of nationwide injunctions without eliminating them entirely.[9] However, Inhibitory Standards fail to meaningfully

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5. *See* Memorandum from the Att'y Gen. to the Heads of Civil Litig. Components & U.S. Attorneys on Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions 2 (Sept. 13, 2018), https://www.justice.gov/opa/press-release/file/1093881/download [https://perma.cc/5D5D-RBD8]; William Barr, Remarks to the American Law Institute on Nationwide Injunctions (May 21, 2019), https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-american-law-institute-nationwide [https://perma.cc/6KY2-4YVA].

6. *See* Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 599–601 (2020) (Gorsuch, J., concurring) ("The real problem here is the increasingly common practice of trial courts ordering relief that transcends the cases before them . . . . [T]he routine issuance of universal injunctions is patently unworkable . . . ."); Trump v. Hawaii, 138 S. Ct. 2392, 2429 (2018) (Thomas, J., concurring) ("In sum, universal injunctions are legally and historically dubious."). Chief Justice Roberts has also expressed skepticism about extending the scope of injunctions beyond the plaintiffs. *See* Gill v. Whitford, 138 S. Ct. 1916, 1933 (2018) ("[T]his Court is not responsible for vindicating generalized partisan preferences. The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it.").

7. *See* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017) (proposing that federal courts limit injunctions to the plaintiffs alone); Getzel Berger, Note, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. REV. 1068 (2017) (proposing a restriction on injunctions that extend past the court's circuit); Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 ALA. L. REV. 1 (2019) (proposing variants of both Bray's and Berger's rules); *see also* Injunctive Authority Clarification Act of 2019, H.R. 77, 116th Cong. (2019) (prohibiting injunctions against federal laws or policies that include nonparties).

8. *See, e.g.*, *infra* text accompanying note 44 (citing the travel ban litigation as one such instance); *see also infra* text accompanying note 139 (explaining why a class action would have been unlikely to succeed in the context of the travel ban).

9. These standards include multifactor balancing tests, rebuttable presumptions, and other discretionary devices and approaches. For examples of proposals involving Inhibitory Standards, see *infra* notes 35–37 and accompanying text.

constrain the judiciary; instead of imposing bright-line rules, they rely on judges to voluntarily exercise restraint.[10]

This Article proposes a change to the Federal Rules of Civil Procedure that would reduce the use of nationwide injunctions while ensuring that only the most meritorious cases receive them. Part I contextualizes the recent rise in nationwide injunctions and introduces the Prohibitory Rules versus Inhibitory Standards framework to classify existing proposals. Part II introduces a third category, "Inhibitory Rules," and presents this Article's proposed Inhibitory Rule: that only appellate courts may grant nationwide injunctions against the federal government. Part III describes the benefits of this proposal relative to alternative proposals and the status quo. Part IV answers potential objections to the proposal.

I. BACKGROUND

A. The Emergence of the Nationwide Injunction

An injunction is a judicial remedy that commands or prevents an action.[11] Rule 65 of the Federal Rules of Civil Procedure governs the issuance of nationwide injunctions, but currently lacks any provision concerning the permissible scope of injunctive relief.[12] When a court—typically, but not always, a district court[13]—grants an injunction against the federal government, this usually takes the form of prohibiting the government from enforcing a policy, either against the plaintiffs or against everyone, plaintiffs and non-plaintiffs alike. The latter scenario, in which the injunction takes the form of universal relief, rather than particular relief, is known as a nationwide injunction.[14]

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10. Bray describes this as "exhortation." *See* Bray, *supra* note 7, at 423 ("[Most proposals] tend to exhort judges to apply the existing principles in a restrained way. But . . . [e]xhortation is not a solution to structural problems and ideological forces.").

11. *Injunction*, BLACK'S LAW DICTIONARY (11th ed. 2019). See FED. R. CIV. P. 65(a), (c)–(d) for rules governing injunctions issued by the federal courts.

12. *See* FED. R. CIV. P. 65.

13. While district courts are typically the courts that grant injunctive relief, appellate courts can and do independently issue and broaden injunctions without remanding to the district court. *See, e.g.*, League of Women Voters of the United States v. Newby, 838 F.3d 1, 7 (D.C. Cir. 2016) ("This court can independently grant an injunction after considering the proper factors"); New York, N.H. & H.R. Co. v. Interstate Commerce Comm'n, 200 U.S. 361, 405 (1906) ("We, therefore, conclude that the injunction below should be modified and enlarged . . . . And, as thus modified, the decree below is affirmed."); *see also* Berger, *supra* note 7, at 1070 n.4 ("As the primary fact finders, district courts are usually the ones issuing injunctions, which are then reviewed by the courts of appeal. Appellate courts, however, can and do issue broad injunctions of their own.").

14. For that reason, nationwide injunctions are often called "universal injunctions." A full discussion regarding proper terminology is outside the scope of this Article. For contributions to the terminological debate, see *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 n.1 (Thomas, J., concurring) ("'Nationwide injunctions' is perhaps the more common term. But I use the term 'universal injunctions' in this opinion because it is more precise."); Berger, *supra* note 7, at 1076 n.37 ("I am sticking with 'nationwide injunction' since that is the term used by courts and practitioners."); and Bray, *supra* note 7, at 419 n.5 (pointing out flaws of both terms). For

Nationwide injunctions are a relatively recent phenomenon in this country's history, emerging in the early- to mid-twentieth century[15] and increasing in use since the 1990s.[16] The reasons for this emergence are contested and not traceable to a single cause, though legal commentators have suggested as possible contributing factors the rise in unilateral executive action and the decline of class actions.[17]

During Obama's presidency, district courts issued twenty nationwide injunctions to halt various executive actions,[18] including DAPA,[19] a federal overtime pay policy,[20] and the Department of Education's transgender bathroom policy.[21] District courts' use of nationwide injunctions has continued to rise during the Trump administration. Attorney General William Barr has complained that the Trump administration has faced more nationwide injunctions than were issued, in total, during the twentieth century.[22] District courts have issued nationwide injunctions

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less common terms, see Transcript of Oral Argument at 73, Trump v. Hawaii, 138 S. Ct. 2392 (2018) ("cosmic injunction," used by Justice Gorsuch); Reply Brief for Petitioners at 30, Trump v Hawaii, 138 S. Ct. 2392 ("absent-party injunctions," used by Solicitor General Noel Francisco); and Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J. L. & PUB. POL'Y 487, 490–91 (2016) ("defendant-oriented injunction").

15. Samuel Bray claims that nationwide injunctions did not emerge until the 1960s. *See* Bray, *supra* note 7, at 438. This claim has been favorably cited in both the academic literature and by the Supreme Court. *See, e.g.*, Howard M. Wasserman, *"Nationwide" Injunctions Are Really "Universal" Injunctions and They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. 335, 353 (2018); Trump v. Hawaii, 138 S. Ct. 2392, 2428 (2018) (Thomas, J., concurring). However, Mila Sohoni has recently challenged Bray's account, arguing that courts issued nationwide injunctions against the federal government beginning as early as 1913. *See* Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 943 (2020). Regardless of the precise decade of origin, scholars do not contest that their frequency has increased in recent decades.

16. Morley, *supra* note 7, at 4.

17. *See* Bray, *supra* note 7, at 456–57 ("In short, the rise of the national injunction seems to have been gradual and unplanned . . . . What made it thinkable was not a single unifying cause but rather shifts in how judges thought about legal challenges and invalid laws, accompanied by changes in agency practice and new reasons for judicial confidence."); Frost, *infra* note 28, at 1090 ("Although nationwide injunctions have been issued more frequently over the last fifty years, that may be the natural response to the expansion of federal law and the recent increase in major policy changes made through unilateral executive action."); Suzette M. Malveaux, Response, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56, 60 (2017) ("As the availability of the class action device goes down, the need for the national injunction goes up.").

18. William Barr, *End Nationwide Injunctions*, WALL ST. J. (Sept. 5, 2019, 6:37 PM), https://www.wsj.com/articles/end-nationwide-injunctions-11567723072 [https://perma.cc/UP6K-CCHT].

19. Texas v. United States, 86 F. Supp. 3d 591 (S.D. Tex.), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016).

20. Nevada v. U.S. Dep't of Labor, 218 F. Supp. 3d 520 (E.D. Tex. 2016).

21. Texas v. United States, 201 F. Supp. 3d 810 (N.D. Tex. 2016), *order clarified*, No. 7:16-CV-00054-O, 2016 WL 7852331 (N.D. Tex. Oct. 18, 2016).

22. *See* Barr, *supra* note 5 (noting that in President Trump's first 29 months in office, "federal district courts have issued 37 nationwide injunctions against the Executive Branch"

against the census citizenship question,[23] the latter two iterations of the Trump travel ban,[24] the executive order eliminating federal funding for sanctuary cities,[25] the transgender military ban,[26] and the termination of Temporary Protected Status for Haitian, Sudanese, El Salvadorian, and Nicaraguan immigrants.[27]

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while "courts issued only 27 nationwide injunctions in all of the 20th century.").

23. New York v. U.S. Dep't of Commerce, 351 F. Supp. 3d 502 (S.D.N.Y.), *aff'd in part, rev'd in part and remanded*, 139 S. Ct. 2551 (2019).

24. Hawaii v. Trump, 265 F. Supp. 3d 1140 (D. Haw. 2017) (enjoining the third version of the travel ban on a nationwide basis); Int'l Refugee Assistance Project v. Trump, 265 F. Supp. 3d 570 (D. Md. 2017) (same); Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539 (D. Md.) (enjoining the second version of the travel ban on a nationwide basis); Hawaii v. Trump, 241 F. Supp. 3d 1119 (D. Haw. 2017) (same).

25. City of Chicago v. Sessions, 264 F. Supp. 3d 933 (N.D. Ill. 2017), *aff'd*, 888 F.3d 272 (7th Cir.), *vacated*, No. 17-2991, 2018 WL 4268814 (7th Cir. 2018); Cty. of Santa Clara v. Trump, 250 F. Supp. 3d 497 (N.D. Cal. 2017).

26. Stockman v. Trump, No. EDCV171799JGBKKX, 2017 WL 9732572 (C.D. Cal. Dec. 22, 2017); Karnoski v. Trump, No. C17-1297-MJP, 2017 WL 6311305 (W.D. Wash. Dec. 11, 2017); Stone v. Trump, 280 F. Supp. 3d 747 (D. Md. 2017); Doe 1 v. Trump, 275 F. Supp. 3d 167 (D.D.C. 2017), *vacated sub nom.* Doe 2 v. Shanahan, 755 F. App'x 19 (D.C. Cir. 2019).

27. Ramos v. Nielsen, 336 F. Supp. 3d 1075 (N.D. Cal. 2018).

The recent surge in nationwide injunctions has prompted a flurry of academic scholarship,[28] political commentary,[29] press coverage,[30] and statutory proposals[31] that support, defend, and propose modifications to the current practice of issuing nationwide injunctions.[32]

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28. *See, e.g.*, Spencer E. Amdur & David Hausman, Response, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. F. 49 (2017); Berger, *supra* note 7; Bray, *supra* note 7; Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum-Shopping, Politicizing Courts, and Eroding Constitutional Structure* (Geo. Mason U. Legal Studies Research Paper Series, Paper No. LS 18–22); Frank Chang, *The Administrative Procedure Act's Stay Provision: Bypassing Scylla and Charybdis of Preliminary Injunctions*, 85 GEO. WASH. L. REV. 1529 (2017); Zachary D. Clopton, *National Injunctions and Preclusion*, 118 MICH. L. REV. 1 (2019); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018); Kate Huddleston, *Nationwide Injunctions: Venue Considerations*, 127 YALE L.J.F. 242 (2017); Malveaux, *supra* note 17, Bradford Mank & Michael E. Solimine, *State Standing and National Injunctions*, 94 NOTRE DAME L. REV. 1955 (2019); Morley, *supra* note 7; Jonathan R. Nash, *State Standing for Nationwide Injunctions Against the Federal Government*, 94 NOTRE DAME L. REV. 1985 (2019); Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095 (2017); Sohoni, *supra* note 15, Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEXAS L. REV. 67 (2019); Howard M. Wasserman, *supra* note 15; Szymon S. Barnas, Note, *Can and Should Universal Injunctions Be Saved?*, 72 VAND. L. REV. 1675 (2019); Matthew Erickson, Note, *Who, What, and Where: A Case for a Multifactor Balancing Test as a Solution to Abuse of Nationwide Injunctions*, 113 NW. U. L. REV. 331 (2018); Katherine B. Wheeler, Comment, *Why There Should Be a Presumption Against Nationwide Preliminary Injunctions*, 96 N.C. L. REV. 200 (2017); Judge Gregg Costa, *An Old Solution to the Nationwide Injunction Problem*, HARV. L. REV. BLOG (Jan. 25, 2018), https://blog.harvardlawreview.org/an-old-solution-to-the-nationwide-injunction-problem [https://perma.cc/8SBZ-BCUA].

29. *See supra* notes 5 and 18.

30. *See, e.g.*, Nicholas Bagley and Samuel Bray, *Judges Shouldn't Have the Power to Halt Laws Nationwide*, THE ATLANTIC (October 31, 2018), https://www.theatlantic.com/ideas/archive/2018/10/end-nationwide-injunctions/574471 [https://perma.cc/RX8B-WKPL]; Getzel Berger, *Op-Ed: Nationwide Injunctions are Wrong — Even When They Stop Trump*, L.A. TIMES (May 12, 2017, 4:00 AM), https://www.latimes.com/opinion/op-ed/la-oe-berger-injunctions-lower-federal-courts-judges-20170512-story.html [https://perma.cc/2P3S-N5XC]; David French, *The Nationwide Dysfunction of the District-Court Injunction*, NATIONAL REVIEW (June 6, 2019, 10:34 AM), https://www.nationalreview.com/magazine/2019/06/24/the-nationwide-dysfunction-of-the-district-court-injunction [https://perma.cc/5JUH-E248].

31. *See* Injunctive Authority Clarification Act of 2019, H.R. 77, 116th Cong. (2019) ("prohibit[ing] federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty, unless the nonparty is represented by a party in a class action lawsuit"); Assigning Proper Placement of Executive Action Lawsuits Act ("APPEAL Act"), H.R. 2660, 115th Cong. (2017) ("provid[ing] exclusive original jurisdiction to the U.S. District Court for the District of Columbia for cases regarding an executive order, action, or memorandum").

32. Analyzing whether nationwide injunctions accord with Article III and equitable principles is beyond the scope of this Article, which assumes their constitutionality in light of their continued use by the federal courts. For arguments defending the legitimacy of nationwide injunctions, see Frost, *supra* note 28; and Sohoni, *supra* note 15. For contrary views, see Bray, *supra* note 7, at 471–72, 481; Morley, *supra* note 14, at 521–31; and

B. Current Scholarship: Prohibitory Rules and Inhibitory Standards

Proposals addressing the recent rise in nationwide injunctions generally fall into two categories. On one side are bright-line, structural modifications that foreclose the possibility of obtaining a nationwide injunction. I call these "Prohibitory Rules"—adopting any of these rules would eliminate nationwide injunctions entirely. For instance, Bray has proposed that federal courts no longer issue injunctions that protect nonparties.[33] Getzel Berger argues for a circuit-border rule, in which the scope of injunctions against the federal government may not exceed the geographic border of the enjoining circuit.[34]

In contrast to Prohibitory Rules are proposed standards such as balancing tests,[35] rebuttable presumptions,[36] and other mechanisms that give judges broad discretion[37] in determining whether to issue a nationwide injunction. I call these "Inhibitory Standards": doctrinal mechanisms that generally aim to discourage—or at least make consistent[38]—the issuance of nationwide injunctions without prohibiting them altogether.

Prohibitory Rules have the advantage of curbing judicial discretion through unambiguous structural modifications. In comparison to Inhibitory Standards, Prohibitory Rules better address Samuel Bray's concern that mere "exhortation" is insufficient to constrain judges.[39] Inhibitory Standards, which employ balancing tests or other mechanisms that permit broad judicial discretion, fail to improve predictability or uniformity the way Prohibitory Rules do. This problem becomes apparent for proposals such as Zayn Siddique's "complete relief" principle, under which the enjoining court would have to "state why the geographic scope extends no further than necessary to provide complete relief to the party seeking the injunction."[40] Siddique concedes that the complete relief principle would not resolve

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Wasserman, *supra* note 15, at 338–39.

33. *See* Bray, *supra* note 7, at 469 ("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.").

34. *See* Berger, *supra* note 7, at 1100; *see also* Morley, *supra* note 7, at 52–53 (arguing for a circuit-border rule for Rule 23(b)(2) class actions).

35. *See, e.g.*, Mank et al., *supra* note 28; Daniel J. Walker, *Administrative Injunctions: Assessing the Propriety of Non-Class Collective Relief*, 90 CORNELL L. REV. 1119 (2006); Erickson, *supra* note 28.

36. *See, e.g.*, Wheeler, *supra* note 28; *see also* Michelle R. Slack, *Separation of Powers and Second Opinions: Protecting the Government's Role in Developing the Law by Limiting Nationwide Class Actions Against the Federal Government*, 31 REV. LITIG. 943 (2012) (proposing a rebuttable presumption against certification of nationwide class actions).

37. *See, e.g.*, Trammell, *supra* note 28, at 67 (proposing that courts may issue nationwide injunctions when the government "acts in bad faith" and at least three other lower courts have ruled in the same way).

38. *See, e.g.*, Siddique, *supra* note 28, at 2145 ("This Article . . . takes no position on whether nationwide injunctions, as a whole, should be more or less available; it only contends that injunctive relief should be tailored to fit the precise harms asserted by a particular plaintiff.").

39. *See supra* note 10 and accompanying text.

40. Siddique, *supra* note 28, at 2141.

questions like whether the nationwide injunction against DAPA would stand: under his proposal, the decision could come out either way, depending on how much weight the court accords to the plaintiff's purported injury.[41] The problem of unpredictability is even more acute with balancing test proposals. For instance, it is doubtful that nine- or thirteen-factor balancing tests[42] would encourage doctrinal standardization or significantly curb judicial discretion.[43]

However, unambiguously prohibiting nationwide injunctions through Prohibitory Rules carries significant costs. Occasionally, nationwide injunctions are the only way for all affected parties to obtain complete relief. They are particularly crucial for those who face irreparable harm but cannot feasibly fight back through litigation. For instance, it would have been difficult or impossible for many of the millions of noncitizen, nonresident Muslims affected by the Trump travel ban to join the litigation. As Amanda Frost notes, "all [of the individuals affected by the ban] were outside of the United States, all were noncitizens, and most did not have access to lawyers familiar with the U.S. immigration system."[44] Preventing injunctive relief from extending past the plaintiffs in all circumstances, as Prohibitory Rules do, has the undesirable consequence of disadvantaging those who lack the resources to bring their own litigation.[45] In addition, certain harms, such as challenges to environmental regulations and redistricting plans, require relief that extends beyond the plaintiffs due to the indivisible nature of the rights involved. One cannot, for instance, enforce a clean air regulation with respect to a single plaintiff but not for others similarly situated.[46] These "indivisible" or "incidental" remedies often require nationwide relief in order to be effective.[47] Other benefits of nationwide injunctions include reduced duplicative litigation,[48] improved administrability of national policies (by

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41. *Id.* at 2146–47.

42. *See* Walker, *supra* note 35, at 1144–45 (proposing a nine-factor balancing test); Erickson, *supra* note 28, at 352–59 (proposing a balancing test with three "meta-factors" and thirteen subfactors).

43. *Cf.* Serafinn v. Local 722, 597 F.3d 908, 913 (7th Cir. 2010) ("When rules, standards, and precedents govern, the district court's discretion is limited. When multi-factor balancing tests and complex fact-determinations govern, the district court's discretion is greater.").

44. Frost, *supra* note 28, at 1095.

45. Berger, *supra* note 7, at 1083–84; Malveaux, *supra* note 17, at 61.

46. *See* Frost, *supra* note 28, at 1091.

47. *See* Siddique, *supra* note 28, at 2117 (describing incidental nationwide injunctions as "situations in which, despite the lack of an alleged nationwide harm, a court must still issue a nationwide injunction in order to provide complete relief"); PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.04(b) (AM. LAW INST. 2010) ("Indivisible remedies are those such that the distribution of relief to any claimant as a practical matter determines the application or availability of the same remedy to other claimants.").

48. *See, e.g.*, Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (affirming a nationwide injunction against a federal agency rule because "refusal to sustain a broad injunction is likely merely to generate a flood of duplicative litigation"); *see also* Berger, *supra* note 7, at 1082–83 ("Nationwide injunctions are a cost-effective way to resolve nationwide disputes. If the first court to decide a legal question issues a nationwide injunction, it conserves the cost and hassle of entertaining separate lawsuits all over the country. . . . If every immigrant impacted by the travel ban had to file an individual suit, their rights could be irreparably damaged in the interim.").

promoting legal uniformity),[49] and promotion of rule-of-law values such as treating like litigants alike.[50]

Unlike Prohibitory Rules, Inhibitory Standards realize these benefits by allowing nationwide injunctions in some—but not all—cases calling for such broad relief. Proponents of Inhibitory Standards argue that case-by-case analysis allows for a nuanced approach to a complex, powerful, and controversial tool of equity.[51]

II. AN APPELLATE SOLUTION

At their best, Inhibitory Standards aim to avoid the worst of the injustices that would result from a Prohibitory Rule's blanket ban on nationwide injunctions. However, Inhibitory Standards are far less determinate than Prohibitory Rules and, as a result, fail to meaningfully constrain the judiciary.[52] What should be done?

A. Inhibitory Rules: An Alternative Approach

The solution lies in what I term an "Inhibitory Rule." Like a Prohibitory Rule, an Inhibitory Rule proposes a bright-line, structural modification to the judicial system that serves to constrain judicial discretion and promote predictability and uniformity. But like an Inhibitory Standard, an Inhibitory Rule does not completely foreclose the possibility of nationwide injunctions when they are needed, such as when a case calls for an indivisible remedy. This Article's proposal—allowing only the appellate courts to issue nationwide injunctions against the federal government—takes the form of an Inhibitory Rule.[53]

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49. *See, e.g.*, Batalla Vidal v. Nielsen, 279 F. Supp. 3d 401, 437–38 (E.D.N.Y. 2018) (granting a nationwide injunction against the DACA rescission based in part on "a strong federal interest in the uniformity of federal immigration law").

50. *See, e.g.*, *The Role and Impact of Nationwide Injunctions by District Courts: Hearing before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 115th Cong. 6 (2017) (statement of Amanda Frost), https://docs.house.gov/meetings/JU/JU03/20171130/106665/HHRG-115-JU03-Wstate-FrostA-20171130.pdf [https://perma.cc/M9ST-APWM] ("Nationwide injunctions are also consistent with rule-of-law values, such as providing uniformity in the interpretation and implementation of federal law and ensuring that similarly-situated individuals are treated alike.").

51. For instance, Alan Trammell argues that his proposal would permit a nationwide injunction against the first version of the travel ban (Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017)), but not the final version (Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017)). Trammell, *supra* note 28, at 112–13.

52. *Cf.* Bray, *supra* note 7, at 480 (arguing that standards, as opposed to rules, governing nationwide injunctions are "highly indeterminate").

53. This Article is not the first to propose an Inhibitory Rule addressing nationwide injunctions. Szymon Barnas and Judge Gregg Costa have recently proposed their own Inhibitory Rules. *See* Barnas, *supra* note 28; Costa, *supra* note 28. A recently proposed statute, the APPEAL Act, may also be so classified. Assigning Proper Placement of Executive Action Lawsuits Act ("APPEAL Act"), H.R. 2660, 115th Cong. (2017). However, each of these proposals has at least one major weakness that this Article's proposal addresses. For a discussion of these Inhibitory Rules, see *infra* note 60 (discussing the Costa proposal); and

B. Only Federal Appellate Courts Should Grant Nationwide Injunctions

The best course of action to address the increase in nationwide injunctions would be amending the Federal Rules of Civil Procedure to allow only federal appellate courts to grant nationwide injunctions. I propose adding the following provision to Rule 65(d):

> (3) *Scope Limits*. District courts may not grant injunctions protecting nonparties in actions challenging any federal statute, regulation, order, or other legal provision. But the Supreme Court or the Court of Appeals that would have appellate jurisdiction over the action may, in its discretion, grant an injunction with broader scope.

In practice, if an appellate court determined that a given case calls for injunctive relief beyond the plaintiff's alone, it could issue an injunction with appropriate scope (including, if necessary, nationwide scope) either on appeal from a final district court judgment or through interlocutory appeal while the case is still pending in the district court.[54] If denied by the circuit court, plaintiffs could petition the Supreme Court for a writ of certiorari. This amendment would leave unchanged the substantive doctrinal standards governing injunctions, which put forth the necessary factors plaintiffs must establish for a court to grant an injunction[55] and the permissible scope of injunctive relief.[56]

III. BENEFITS OF AN APPELLATE SOLUTION

A. Reduces Disruption of Executive Policy

Recent critics of nationwide injunctions have emphasized the disruption they cause to executive policy. Attorney General Barr, for instance, criticized nationwide injunctions for "frustrat[ing] presidential policy for most of the President's term with no clear end in sight," focusing particularly on the ongoing DACA litigation, which has been the subject of multiple nationwide injunctions.[57]

This problem is not limited to Republican administrations. Texas district courts issued nationwide injunctions against many key Obama administration initiatives,

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Section III.B (discussing the Barnas proposal and the APPEAL Act).

54. 28 U.S.C. § 1292(a)(1) vests jurisdiction in the circuit courts to hear interlocutory appeals arising from district court interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1292(a)(1) (2018).

55. *See infra* note 104 for an overview of the necessary factors established in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008) and *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

56. Specifically, the scope of injunctive relief "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994) (quoting Califano v. Yamasaki, 442 U.S. 682, 702 (1979)).

57. Barr, *supra* note 5. For DACA-related nationwide injunctions, see *supra* note 4.

including DAPA, changes to the Department of Labor's overtime pay policy, and the Department of Education's transgender bathroom policy.[58] Injunctions against President Obama's programs continued beyond his presidency: in 2019, a district judge for the Northern District of Texas issued a nationwide injunction against the Affordable Care Act's contraceptive mandate.[59]

This Article's proposal addresses these disruptions by making the standard to obtain a nationwide injunction significantly more demanding. Requiring an appellate court rather than a district court to grant a nationwide injunction (that is, requiring at least two sympathetic appellate judges rather than a single sympathetic district judge) would reduce the frequency of nationwide injunctions without barring them altogether.[60]

This is also why the proposed Rule change applies only to challenges involving the federal government. The present controversy surrounding nationwide injunctions centers on challenges to government actions and policies, such as DACA and the travel ban, not against state or private actions. The federal government differs substantially from a private litigant, not least because nationwide injunctions against private parties present none of the same prospects for disrupting government policies.[61] Similarly, cases of nationwide injunctions against state laws do not present the same threats of federal policy disruption, forum shopping, or conflicting injunctions latent in nationwide injunctions against the federal government.[62] Another reason to limit the proposal to federal challenges is that nationwide injunctions are uniquely vital in private intellectual property disputes. A patent infringer often must be enjoined nationwide for relief to be effective.[63] Similarly, a

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58. *See supra* notes 19–21 and accompanying text.

59. DeOtte v. Azar, 393 F. Supp. 3d 490, 513–14 (N.D. Tex. 2019), *judgment entered*, No. 4:18-CV-00825-O, 2019 WL 3786545 (N.D. Tex. July 29, 2019).

60. In this respect, this proposal's solution parallels that of Judge Costa, who proposes that only three-judge *district* courts issue nationwide injunctions. *See* Costa, *supra* note 28. The proposal in this Article features a number of improvements over Judge Costa's, however. For instance, the fact that appellate decisions, as opposed to decisions of district courts, have precedential value should create a more uniform doctrine for nationwide injunctions. *See infra* Section III.C. Moreover, Judge Costa's proposal, which features direct appeals from the district panel to the Supreme Court, would burden the Supreme Court no less than this Article's proposal. District panels also place a "heavy burden" on the federal judiciary more generally by frequently obligating judges to travel long distances to convene for trials. 17A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 4234 (3d ed. 1998). Finally, requiring a three-judge district panel carries with it all the procedural pitfalls that result from an erroneous grant or denial of such a panel. *See* Comment, *The Three-Judge Federal Court in Constitutional Litigation: A Procedural Anachronism*, 27 U. CHI. L. REV. 555, 566–71 (1960).

61. United States v. Mendoza, 464 U.S. 154, 159 (1984) ("We have long recognized that 'the Government is not in a position identical to that of a private litigant,' both because of the geographic breadth of government litigation and also, most importantly, because of the nature of the issues the government litigates." (citation omitted) (quoting U.S. Immigration & Naturalization Serv. v. Hibi, 414 U.S. 5, 8 (1973)); *see also* Slack, *supra* note 36, 971–87 (describing the differences in more detail).

62. Sohoni, *supra* note 15, at 981.

63. *See, e.g.*, Leman v. Krentler-Arnold Hinge Last Co., 284 U.S. 448, 451–52 (1932)

plaintiff that operates nationwide will require nationwide injunctive relief against a trademark infringer that also operates nationwide.[64]

Limiting the proposed Rule to suits against the federal government addresses the problem of executive policy disruption while avoiding unwanted changes to private injunctive relief doctrine, particularly as it pertains to intellectual property law.

B. Reduces Forum Shopping

Critics frequently attack nationwide injunctions for encouraging forum shopping.[65] Because any of the nearly 600 district judges[66] can currently issue a nationwide injunction—and because unsuccessful outcomes do not preclude nonparties from bringing additional actions[67]—litigants may, as Samuel Bray puts it, "[s]hop 'til the statute drops."[68]

However, attempts to counter forum shopping risk swinging too far in the opposite direction. For instance, the APPEAL Act[69] (an unenacted 2017 Congressional bill) and a recent proposal by Szymon Barnas[70] would each centralize nationwide injunction suits in a single forum—respectively, the District Court for the District of Columbia and a specially-created twelve-member forum of district judges appointed by the Chief Justice. The former proposal massively expands the power of a single district court[71] at the expense of the other courts, producing a structural imbalance in the federal judiciary.[72] The latter creates an even more severe imbalance: under Barnas's proposal, a single official (the Chief Justice) could unilaterally determine the composition of the specialty panel that would decide nationwide injunction cases and, by extension, determine the ultimate fate of nationwide injunctions themselves.[73]

This Article's proposal reduces, but does not eliminate, the diversity of potential forums that could grant nationwide injunctions from ninety-four district courts to

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(affirming a nationwide injunction against a patent infringer because "[t]he decree was binding upon the respondent, not simply within the District of Massachusetts, but throughout the United States").

64. *See, e.g.*, Hyatt Corp. v. Hyatt Legal Servs., 736 F.2d 1153, 1159 (7th Cir. 1984); *see also* Siddique, *supra* note 28, at 2113 n.99 (collecting examples of this practice).

65. *See, e.g.*, Bray, *supra* note 7, at 419, 457–61 (2017); Wasserman, *supra* note 15, at 363–64. Even defenders of nationwide injunctions acknowledge their tendency to incentivize forum shopping. *See, e.g.*, Frost, *supra* note 28, at 1104–06; Malveaux, *supra* note 17, at 57.

66. *Judicial Vacancies*, U.S. COURTS (Feb. 7, 2020), https://www.uscourts.gov/judges-judgeships/judicial-vacancies [https://perma.cc/M3T9-PFYS] (listing 677 authorized district court judgeships, 72 vacancies, and 19 pending nominees, for a net total of 586 district judges).

67. This phenomenon is often termed "preclusive asymmetry." *See, e.g.*, Maureen Carroll, *Aggregation for Me, but Not for Thee: The Rise of Common Claims in Non-Class Litigation*, 36 CARDOZO L. REV. 2017, 2020–21 (2015); Barnas, *supra* note 28, at 1695–96.

68. Bray, *supra* note 7, at 460.

69. Assigning Proper Placement of Executive Action Lawsuits Act ("APPEAL Act"), H.R. 2660, 115th Cong. (2017).

70. Barnas, *supra* note 28, at 1707.

71. (Not to mention its caseload.)

72. *See* Barnas, *supra* note 28, at 1710.

73. *Id.* at 1714.

thirteen circuit courts. Granted, this is not a silver bullet to prevent forum shopping; circuit courts exhibit ideological variation just as district courts do.[74] Litigants seeking to challenge Democratic-administration policies would likely still sue in what Cass Sunstein calls the "famously conservative" Fourth Circuit,[75] while the more liberal Ninth Circuit would probably continue to see challenges to Republican-administration policies.[76] Regardless, at minimum this proposal abolishes what Alex Botoman has termed "judge shopping," an extreme form of forum shopping in which plaintiffs in certain federal districts can select not merely their own forum, but their own judge.[77] Whereas litigants may continue to shop for a sympathetic judge at the district level, they cannot, under this proposal, rely on that tactic at the appellate level, where judges are generally assigned on a random basis to three-member panels.[78]

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74. *See* CASS. R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 108–09 (2006); Andreas Broscheid, *Comparing Circuits: Are Some U.S. Courts of Appeals More Liberal or Conservative than Others?*, 45 LAW & SOC'Y REV. 171, 188 (2011) ("[T]here are in fact differences between federal appeals circuits that can be characterized as ideological, and some of the circuits commonly believed to be more liberal or conservative are in fact more liberal or conservative in a number of ways: The Second and Ninth circuits have more liberal than conservative three-judge panels, while the Fourth, Fifth, and Seventh circuits have more conservative panels.").

75. SUNSTEIN ET AL., *supra* note 74, at 109.

76. Indeed, this is already standard practice. Litigants often brought challenges to Obama administration policies in the Fifth Circuit, while the Ninth Circuit has tended to see challenges to Bush and Trump administration policies. *See* Bray, *supra* note 7, at 459–60; Berger, *supra* note 7, at 1078–79, 1092. This practice may be on the decline, however, as once-liberal circuits become more conservative due to an influx of new Trump appointees. *See* Ben Feuer, *Thanks to Trump, the Liberal 9th Circuit Is No Longer Liberal*, WASH. POST (Feb. 28, 2019, 6:00 AM), https://www.washingtonpost.com/outlook/2019/02/28/thanks-trump-liberal-ninth-circuit-is-no-longer-liberal [https://perma.cc/Y8LE-CEDK]. Moreover, 2017 marked a departure from the Senate's longstanding "blue slip" tradition, which gave senators veto power over judicial nominees from their home states—a departure which could further reduce regional circuit variation. *See* Joseph P. Williams, *McConnell to End Senate's 'Blue Slip' Tradition*, U.S. NEWS & WORLD REP. (Oct. 11, 2017, 2:14 PM), https://www.usnews.com/news/politics/articles/2017-10-11/mcconnell-to-end-senates-blue-slip-tradition [https://perma.cc/WYK4-BABR].

77. Alex Botoman, Note, *Divisional Judge-Shopping*, 49 COLUM. HUM. RTS. L. REV. 297, 298–308 (2018). Judge shopping results from the partitioning of certain federal districts into divisions. Filing in certain divisions virtually guarantees a hearing before a particular judge. Botoman notes that during the Obama administration, litigants employed this method to obtain nationwide injunctions against DAPA and other major administration policies by bringing their cases before divisions of Texas district courts where they could expect favorable rulings from certain judges. *Id.*

78. ADMIN. OFFICE OF THE U.S. COURTS, A JOURNALIST'S GUIDE TO THE FEDERAL COURTS 36 (2017), https://www.uscourts.gov/sites/default/files/journalists_guide_to_the_federal_courts.pdf. [https://perma.cc/FK8G-TAFJ].

C. Improves Predictability, Uniformity, and Accuracy

Adopting Rule 65(d)(3) would promote predictability, uniformity, and doctrinal accuracy, both within a given case and as a matter of standardizing doctrine on a broader scale.[79] The proposal does so in two ways: it requires multi-judge panels to determine whether to grant or deny nationwide injunctions, and it encourages doctrinal uniformity based on the precedential authority of the federal appellate courts.

Three judges would, all things equal, be more likely to reach more consistent results than one—promoting predictability and uniformity in the federal court system.[80] Moreover, increasing the number of judges in a given case would likely improve the court's performance by providing the opportunity for group deliberation.[81] The Supreme Court has concurred in this reasoning, noting that appellate courts are "structurally suited" to reach accurate decisions due in part to their use of multi-judge panels, which "permit reflective dialogue and collective judgment."[82] It would make sense, then, for three appellate judges, rather than one district judge, to handle cases involving nationwide injunctions against the federal government, which often implicate matters of great public concern.[83]

This consideration is closely connected to the problems of forum shopping and executive policy disruption. For instance, the judge who granted a nationwide injunction against DAPA (whom, Botoman notes, the plaintiffs deliberately sought to hear the case) had a long history of criticizing the Obama administration's

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79. For an overview of the benefits of predictability and uniformity in the federal court system, see Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 850–54 (1994) (citing, among other factors, protection of reliance interests, reduction of adjudicatory costs, efficient enforcement and administration of public law, and equal treatment under the law).

80. *Cf.* Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 392 (2007) ("[D]ecisions jointly made by three judges are less likely to be idiosyncratic than the decisions of single judges acting alone."); Irene M. Ten Cate, *International Arbitration and the Ends of Appellate Review*, N.Y.U. 44 J. INT'L. L. & POL. 1109, 1144 (2012) ("[A]s a matter of statistical probability, a three-judge panel reduces the risk of a truly erratic decision.").

81. Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 97–102 (1986); *see also* Caminker, *supra* note 79, at 847 ("[M]ultimember courts create the opportunity for collegial deliberation, which improves individual decisionmaking by adding perspectives and ferreting out faulty reasoning.").

82. Salve Regina Coll. v. Russell, 499 U.S. 225, 232 (1991); *see also* United States v. McConney, 728 F.2d 1195, 1201 (9th Cir.) ("It stands to reason that the collaborative, deliberative process of appellate courts reduces the risk of judicial error on questions of law.").

83. *See, e.g.*, Batalla Vidal v. Nielsen, 279 F. Supp. 3d 401 (E.D.N.Y. 2018) (granting a nationwide injunction against the DACA rescission); Int'l Refugee Assistance Project v. Trump, 265 F. Supp. 3d 570, 633 (D. Md. 2017) (granting a nationwide injunction against the travel ban); City of Chicago v. Sessions, 264 F. Supp. 3d 933 (N.D. Ill. 2017) (granting a nationwide injunction against an executive order restricting federal funding for sanctuary cities); Texas v. United States, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (granting a nationwide injunction against DAPA).

immigration policies.[84] A single judge's individual policy preferences should not determine the status of national policies. A three-judge panel provides a simple yet effective method of tempering the effects of judges' specific predispositions.

Further, since appellate decisions, unlike district court decisions, serve as binding precedent for their own circuits and persuasive authority for other circuits,[85] raising nationwide injunctions to the appellate level would encourage standardization of the doctrine surrounding nationwide injunctions sorely lacking today.[86]

D. Reduces Use of Extreme Procedural Mechanisms

The increased prevalence of nationwide injunctions has spurred the government to resort to extreme procedural mechanisms.[87] In the DACA litigation alone, the Supreme Court has seen three separate petitions for certiorari before judgment—an extraordinary procedure that, if granted, permits the Supreme Court to review a district court's judgment without waiting for the intervening appellate court to render a decision.[88] Judges from across the ideological spectrum have complained of the impact of nationwide injunctions on court administration: Justice Sotomayor has lamented the government's "unfortunate[]" normalization of stays pending appeal in the context of another nationwide injunction case,[89] while Justice Thomas has written that the increased use of nationwide injunctions makes "every case a national emergency for the courts and for the Executive Branch."[90]

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84. Botoman, *supra* note 77, at 300–303.

85. *See* 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 134.02[1][d] (3d ed. 2019); Thomas E. Baker & Douglas D. McFarland, Commentary, *The Need for A New National Court*, 100 HARV. L. REV. 1400, 1407 (1987).

86. *See* Siddique, *supra* note 28, at 2139–40 ("First, there is no satisfactory account of when courts actually issue nationwide injunctions . . . . Second, there is little clarity about what principle should guide the decision of whether or not to issue a nationwide injunction."); *see also* Berger, *supra* note 7, at 1071 ("There is no coherent doctrine or consistent precedent guiding a court's decision on the scope of an injunction.").

87. *See* Morley, *supra* note 7, at 33 (noting that nationwide injunctions "repeatedly trigger emergency litigation, often involving the Supreme Court"); Stephen I. Vladeck, Essay, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 122 (2019) ("By volume, the most common ground the Trump Administration has invoked for needing emergency or extraordinary relief has been as a response to nationwide injunctions issued by district courts against executive branch policies.").

88. *See* Petition for a Writ of Certiorari Before Judgment, Nielsen v. Vidal, No. 18-589 (Nov. 5, 2018); Petition for a Writ of Certiorari Before Judgment, Trump v. NAACP, No. 18-588 (Nov. 5, 2018); Petition for a Writ of Certiorari Before Judgment, U.S. Dept. of Homeland Sec. v. Regents of the Univ. of Cal., No. 18-587 (Nov. 5, 2018).

89. Barr v. E. Bay Sanctuary Covenant, No. 19A230, 2019 WL 4292781, at *3 (Sept. 11, 2019) (Sotomayor, J., dissenting).

90. Trump v. Hawaii, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring); *see also* Dep't of Homeland Sec. v. New York, No. 19A785, 2020 WL 413786, at *2 (Jan. 27, 2020) (Gorsuch, J., concurring) ("[T]he routine issuance of universal injunctions is patently unworkable, sowing chaos for litigants, the government, courts, and all those affected by these conflicting decisions.").

Heightening barriers to obtaining nationwide injunctions would likely reduce the frequency of these emergencies significantly. The federal government would petition less frequently for certiorari before judgment and stays pending appeal. More cases would proceed through the court system via the normal appellate procedure, reducing procedural chaos and encouraging deliberative and well-informed judicial decision-making.[91]

Defenders of the status quo may argue that under the current system, circuit courts can simply stay district courts' nationwide injunctions, reducing the government's need to resort to extreme procedural mechanisms. However, the time between a district court's injunction and appellate review of that injunction can be months, resulting in significant disruption to administrative policy even when the government ultimately prevails—not to mention the toll this delay can take on those whose livelihoods depend on the continued existence of the challenged policies (such as DAPA).[92]

Finally, with fewer nationwide injunctions to confront, the government may feel less compelled to employ extreme procedural mechanisms with such regularity. A détente in the procedural arms race may benefit both plaintiffs and defendants in the long run.

E. Requires Only an Amendment to the Federal Rules of Civil Procedure

Though recent proposals have called for new doctrinal rules and standards,[93] new federal statutes,[94] or some combination thereof,[95] this Article's proposal would require only an amendment to the Federal Rules of Civil Procedure.[96]

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91. *See, e.g.*, Vladeck, *supra* note 87, at 126–27 (describing the positive impact on Supreme Court decision-making of "waiting for most cases to go through multiple layers of review by the lower courts").

92. Indeed, in two recent nationwide injunction cases, nearly a year passed between the district court's injunction and the appellate court's decision. *See* Regents of the Univ. of California v. U.S. Dep't of Homeland Sec., 908 F.3d 476 (9th Cir. 2018) (rendering a decision on November 8, 2018, nearly eleven months after the district court's January 9, 2018 decision); Texas v. United States, 809 F.3d 134 (5th Cir. 2015) (rendering a decision on November 9, 2015, nearly ten months after the district court's February 16, 2015 decision).

93. *See, e.g.*, Berger, *supra* note 7 (proposing a circuit-border rule); Bray, *supra* note 7 (proposing that federal courts limit injunctions to the plaintiffs alone); Clopton, *supra* note 28 (proposing that the Supreme Court overrule *United States v. Mendoza*, 464 U.S. 154 (1984), to permit offensive nonmutual collateral estoppel against the federal government); Mank et al., *supra* note 28 (proposing factors courts should take into account before granting nationwide injunctions in cases with state plaintiffs); Walker, *supra* note 35 (proposing that courts consider nine factors when enjoining a federal agency); Erickson, *supra* note 28 (proposing a balancing test with three "meta-factors" and thirteen subfactors).

94. Injunctive Authority Clarification Act of 2019, H.R. 77, 116th Cong. (2019); Assigning Proper Placement of Executive Action Lawsuits Act ("APPEAL Act"), H.R. 2660, 115th Cong. (2017); *see also* Costa, *supra* note 28 (proposing "[a] new statute requiring a three-judge panel").

95. *E.g.*, Morley, *supra* note 7, at 48–63 (advocating for doctrinal reforms, a change to the Federal Rules, or a federal statute addressing nationwide injunctions).

96. For an overview of the Federal Rules amendment process, see *infra* note 100.

Doctrinal proposals tend to take the form of Inhibitory Standards (such as balancing tests) and are therefore unlikely to meaningfully constrain the use of nationwide injunctions.[97] In addition, rulemaking, unlike doctrinal changes put forth in a court decision, is insulated from the context of a particular case or judge's ideology and commands greater deference due to the process's "quasi-administrative law" nature.[98] These factors make changes to the Federal Rules "less likely to generate controversy than ad hoc judicial rule changes."[99]

Moreover, adopting new doctrinal standards through Supreme Court edict is not necessarily easier than changing the Federal Rules. In both cases, convincing the Supreme Court represents the key hurdle.[100] And if the prospect of convincing the Supreme Court appears slim, the prospect of convincing Congress is slimmer still. Considering historically high levels of Congressional gridlock, passing a law on such a politically charged issue appears highly unlikely.[101] A change to the Federal Rules, which does not require express Congressional approval,[102] would provide a far less challenging route.

The Rules Enabling Act requires that the Federal Rules do not "abridge, enlarge or modify any substantive right."[103] This Article's proposal is purely procedural, so adopting it requires nothing more than a Federal Rule change. Because this proposal does not alter the substantive standards governing injunctions,[104] it would neatly fall

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97. *See supra* Section I.B for an overview of Inhibitory Standards versus Prohibitory Rules.

98. Harold Hongju Koh, *"The Just, Speedy, and Inexpensive Determination of Every Action?"*, 162 U. PA. L. REV. 1525, 1535 (2014); *see also* Morley, *supra* note 7, at 50 ("Addressing the issue of nationwide injunctions through the rulemaking process . . . ensures the rule is crafted outside the context of a particular case, in which the nature of the underlying rights or identities of the litigants may color the Court's consideration of the issue.").

99. Koh, *supra* note 98, at 1536.

100. Amending the Federal Rules requires approval from the Supreme Court Advisory Committee on Civil Rules, the Committee on Rules of Practice, and the Judicial Conference. After final approval by the Supreme Court (what I have termed the "key hurdle"), the amendment lies before Congress for at least seven months. If Congress takes no action, then the amendment passes. *See* JAMES C. DUFF, DIRECTOR, ADMIN. OFFICE OF THE U.S. COURTS, OVERVIEW FOR THE BENCH, BAR, AND PUBLIC: THE FEDERAL RULES OF PRACTICE AND PROCEDURE, https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public [https://perma.cc/T3S5-GRKS] (last visited June 2, 2020).

101. *See* Joe Perticone, *Trump and Congressional Democrats Are Taking Washington Gridlock to a Whole New Level*, BUSINESS INSIDER (May 25, 2019, 10:01 AM), https://www.businessinsider.com/washington-gridlock-trump-congress-democrats-2019-5 [https://perma.cc/YS5J-RZRC]; Sheryl Gay Stolberg & Nicholas Fandos, *As Gridlock Deepens in Congress, Only Gloom Is Bipartisan*, N.Y. TIMES (Jan. 27, 2018), https://www.nytimes.com/2018/01/27/us/politics/congress-dysfunction-conspiracies-trump.html [https://perma.cc/BE6H-HDPT].

102. *See supra* note 100.

103. 28 U.S.C. § 2072(b) (2018).

104. In *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), and *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), the Court set forth substantive standards governing preliminary injunctions, permanent injunctions, and the scope of injunctions, respectively.

under "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[105] As a result, no action beyond an amendment to the Federal Rules is necessary to execute this Article's proposal.

F. Promotes Reasonable Percolation

"Percolation" refers to the process by which legal questions develop through different courts pending their resolution by the Supreme Court.[106] Among the most bemoaned aspects of nationwide injunctions is their tendency to "short-circuit" percolation by issuing a blanket prohibition on the challenged policy or law and foreclosing other courts from bringing their own reasoning to bear on the issue.[107] Even proponents of nationwide injunctions acknowledge the benefits of percolation.[108]

However, the value of percolation has its limits; it should not be considered a "trump card."[109] Judges must balance percolation against the values of efficiency, uniformity and prevention of irreparable harm to parties otherwise unable to sue.[110]

For a court to grant a preliminary injunction, a plaintiff must establish "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20.

For a court to grant a permanent injunction, a plaintiff must demonstrate "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay*, 547 U.S. at 391.

Finally, the scope of injunctive relief "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen*, 512 U.S. at 765 (quoting Califano v. Yamasaki, 442 U.S. 682, 702 (1979)).

105. Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941).

106. *See, e.g.*, Bray, *supra* note 7, at 420; Harold Leventhal, *A Modest Proposal for a Multi-Circuit Court of Appeals*, 24 AM. U. L. REV. 881, 907 (1975).

107. For the term "short-circuit," see Wasserman, *supra* note 15, at 378. For others who criticize nationwide injunctions on percolation grounds, see, for example, *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring) (noting that nationwide injunctions "prevent[] legal questions from percolating through the federal courts"); Berger, *supra* note 7, at 1085–87; Bray, *supra* note 7, at 461; Morley, *supra* note 7, at 18.

108. *See, e.g.*, Amdur et al., *supra* note 28, at 52; Frost, *supra* note 28, at 1104.

109. Clopton, *supra* note 28, at 38; *see also* Malveaux, *supra* note 17, at 58 ("In these instances where so many risk irreparable harm, it behooves the Court to ask: How much time and how many decisions are reasonable for percolation? . . . Incrementalism has its costs too."); William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 11 (1986) ("If we were talking about laboratory cultures or seedlings, the concept of issues 'percolating' in the courts of appeals for many years before they are really ready to be decided by the Supreme Court might make some sense. But it makes very little sense in the legal world in which we live."); Barnas, *supra* note 28, at 1713–14 ("[T]he endorsement of nationwide class actions in *Califano* and nonmutual offensive issue preclusion in *Parklane* suggests that percolation is an important but not dispositive policy concern.").

110. *See supra* notes 44–50 and accompanying text.

For example, in *Califano v. Yamasaki*, the Supreme Court upheld a nationwide injunction despite countervailing percolation considerations.[111] Moreover, in practice, nationwide injunctions do not necessarily foreclose percolation. For instance, Spencer Amdur and David Hausman point out that two circuits reviewed the Trump travel ban despite nationwide injunctions in each.[112] Finally, the types of cases to which nationwide injunctions most often apply—challenges to executive policies[113]—are not the types of cases that benefit from percolation, due to both the uniform nature of the policy being challenged and the typically numerous amici curiae providing an adequate substitute for percolation.[114]

This Article's proposal promotes percolation among the courts, within reasonable limits. A district judge would no longer be able to singlehandedly halt the percolation process. By raising the barrier for nationwide injunctions, fewer legal issues will be short-circuited, leading to more inter-circuit dialogue and better-informed Supreme Court decisions. Even in cases in which nationwide injunctions are granted, the *intra*-circuit dialogue between the district judge and the circuit judges, and among the circuit judges themselves, represents an improvement over the current practice. At the same time, competing values should not take a backseat to percolation in every case. When an appellate court believes a claim warrants nationwide relief, the values of uniformity, efficiency, and prevention of irreparable harm can still win the day.

G. Reduces Risk of Conflicting Injunctions

The current proliferation of nationwide injunctions raises the specter of conflicting injunctions.[115] If one federal court vacates a federal policy and another

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111. 442 U.S. 682, 702-03 (1979) ("It often will be preferable to allow several courts to pass on a given class claim in order to gain the benefit of adjudication by different courts in different factual contexts . . . . But we decline to adopt the extreme position that such a class may never be certified.").

112. *See* Amdur et al., *supra* note 28, at 53 n.27.

113. *Cf.* Barnas, *supra* note 28, at 1680 n.22 (noting that most nationwide injunctions in the present day concern challenges to executive actions).

114. Barnas, *supra* note 28, at 1712–13 ("Percolation is most valuable when novel legal questions arise in various factual contexts. But universal injunction cases often involve narrow questions of law regarding [] systemwide and uniform government policies . . . . Even if percolation is important in universal injunction suits, the numerous amici curiae and intervenors that often participate in such suits—and the three-judge panels of the proposed forum—can serve as the 'many minds' of common law percolation." (footnotes omitted)).

115. *See, e.g.*, Berger, *supra* note 7, at 1088; Erickson, *supra* note 28, at 340–44; Josh Blackman, *Dueling Cosmic Injunctions, DACA and Departmentalism*, LAWFARE (May 22, 2018, 8:20 AM), https://www.lawfareblog.com/dueling-cosmic-injunctions-daca-and-departmentalism [https://perma.cc/8PDU-CUT9]; s*ee also* Dep't of Homeland Sec. v. New York, No. 19A785, 2020 WL 413786, at *2 (Jan. 27, 2020) (Gorsuch, J., concurring) ("The risk of winning conflicting nationwide injunctions is real too."). Indeed, one legal commentator has advocated for DAPA recipients to challenge *Texas v. United States* in different venues, in hopes of creating a conflict between the federal courts. *See* Denise Cartolano, *How the Lone Star State Reached the Entire Nation: The Need to Limit the Nationwide Injunction Against DAPA and DACA in United States v. Texas*, 12 FLA. A&M U. L. REV. 135 (2016) ("This nationwide injunction needs to be devalued and eventually

demands that the government continue enforcing the policy, each on a nationwide basis, the government cannot comply with both injunctions, risking sanctions from at least one court. Avoiding these conflicts is ultimately an exercise in judicial self-restraint because the federal courts presently lack bright-line rules governing such conflicts.[116]

Limiting authority to issue nationwide injunctions to the appellate courts addresses this concern by reducing the probability of conflicting injunctions. Put simply, thirteen circuit courts are far less likely to come into conflict than ninety-four district courts.

Moreover, the prospect of conflicting injunctions may be more a product of academic speculation than a real threat to the court system. The doctrine of comity "instructs federal courts to avoid stepping on each other's toes when parallel suits are pending in different courts."[117] Federal courts exercise comity by modifying, staying, or declining to grant injunctions that raise the possibility of conflict.[118] The mechanism of comity works well—so well that critics of nationwide injunctions cannot point to a single instance where the government has faced conflicting injunctions in the modern era.[119] As noted by Spencer Amdur and David Hausman, the risk of such injunctions remains "vanishingly low."[120] Eliminating nationwide injunctions to reduce the possibility of conflicting injunctions would be akin to illegalizing golf to reduce the risk of death by lightning strike.

H. Accords with Structural and Historical Considerations

Bray correctly describes the rise of nationwide injunctions not as a matter of bad doctrine or unprecedentedly cavalier federal judges, but as a structural problem calling for a structural solution.[121] This Article's proposal addresses longstanding

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eliminated. Conflicting decisions from federal courts across the nation is the way to effectuate this.").

116. Bray, *supra* note 7, at 462. See also Blackman, *supra* note 115, who describes the potential conflict as amounting to a game of "jurisprudential chicken": "Prudential concerns may prevent one judge from stepping on the toes of another judge, but these are not constitutional considerations. Given the insulation and autonomy afforded by life tenure, it is entirely possible that neither side would blink."

117. *In re* Naranjo, 768 F.3d 332, 348 (4th Cir. 2014) (internal quotation marks omitted) (quoting Smentek v. Dart, 683 F.3d 373, 376 (7th Cir. 2012)).

118. *See* Berger, *supra* note 7, at 1089–90; Bray, *supra* note 7, at 463 n.274 (listing cases).

119. For instance, the closest Bray comes to offering an example of a conflicting injunction in the modern era is his claim that a New York district judge may have been willing to, but ultimately did not, grant a conflicting injunction during the DACA litigation. Bray, *supra* note 7, at 463. Note that conflicting injunctions are not the same as circuit splits—the former phenomenon refers to multiple courts subjecting a single party to inconsistent injunctive obligations; the latter refers to different circuit courts reaching different legal conclusions on the same issue. Circuit splits occur with some regularity; conflicting injunctions do not.

120. Amdur et al., *supra* note 28, at 52.

121. *See* Bray, *supra* note 7, at 423 ("But if the rise of the national injunction was not due to willful judging — if it was latent in the structure of the federal courts and then manifested with changes in ideology—then we must look elsewhere for the answer. Exhortation is not a solution to structural problems and ideological forces." (footnote omitted)).

concerns about the balance of powers between branches without significantly departing from historical practice.

Three-judge review of significant legal challenges in the first instance has a long history. In response to the Supreme Court's 1908 invalidation of a state statute in *Ex parte Young*, Congress passed a law in 1910 requiring that three-judge district court panels hear constitutional challenges to state statutes.[122] In 1937, Congress extended this three-judge requirement to challenges to federal statutes.[123] These laws reflect Congress's view that a single district judge should not have the power to singlehandedly strike down laws.[124] The scope of these panels has since been significantly narrowed,[125] but the structural principles of judicial decentralization and hierarchy remain relevant,[126] not only for the administration of justice, but also for the courts' legitimacy. Wright and Miller note that Congress originally set up three-judge panels to strike down state laws because "there would be less public resentment if enforcement of the state statute were stayed by three judges rather than one, and . . . the provision for direct appeal to the Supreme Court would provide speedy review."[127]

Moreover, this Article's proposal would not significantly alter established judicial practice. Though Bray claims his proposal has a strong historical basis in equity, critics correctly note that completely eliminating nationwide injunctions would drastically overhaul the way courts grant relief.[128] Amdur and Hausman call for "less radical alternatives, which would allow broad injunctions when necessary to prevent real-world injuries, but would otherwise preserve opportunities for percolation across multiple chancellors."[129] This proposal represents such an alternative.

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122. Act of June 18, 1910, Pub. L. No. 61-218, ch. 309, § 17, 36 Stat. 539, 557 (codified at 28 U.S.C. § 2281) (repealed 1976).

123. Act of Aug. 24, 1937, ch. 754, § 3, 50 Stat. 751 (codified at 28 U.S.C. § 2282) (repealed 1976). For a more thorough history of three-judge district courts, see Joshua A. Douglas & Michael E. Solimine, *Precedent, Three-Judge District Courts, and the Law of Democracy*, 107 GEO. L.J. 413, 419–21 (2019).

124. Douglas et al., *supra* note 123, at 419–20.

125. Douglas et al., *supra* note 123, at 420–21 ("Today, federal law requires three-judge district courts only for redistricting cases involving congressional or statewide reapportionments, certain campaign finance challenges, lawsuits under other statutes that Congress has found would benefit from the special three-judge district court procedure, and a few laws involving the appointment of sitting members of Congress to cabinet positions.").

126. *See, e.g.*, Costa, *supra* note 28 ("That lone [district] judge issuing a nationwide injunction effectively overrules numerous judges who may have already rejected the same claim. It also subverts our judicial hierarchy as a nationwide injunction issued by a single district judge has greater effect than a court of appeals' decision on the same issue in a noninjunction posture (that decision would only be binding within the circuit).").

127. *See* WRIGHT ET AL., *supra* note 60, § 4234.

128. *See, e.g.*, Malveaux, *supra* note 17, at 56 (describing Samuel Bray's rule as "too blunt an instrument to address the complexity of our tripartite system of government, our pluralistic society, and our democracy").

129. Amdur et al., *supra* note 28, at 50. The term "chancellors" refers to Samuel Bray's *Multiple Chancellors*, which analogizes district judges to the English Lord Chancellor based on their shared capacity to grant sweeping injunctive relief. *See* Bray, *supra* note 7.

IV. POTENTIAL OBJECTIONS

A. Why Is a Plaintiffs-Only Restriction Superior to a Circuit-Border Restriction?

This Article's proposal prohibits district courts from granting injunctive relief beyond the plaintiffs (a "plaintiffs-only restriction"). In contrast, some critics of nationwide injunctions have proposed a "circuit-border" Prohibitory Rule, in which injunctions are limited to the enjoining court's circuit.[130] However, a blanket circuit-border restriction violates the long-held principle that equity acts in personam and is not constrained by geographic boundaries.[131]

Recognizing this difficulty, one proponent of the circuit-border rule distinguishes between "plaintiff-oriented" injunctions and "defendant-oriented" injunctions to allow broader injunctions when the remedy is tailored to the plaintiffs alone.[132] But even this amended circuit-border rule contains a fatal flaw: because people can move between states, a circuit-bounded injunction would often amount to a nationwide injunction, rendering this purported restraint frequently ineffective. Berger, a circuit-border rule proponent, admits as such: "In many cases, a circuit-wide injunction might have nationwide effect as a practical matter. For example, if the *Washington v. Trump* injunction were limited to the Ninth Circuit or the state of Washington, those affected by the executive order could simply enter the United States through West Coast airports . . . ."[133] Limiting relief to the plaintiffs rather than to the circuit in the absence of an appellate-granted nationwide injunction effectively restricts this type of overbroad relief while adhering to longstanding principles of equity.[134]

B. Are There Any Circumstances in Which a District Court Alone Can Grant Nationwide Relief?

This Article's proposed Rule change preserves three ways district courts could provide relief with nationwide scope.

First, a district court may still grant relief that extends to nonparties when the case does not challenge federal laws or policies. Second, this proposal does not restrict a district court's ability to issue a temporary restraining order (TRO) with nationwide scope. I describe how this would work in more detail in Section IV.C below. Third, courts can issue class actions after certifying a nationwide class of plaintiffs under Federal Rule 23(b)(2).[135] Class actions have several benefits that "quasi-individual

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130. *See, e.g.*, Berger, *supra* note 7, at 1073; Morley, *supra* note 7, at 52–53.

131. *See* Steele v. Bulova Watch Co., 344 U.S. 280, 289 (1952) ("[T]he District Court in exercising its equity powers may command persons properly before it to cease or perform acts outside its territorial jurisdiction."); *see also* Siddique, *supra* note 28, at 2103 n.39 (collecting cases affirming this principle).

132. *See* Morley, *supra* note 7, at 11.

133. Berger, *supra* note 7, at 1104.

134. Samuel Bray also advocates for a plaintiffs-only rule, albeit without allowing any form of nationwide injunction. *See* Bray, *supra* note 7, at 469; *see also id.* at 438 n.121 (arguing that such a rule does not violate the APA); *id.* at 469–73 (describing how such a rule would work in practice).

135. *See, e.g.*, Califano v. Yamasaki, 442 U.S. 682 (1979).

actions" lack.[136] For instance, they avoid mootness and standing concerns latent in any non-class action.[137] However, doctrinal changes such as heightened certification requirements have made class actions significantly harder to obtain in recent years.[138] In fact, it is unclear whether the class action in its current form could have provided timely and universal relief in, for instance, the recent travel ban litigation: the diversity of plaintiffs' injuries would have rendered the putative class vulnerable to challenges concerning the commonality and typicality requirements for class certification.[139] Considering these factors along with the increased delay and expense associated with class actions,[140] it becomes clear that the class action mechanism alone cannot handle every challenge to a federal policy. There will always be cases in which nationwide injunctions remain necessary.[141]

C. Does This Change Delay Needed Relief?

Requiring an appellate court to grant nationwide relief may appear to delay the relief sought by plaintiffs. This is a grave issue if plaintiffs face irreparable harm, such as deportation. However, if harm is truly imminent, a TRO with nationwide scope would suffice to secure immediate relief.[142] For instance, in *Washington v. Trump*, the district court granted a nationwide TRO to block the first iteration of the travel ban.[143]

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136. I have adopted this term from Maureen Carroll, who defines quasi-individual actions as non-class actions seeking injunctive relief that extends to nonparties. *See* Carroll, *supra* note 67, at 2020.

137. *See id.* at 2036 ("The class action device protects against the risk of mootness; even after the class representative's personal claim has become moot, the case may continue so long as some member of the class retains a live claim."); *id.* ("In a class action, in contrast [to a quasi-individual action], the representative can satisfy this standing requirement by demonstrating that some member of the class remains subject to ongoing or imminent harm . . . .").

138. *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011) (raising the class action commonality requirement). For academic literature discussing heightened difficulties in obtaining class actions, see A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441 (2013); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013); and Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843 (2016).

139. *See* Frost, *supra* note 28, at 1097; FED. R. CIV. P. 23(a)(2)–(3).

140. *See* Carroll, *supra* note 67, at 2035–36 ("On the whole, considerations of cost and delay create strong disincentives to class treatment.").

141. This Article's proposal also has ancillary benefits for class actions. Perhaps raising the standards for nationwide injunctions will have the added benefit of resurrecting the moribund class action mechanism.

142. TROs are essentially short-term or stopgap injunctions, generally issued when the court determines that providing notice and a hearing, which injunctions require, would cause a delay resulting in irreparable harm. *See* WRIGHT ET AL., *supra* note 60, § 2951. The test for evaluating a temporary restraining order is "generally the same" as that of a preliminary injunction. Anna Majestro, *Preparing for and Obtaining Preliminary Injunctive Relief*, A.B.A. (June 4, 2018), https://www.americanbar.org/groups/litigation/committees/woman-advocate/practice/2018/preliminary-injuction-relief [https://perma.cc/8K3N-6SYX].

143. No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017).

Though TROs are usually limited to fourteen days, district courts can extend the relief for good cause.[144] In addition, if the appellate court believes that nationwide relief could be warranted, it has discretion to hear the interlocutory appeal on an accelerated schedule.[145] As a result, this proposal does not present a significant challenge to deserving claims for nationwide relief.

CONCLUSION

The dramatic increase in nationwide injunctions under the Obama and Trump administrations has spurred legal commentators to propose a variety of potential solutions. This Article categorizes existing proposals as Prohibitory Rules, Inhibitory Standards, and Inhibitory Rules, and it proposes an Inhibitory Rule of its own. Limiting authority to issue nationwide injunctions to the appellate courts addresses widespread concerns about nationwide injunctions while preserving them where they are most needed. This proposal has the added benefits of promoting judicial consistency and being easier to adopt than alternative approaches.

Moreover, this Article's proposal appeals to concerns across the political spectrum. Republican frustrations with the elevated number of nationwide injunctions need no further elaboration. But support for this proposal should be just as strong among Democrats. As of April 2020, President Trump has appointed more than one in four circuit court judges.[146] Democrats can no longer rely on the federal courts as a counterweight to executive action they find objectionable, and should recognize their interest in curbing the frequency of nationwide injunctions should a Democrat become president and seek to, for instance, reinstate DAPA.

If adopted, this Inhibitory Rule would moderate the use of nationwide injunctions without barring deserving parties from obtaining prejudgment relief on a nationwide basis. As such, this proposed change to the Federal Rules facilitates the just, speedy, and inexpensive determination of civil proceedings.[147]

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144. FED. R. CIV. P. 65(b)(2).

145. That is, before the TRO expires. *Cf.* Wirtz v. City of South Bend, 669 F.3d 860, 863 (7th Cir. 2012) (noting that courts may hear appeals on an accelerated schedule because "[a]ppellate courts can act quickly when there is a compelling reason for them to do so").

146. David Luchs, *Trump Has Appointed Second-Most Federal Judges Through April 1 of a President's Fourth Year*, BALLOTPEDIA (Apr. 3, 2020, 11:10 AM), https://news.ballotpedia.org/2020/04/03/trump-has-appointed-second-most-federal-judges-through-april-1-of-a-presidents-fourth-year [https://perma.cc/KRD7-VV42].

147. *See* FED. R. CIV. P. 1.