No. 19-454

IN THE
Supreme Court of the United States

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

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA AND STATE OF NEW JERSEY,

Respondents.

On Writ of *Certiorari* Before Judgment to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICI CURIAE* THE PUBLIC INTEREST LAW CENTER AND FIVE AFFILIATED LAWYERS' COMMITTEES IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

Constitution

Statutes

Other Authorities

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are the Public Interest Law Center, and five other affiliates (listed in the Appendix to this brief) of the national Lawyers' Committee for Civil Rights Under Law.

Amici are nonpartisan, nonprofit organizations whose shared roots date to 1963, when President Kennedy enlisted the private bar in combating racial discrimination, and the resulting inequality of opportunity. These independently funded and governed organizations battle injustice in its many forms, and create systemic reform.

Amici work on some of the most important current national issues, including voting rights; healthcare; environmental health and justice; employment discrimination; fair housing and community development; educational opportunity; rights of persons with disabilities; and immigration.

One of the issues before the Court is a federal court's ability to issue an injunction that applies across the United States—*i.e.*, a "nationwide" injunction. For the most vulnerable communities represented by *amici*, nationwide injunctions are often critical for achieving justice, and are vital tools in advancing the cause of equal justice under law in a wide range of litigation; their legality directly affects the work of *amici*.

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[1] The parties submitted blanket consents to *amicus* briefs in this case. *Amici* affirm that no counsel for any party authored this brief, and no person other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici submit this brief to address federal courts' ability to grant injunctive relief that is national in scope, and to provide the Court with important historical evidence that such injunctions are consistent with traditional exercises of courts' equitable powers.

In two recent concurrences, Justices raised concerns about federal courts' issuance of injunctions that explicitly applied throughout the U.S. *See Dep't of Homeland Sec. v. New York*, 589 U.S. ___, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring); *Trump v. Hawaii*, 585 U.S. ___, 138 S. Ct. 2392, 2424-25 (2018) (Thomas, J., concurring). In both instances, the concurrences questioned district courts issuing nationwide injunctions because such injunctions supposedly are a recent phenomenon, not supported by traditional equity principles, in that they provide relief to nonparties across the country. *See Dep't of Homeland Sec.*, 140 S. Ct. at 600; *Hawaii*, 138 S. Ct. at 2424, 2426.

Contrary to suggestions that "nationwide" injunctions are a recent development that exceed the traditional equity powers of U.S. courts, English courts of equity before the founding of the U.S., and state and federal courts in the early days of the Republic, frequently granted relief that applied well beyond the parties before them. These historical precedents, and their reasoning, support modern courts granting injunctive relief with nationwide application when such relief is necessary to render complete justice.

Nationwide injunctions are well within the scope of the traditional equity powers of U.S. courts, and are a constitutional form of relief.

ARGUMENT

I. "NATIONWIDE" INJUNCTIONS ARE DEFINED BY TO WHOM THEY APPLY, NOT THEIR GEOGRAPHIC REACH

In order to consider properly the historical record of courts granting injunctive relief applying beyond the parties, and how such record is relevant to the Court's review of the nationwide preliminary injunction issued in this case, it is necessary to clarify what commentators and the courts mean by "nationwide" injunctions. Despite their name, "nationwide" injunctions' defining characteristic is *not* their geographic scope. It is well settled that federal courts can enjoin parties wherever the parties may try to engage in the conduct that is the subject of the injunction. *See Hawaii*, 138 S. Ct. at 2425, n.1 (nationwide "injunction . . . would not be invalid simply because it governed the defendant's conduct nationwide"); *Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952) ("the District Court in exercising its equity powers may" enjoin conduct "outside its territorial jurisdiction") (citations omitted); *see also Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (assessing scope of putative class under traditional equity principles, and observing, "scope of injunctive relief is dictated by the extent of the violation established," not by geography).

Instead, the debate about "nationwide" injunctions is concerned with injunctions that apply nationwide, not only to the parties before the court, but also to individuals and entities who are *not* parties to the

litigation. *See*, *e.g.*, *Hawaii*, 138 S. Ct. at 2425, n.1, (nationwide "injunctions are distinctive because they prohibit the Government from enforcing a policy with respect to anyone, including nonparties"); *see also* A. Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1071 (2018) (defining "nationwide" injunctions as "an injunction at any stage of the litigation that bars the defendant from taking action against individuals who are not parties to the lawsuit in a case that is not brought as a class action").

Insofar as the feature of "nationwide" injunctions granting *nonparties* the benefit of equitable relief is what generates criticisms they are beyond the constitutional powers of federal courts, this brief turns to the historical record that granting equitable relief to nonparties was well established in the common law of England and early American decisions, and, thus, is within federal courts' ARTICLE III powers.

II. FEDERAL COURTS HAVE CONSTITUTIONAL AUTHORITY TO GRANT EQUITABLE RELIEF THAT APPLIES NATIONWIDE, TO PARTIES BEYOND THOSE BEFORE THE COURT

Arguments that nationwide injunctions are a "modern" invention, thus calling into question whether such a form of relief is consistent with historical equity practice and constitutionally viable, are based on the incorrect premise that courts traditionally have not granted wide-reaching equitable relief applicable to parties and nonparties alike.

ARTICLE III of the Constitution says "[t]he judicial Power" of the federal courts "shall extend to all

Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States[.]" U.S. CONST., ART. III, § 2. As to such "judicial Power" in equity cases, "settled doctrine . . . is, that the *remedies in equity are to be administered* . . . according to the *practice of courts of equity in the parent country*[.]" *Boyle v. Zacharie*, 32 U.S. (6 Pet.) 648, 658 (1832) (Story, J.) (emphasis added); *see also Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) ("authority to administer" equity suits consistent with "principles of the system of judicial remedies . . . devised and . . . administered by the English Court of Chancery at the time of the separation of the two countries"); *Vattier v. Hinde*, 33 U.S. (7 Pet.) 252 (1833) (Marshall, C.J.) (equitable powers of federal courts "generally understood to adopt the principles, rules and usages of the court of chancery of England"); A. Dobie, HANDBOOK OF FEDERAL JURISDICTION & PROCEDURE, at 660 (1928) ("equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act"). Nationwide injunctions are consistent with historical practice in English courts before the adoption of the Constitution, and with early precedents in the U.S., and thus are within the "judicial Power" granted by the Constitution.

As stated above, Justice Thomas's concurrence in *Trump v. Hawaii* expressed skepticism that courts may impose "universal injunctions." 138 S. Ct. at 2425; *see also Dep't of Homeland Sec.*, 140 S. Ct. at 600 (Justice Gorsuch also questioning nationwide injunctions). Relying on the writing of Professor

Samuel Bray, Justice Thomas wrote that nationwide injunctions against the government do not comport with historic equity practice because "as a general rule, American courts of equity did not provide relief beyond the parties to the case." *Hawaii*, 138 S. Ct. at 2427 (citing S. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017)). Bray, however, is incorrect.

In his 2017 article, Bray argues that, while English courts in equity did sometimes protect the rights of persons not before the court, they did not afford relief as broad as a nationwide injunction in modern America. *See* Bray, 131 HARV. L. REV. at 426. In this case, Bray and a fellow professor, Professor Nicholas Bagley, agree the issue presented by nationwide injunctions is affording relief to nonparties, *see* Br. for N. Bagley & S. Bray as *Amici Curiae* Supporting Petitioners at 2 (this case "squarely raises" the "trend" of federal courts "issuing injunctions that extend beyond the parties"), and acknowledge a "robust history" of equity granting relief to parties other than those before the courts. *See id.* at 9-10 (discussing what they label "group" litigation). Despite these admissions, and settled law that injunctions are not subject to geographic limitation, Bray and Bagley nevertheless maintain that "National injunctions are new. There were no national injunctions in English equity. Nor were there any for at least the first century of the United States." *Id.* at 3. This is a form over substance argument, and is based on *post hoc* assignment of a label to a variety of injunction that applies to parties and nonparties.

Moving past semantics, there is no disputing the fundamental, substantive point: long-standing

English and early American precedents establish that, as of the time of the Constitution's adoption, courts of equity could and did issue broad injunctions affecting the rights or duties of parties not before the court. The exercise of this authority by English courts of equity had been settled by at least the 17th Century, and American courts exercised it continually from 1789 through today (including in cases against federal, state, or local governments). These courts did so to prevent "irreparable mischief, or such multiplied vexations, and such constantly recurring causes of litigation" as would arise if courts were limited to issuing decrees that bound only the parties before them. *Knight v. Carrollton R. Co.*, 9 La. Ann. 284, 286 (1854) (citing numerous English cases). "If indeed courts of equity did not interfere in such like cases, the justice of the country would be very lame and inadequate." *Id.*

English practice during the pre-Constitution era, and U.S. courts thereafter, consistently exercised equity jurisdiction whenever a party's wrongful conduct would do harm to others, and, where necessary, extended that jurisdiction well beyond the parties. This history makes clear the power to grant nationwide injunctions—*i.e.*, the power to issue injunctions that apply beyond the parties before the court—is within a federal court's equity powers.

A. "Principles, Rules, and Usages" of English Equity Before 1789 Included Granting Injunctions Extending Beyond the Parties Before the Court.

A federal court's authority to provide equitable relief, including an injunction with nationwide scope, accords with "the principles of the system of judicial

remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries." *Atlas Life Ins. Co. v. W. I. Southern, Inc.*, 306 U.S. 563, 568 (1939). At the time of the adoption of the Constitution, English decisions recognized that decrees of an equity court could broadly bind nonparties. American courts have followed this precedent from the earliest days of the country.

1. English equity decisions before 1789.

English practice on these issues had been well-established by the 1676 decisions in *Brown v. Vermuden*, 1 Ch. Cas. 272 & 283, 22 E.R. 796 & 802 (1676).[2] Brown sued to enforce a decree "against certain Persons Workers and Owners of Lead Mines in Derbyshire," requiring defendants to pay a certain amount based on the quantity of lead ore mined. *Id.* at 283, 22 E.R. at 802. The original suit proceeded against four defendants, but the Chancellor entered a judgment in favor of Brown's predecessor and his successors, "whereby a certain manner of tithing of Lead [Ore] was decreed, not only against the particular Persons named Defendants, but all other Owners and Workers." *Id.* at 272, 283, 22 E.R. at 797, 802.

Brown's predecessor served the decree on Vermuden, "who owned and wrought a Mine there." *Id.* at 273, 22 E.R. at 797. Vermuden "insisted that he [was] not bound by the Decree, for that he was not Party to" the original suit, and was not in privity

[2] The Chancellor issued two decisions in *Brown v. Vermuden*; both addressed whether an equitable decree applied to nonparties.

with a party. *Id.* Vermuden argued that he "could have no Bill of Review of [the decree] if it be erroneous, and therefore ought not to be bound" by its terms. *Id.*; *see also id.* at 283, 22 E.R. at 802 ("Vermuden pleaded . . . That he was a Stranger").

The Lord Chancellor overruled Vermuden's plea, holding the "Decree passed against the four" defendants in the original case brought by Brown's predecessor required not just "that the Defendants," but that "all the Miners should pay." *Id.* at 273, 22 E.R. at 797. "If [Vermuden] should not be bound, *Suits of this Nature . . . would be infinite, and impossible to be ended.*" *Id.* (emphasis added). The Chancellor enforced the decree against Vermuden, though he had not been a party, or in privity with the parties. *Id.* at 273, 22 E.R. at 797; *id.* at 283, 22 E.R. at 802.

Numerous other equity courts in early England reached similar results. *See*, *e.g.*, *Ewelme Hospital v. Andover*, 1 Vern. 266, 267, 23 E.R. 460, 461 (1684) (allowing action in equity to proceed without all parties); *Fitton v. Macclesfield*, 1 Vern. 287, 292-93, 23 E.R. 474, 476 (1684) (denying "bill of review," and finding court had equitable jurisdiction over prior matter despite failure to have before it all parties); *How v. Tenants of Bromsgrove*, 1 Vern. 22, 23 E.R. 277 (1681) (concluding "Bills of peace" applicable to nonparties "are proper in equity" "to prevent multiplicity of suits").

The House of Lords, in *City of London v. Perkins*, 3 Bro. P. C. 602, 1 E.R. 1524 (1734), discussed the rationale for the broad reach of this practice, and focused on the common rights or obligations of those that would be subject to the injunction. *Perkins*

involved serial disputes over the right of the London city government to collect a duty from both foreign and domestic importers of goods. *Id*. at 603, 1 E.R. at 1524. In a later dispute, London instituted an equity action in the Court of Exchequer, pleading the prior decrees as grounds to require payment of the duties. On appeal, the House of Lords recognized that "the duty in question was a demand against the *common rights and freedom of every subject of England*." *Id*. at 606, 1 E.R. at 1527 (emphasis added). The Lords, on this ground, enforced the earlier decrees against defendant importers, none of whom had been parties in those earlier cases. *Id*.

Thus, in England, equity jurisdiction extended to cases involving matters of broad public importance, where a decree would bind many members of the public not before the court as parties. *See also Blagrave v. Blagrave*, 1 De Gex & Smale 252, 258, 63 E.R. 1056, 1058 (1847) (*Perkins* supported equitable relief applying to "the public"); *Mayor of York v. Pilkington*, 1 Atk. 282, 26 E.R. 180 (1737) ("all the king's subjects" could be bound by equity decree, even where only few subjects were parties).

These cases, among others, establish that "the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries," *Grupo Mexicano de Desarrollo, S.A.*, 527 U.S. at 318, and the "principles, rules and usages of the court of chancery of England" at that time, *Vattier*, 33 U.S. (7 Pet.) at 274, included broad authority to issue decrees that bound parties not before the Chancellor. This authority applied where the dispute involved "a general exclusive right," *Lord Tenham v. Herbert*, 2 Atk. 483, 484, 26 E.R. 692, 692

(1742); where "all the king's subjects may be concerned in this right," *Pilkington*, 1 Atk. at 284, 26 E.R. at 181; where the suit was between government and "the public," *Blagrave*, 1 De Gex & Smale at 258, 63 E.R. at 1058; "to prevent multiplicity of suits," *Ewelme Hospital*, 1 Vern. at 267, 23 E.R. at 461; where "one general right was liable to invasion by all the world," *Dilly v. Doig*, 2 Ves. junr. 486, 487, 30 E.R. 738 (1794); or where individual suits "would be infinite, and impossible to be ended," *Brown*, 1 Ct. Ch. at 274, 22 E.R. at 797. In short, whenever parties otherwise "must [go] all round the compass to" settle the issues in dispute, equity could act to resolve the issue in one proceeding. *Lord Tenham*, 2 Atk. at 484, 26 E.R. at 692.

2. Calvert's treatise also demonstrates equitable relief applied broadly under English law.

The leading English treatise addressing the scope of equity practice prior to the establishment of the Constitution is A TREATISE UPON THE LAW RESPECTING PARTIES TO SUITS IN EQUITY (2d ed. 1847), by Frederic Calvert ("PARTIES IN EQUITY").[3] Calvert began by stating the general rule regarding parties to equitable actions: "whether the relief sought in the bill . . . touches any particular person, so as to obtain from him a benefit, or to fasten upon him a duty," such a person is a "necessary party."

[3] Justice Joseph Story wrote that no "comprehensive and accurate" treatment of the subject existed before PARTIES IN EQUITY. *See* J. Story, COMMENTARIES ON EQUITY PLEADINGS, AND THE INCIDENTS THEREOF, ACCORDING TO THE PRACTICE OF THE COURTS OF EQUITY, OF ENGLAND AND AMERICA (3d. 1844) ("STORY'S EQUITY PLEADINGS") at xi.

PARTIES IN EQUITY at 16, 21. But, he noted this rule "is founded upon general convenience," and is subject to numerous "occasions for the relaxation of the rule." *Id*. at 21. As Calvert explained:

> The complication of human affairs has, however, become such, that it is impossible always to act strictly on this general rule. Cases arise, in which if you hold it necessary to bring before the court every person having an interest in the question, the suit could never be brought to a conclusion. The consequence would be that *if the court adhered to the strict rule, there would in many cases be a denial of justice*.

Id. at 21-22 (emphasis added; internal quotation, citation omitted). Calvert discussed over a dozen "instances of relaxation" for various circumstances, *id*. at 22-54, each of which Calvert supported by citations to numerous English cases decided before 1789. All of the "relaxations" of the general rule, and the cases cited in support of them, illustrate the great flexibility English equity courts had to permit bills that affected the rights of persons or entities not before the court.

The "relaxations" of the general rule regarding parties were rooted in fundamental principles of the courts of equity in England: "A Court of Law decides some one individual question, which is brought before it," whereas "a *Court of Equity* not merely makes a decision to that extent but also *arranges all the rights*, which the decision immediately affects." *Id*. at 3 (emphasis added). Calvert added that a "'*Court of Equity, in all cases, delights to do complete justice, and not by halves*'; to put an end to litigation,

and to give decrees of such a nature, that the performance of them may be perfectly safe to all who obey them: *interest reipublicae ut sit finis litium* [*i.e.*, it is in the interest of the public that litigation come to an end]." *Id.* (emphasis added; quoting *Knight v. Knight*, 3 P. Wms. 331, 24 E.R. 1088 (1734)).

Calvert's analysis, and the numerous cases he cites, show that English courts possessed the equitable authority to bind persons who were not parties to the action, notably, in cases involving general interests and the rights of the public. English equity practice as of 1789 fully supports the use of equitable power by federal courts in this country to issue injunctions with nationwide scope that include nonparties.

B. Early American Equity Practice Granted Relief that Applied Beyond the Parties to a Litigation.

The principles of English practice carried over to early American equity courts, as demonstrated by both the leading 19th and 20th Century treatises on the subject, and federal and state equity decisions.

1. STORY'S EQUITY PLEADINGS establishes that equitable relief in U.S. courts never was limited to the parties before the court.

The leading American treatise on equity in the 19th Century was STORY'S EQUITY PLEADINGS, by Justice Story. Justice Story analyzed the usages, rules, and practices that the English cases established in equity before 1789, and illustrated how American courts had adopted and applied these principles in the early days following ratification of the Constitution. Justice Story wrote that he aimed his book especially to address "the principles, which

govern . . . the subject of the proper and necessary Parties to Bills." STORY'S EQUITY PLEADINGS at xi.

Justice Story's work tracked Calvert's research and conclusions: after stating the general rule that all persons materially interested in the subject matter of a suit in equity should be made parties to it, STORY'S EQUITY PLEADINGS § 72, at p. 83, the Justice recognized an "exception to the general rule[.]" *Id.* § 94, at pp. 114-15. Where such persons "are exceedingly numerous, and it would be impracticable to join them without almost interminable delays and other inconveniences, which would obstruct, and probably defeat the purposes of justice," they need not be parties to the case, even though the decree would be binding upon them. *Id.* "[T]he doctrine above stated as to the necessity of all persons being made actual parties" was riddled with so "many qualifications" that it was questionable whether it was "maintainable at all in its general signification." *Id.* § 94, at p. 116.

The exceptions derived from the fact that "*there always exists a common interest, or a common right*, which the Bill seeks to establish and enforce, or a general claim or privilege, which it seeks to establish, or to narrow, or take away." *Id.* § 120, at p. 146 (emphasis added). "It is obvious that, under such circumstances, the interest of persons, not actual parties to the suit, may be in some measure affected by the decree; but the suit is nevertheless permitted to proceed without them, in order to prevent a total failure of justice." *Id.* (citing pre-Constitution English cases, including *Pilkington* and *Perkins*); *see also* J. Pomeroy, A TREATISE UPON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA, VOL. I (3rd ed. 1905)

("POMEROY") §§ 243-275, at pp. 356-458 (state and federal cases applied approaches of cases such as *Perkins*, *Pilkington*, and other English decisions regarding scope of equitable relief).

Justice Story cited *Perkins* as precedent allowing a bill in equity "where there has been a general right claimed by the plaintiff," *id.* § 124, at p. 150, emphasizing that, in *Perkins*, the Chancery Court had allowed the bill to go forward "notwithstanding the objection, that *all the subjects of the realm might be concerned* in the right." *Id.* § 124, at pp. 149-50 (emphasis added). This was because, "[i]n such a case, a great number of actions might otherwise be brought, and almost interminable litigation would ensue; and, therefore, the Court suffered the Bill to proceed, although the defendants might make distinct defences, and although there was no privity between them and the city." *Id.* § 124, at p. 150.

As to *Pilkington*, Justice Story wrote that the Chancellor had sustained the action because "such a Bill, under the circumstances, . . . furnish[ed] a ground to quiet *the general right*, not only as to the persons before the Court, but as to all others in the same predicament." *Id.* § 125, at p. 150 (emphasis added).

> In all these classes of cases, *it is apparent, that all the parties* stand, or are supposed to stand, in the same situation, and have *one common right*, or one common interest, *the operation and protection of which will be for the common benefit of all*[.]

Id. § 126, at pp. 151-52 (emphasis added).

2. Early federal and state decisions in equity granted relief applicable beyond the parties to the litigation.

Justice Story also addressed equity practice as to absent parties as Circuit Justice in *West v. Randall*, 2 Mason 181, 29 F. Cases 718 (C. Ct. D.R.I. 1820). In *West*, plaintiff instituted "a bill against the defendants, as survivors of four trustees, for a discovery and account of certain real and personal estate, alleged to have been conveyed to them by one William West[.]" 2 Mason at 189, 29 F. Cases at 721. West had died, and plaintiff was an heir. Plaintiff did not name as parties West's other heirs, nor West's personal representative, and one defendant sought dismissal for failure to name them. *Id.* at 189-90, 29 F. Cases at 721.

Justice Story began by acknowledging the "general rule in equity that all persons materially interested, either as plaintiffs or defendants in the subject matter of the bill ought to be made parties to the suit, however numerous they may be." *Id.* at 190, 29 F. Cases at 721. But this "being a general rule, established for the convenient administration of justice," Justice Story said, "it must not be adhered to in cases, to which consistently with practical convenience it is incapable of application." *Id.* at 193, 29 F. Cases at 722.

Justice Story gave two illustrations of the exception: "where the parties are very numerous, and the court perceives, that it will be almost impossible to bring them all before the court; *or* where *the question is of general interest*, and *a few may sue for the benefit of the whole*." *Id.* (emphasis

added). Accordingly, "[i]n these and analogous cases of general right," a court of equity will:

> dispense with having all the parties, who claim the same right, before it, from the manifest inconvenience, if not impossibility of doing it, and is satisfied with *bringing so many before it, as may be considered as fairly representing that right, and honestly contesting in behalf of the whole*, and therefore binding, in a sense, that right.

Id. at 195, 29 F. Cases at 723 (emphasis added).

In *Elmendorf v. Taylor*, 25 U.S. (10 Wheat.) 152 (1825), Chief Justice Marshall, writing for a unanimous Court, recognized the flexibility that federal courts of equity have in administering the rules as to parties in equity actions before them. Defendants there argued plaintiff was "a tenant in common with others, and ought not to be permitted to sue in equity, without making his co-tenants parties to the suit[.]" *Id.* at 166. The Court noted that "[t]his objection *does not affect the jurisdiction*" of the federal court, "but addresses itself to the policy of the Court" so that in an action in equity, "all parties concerned shall be brought before them, that the matter in controversy may be finally settled." *Id.* (emphasis added).

But, "[t]his equitable rule," the Court said, "is framed by the Court itself, and is subject to its discretion." *Id.* at 166-67. The rule is not "inflexible," such that "a failure to observe [it] turns the party out of Court, because it has no jurisdiction over his cause." *Id.* at 167. "[B]eing introduced by the Court itself, for the purposes of justice," the Court held, the rule "is susceptible of modification for

the promotion of those purposes." *Id.* The Court observed that "it may be proper to say, that the rule which requires that all persons concerned in interest, however remotely, should be made parties to the suit, though applicable to most cases in the Courts of the United States, is not applicable to all," and that the federal courts had discretion to apply, or not apply, the rule depending on the circumstances of the case. *Id.*

In *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), the Court again considered a request for injunctive relief that extended beyond the actual parties to the case, to an entire state government. Although the Court found that it did not have jurisdiction over the Cherokee Nation's request to prevent enforcement of Georgia state law within the Nation, *Cherokee Nation*, 30 U.S. at 19-20, a dissent authored by Justice Thompson, and joined by Justice Story, concluded that, on the narrower issue of the scope of courts' equity powers, it was within the courts' powers to grant the requested injunction. *Id.* at 77-80.

These decisions illustrate Justice Story's conclusion that "Courts of Equity do not require, that all persons, having an interest in the subject-matter, should, under all circumstances, be before the Court as parties." STORY'S EQUITY PLEADINGS § 142, at p. 176. "On the contrary," both English and American equity decisions established that "there are cases, in which certain parties before the Court are entitled to be deemed the *full representatives of all other persons*, or at least so far as to bind their interests under the decree, although they are not, or cannot be made parties." *Id.* at 177 (emphasis added).

3. Pomeroy's TREATISE UPON EQUITY JURISPRUDENCE and additional early American decisions.

The leading 20th Century treatise on equity rules, POMEROY, concluded that the possibility of a multiplicity of suits alone "shows that the legal remedies are inadequate, and *cannot meet the ends of justice*, and therefore a court of equity interferes" on that ground to provide "some specific equitable remedy, which gives, perhaps in one proceeding, more substantial relief than could be obtained in numerous actions at law." POMEROY § 244, at p. 358 (emphasis added).

POMEROY identified several "classes" of cases in which English and American courts of equity had exercised jurisdiction for the purpose of avoiding a multiplicity of proceedings. *Id.* § 245, at pp. 359-61. These cases included "[w]here a number of persons have separate and individual claims and rights of action against the same party," all of which "*arise from some common cause*, are governed by the same legal rule, and involve similar facts, *and the whole matter might be settled in a single suit* brought by all these persons uniting as co-plaintiffs, or one of the persons suing on behalf of the others, or *even by one person suing for himself alone*." *Id.* § 245, at p. 360 (emphasis added); *see also id.* § 255, at p. 390 (common interests "may perhaps be enforced by one equitable suit" alone).

POMEROY listed "the equitable relief which might be obtained by the single plaintiff in the one case, or by all the plaintiffs united in the other" as including "*a perpetual injunction . . . or the declaration and establishment of some common right* or duty affecting

all the parties." *Id.* § 250, at p. 367 (emphasis added). The treatise noted, "The decisions are full of examples illustrating this most important feature of the doctrine." *Id.*

Finally, POMEROY cited "the very numerous recent cases illustrating" equitable relief being granted to avoid repetitious litigation. *Id.* § 261, at 411, n.(b). These included cases where the court enjoined "the enforcement of an invalid municipal ordinance affecting many persons"; and wrongful acts affecting numerous persons. *See id.* § 261, at pp. 414-15, n.(b).

The cases POMEROY cited illustrate that English precedents recognizing the authority of a court of equity to bind persons not before it to the requirements of its decree maintained their vitality in America into the 20th Century. For example, in *Bailey v. Tillinghast*, 99 F. 801 (6th Cir. 1900), the court of appeals held that "to bring a case within the jurisdiction" of a federal court of equity involving the rights of parties not before the court, all that was necessary was that there existed a common interest among the persons not before the court and the parties to the action regarding "the question involved and the kind of relief sought." 99 F. at 806 (citing *Perkins*, *Pilkington*, and *Lord Tenham*).

In a decision by a leading state court judge in the early years of the Republic, *Brinkerhoff v. Brown*, 6 Johns. Ch. 139 (N.Y. Ch. 1822) (Kent, Ch.), the court found it well settled that, when general rights are at issue, a court of equity would exercise jurisdiction "for the sake of peace, and to prevent a multiplicity of suits." *Id.* at 155 (citing *Pilkington*). The court explained "[t]he rules of pleading in chancery are not so precise and strict as at law," but "are more flexible

in their modification, and *can more readily be made to suit the equity of the case* and the policy of the court." *Id.* at 157 (emphasis added).

The principle of equity applying beyond the parties to a case also is seen in numerous cases regarding tax disputes in the 1800s. *See*, *e.g.*, *Carlton v. Newman*, 1 A. 194 (Me. 1885); *McTwiggan v. Hunter*, 30 A. 962 (R.I. 1895); *see also* POMEROY § 260, at pp. 391-410 (equity suits by one taxpayer could enjoin enforcement of tax against all). In these cases, courts found the taxes to be imposed were improper, and enjoined the government from collecting them from plaintiffs, *and others* subject to the taxes.

As POMEROY found, "[u]nder the greatest diversity of circumstances, and the greatest variety of claims arising from unauthorized public acts, private tortious acts, invasion of property rights, [and] violation of contract obligations," the "weight" of American "authority is simply overwhelming that" the authority of a court of equity

> may and *should be exercised*, either *on behalf of a numerous body of separate claimants against a single party*, or on behalf of a single party against a numerous body . . . where there is and because there is merely a community of interest among them in *the questions of law and fact involved in the general controversy*, or in the kind and form of relief demanded and obtained[.]

POMEROY § 269, at p. 445 (emphasis added).

Thus, from the start of our nation, and to the 20th Century, federal (and state) courts of equity in the U.S. followed established English authority, to bind persons not before the court to equitable decrees, so

as to ensure that American justice was not "lame and inadequate." *Knight*, 9 La. Ann. at 286.

C.The Issuance of Injunctive Relief to Non-parties Continued Through the Early 1900s.

American courts continued to apply the rationales of English and early America equity decisions, and to grant broad equitable relief that applied to nonparties, into the first half of the 20th Century. Numerous cases demonstrate the consistent theme of equity attempting to achieve complete justice, beyond the parties to the litigation.

From the late 19th Century until 1932, federal and state courts regularly issued labor injunctions prohibiting organized labor activities.[4] Labor injunctions routinely extended to broad categories of people who were *not* parties to the litigation. In one high-profile case, this Court affirmed the power of a district court to issue a labor injunction against defendants "and all persons combining and conspiring with them, and all other persons whomsoever." *In Re Debs*, 158 U.S. 564, 570 (1895); *see also id.* at 599 ("jurisdiction of courts to interfere in such matters by injunction is one recognized from ancient times and by indubitable authority").

In *Taliaferro v. United States*, 290 F. 906 (4th Cir. 1923), the district court enjoined officers and members of several unions from interfering with the hiring of strike-breakers. A nearby barber

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[4] Congress stripped federal courts of the power to issue most labor injunctions with the Norris-La Guardia Act of 1932, 29 U.S.C. §§ 101-115. That Act did not displace courts' authority to issue injunctions that apply to nonparties in other contexts.

sympathetic to the strike displayed a large sign that said: "No Scabs Wanted in Here." The barber was held in contempt for violating the injunction. The Fourth Circuit affirmed, even though the barber "was not a member of any of the unions named." 290 F. at 907.

In *Lewis Publishing Co.*, this Court preliminarily enjoined enforcement of the 1912 Post Office Appropriation Act against *any* publisher while the Court considered the constitutionality of the statute. *See Lewis Publ'g Co. v. Morgan* 229 U.S. 288 (1913). The statute required every "editor, publisher, business manager, or owner of every newspaper, magazine, periodical, or other publication" to periodically submit disclosures about their business to the Postmaster General and the local postmaster, or else lose the right to mail their publications. *See Lewis Publ'g Co.*, 229 U.S. at 296-97. Two New York City newspaper publishers separately filed suit, arguing that the Act was unconstitutional. *Id.* at 296-97.

One publisher requested an injunction only for itself, but noted that "upwards of 25,000 newspapers, magazines, and periodicals are published in and throughout the United States," and that "each and all thereof are equally affected by the [Act]." *See* M. Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 945, n.166-67 (2020) (summarizing record transcripts). The district court dismissed both suits and allowed a direct appeal to this Court. *See Lewis Publ'g Co.*, 229 U.S. at 297.

On appeal, one publisher moved for a temporary injunction pending a final decision on the

constitutionality of the Act. *See Journal of Commerce & C. Bulletin v. Burleson*, 229 U.S. 600 (1913). In its motion, the publisher asked that the government be restrained from enforcing the statute against the appellant publisher *and all other* newspaper publishers. *Id.*; *see also* Sohoni, 133 HARV. L. REV. at 946-47 (summarizing motion). The Court granted the motion, thereby enjoining the government from enforcing the Act against *any* publishers until its constitutionality was decided. *Journal of Commerce & C. Bulletin*, 229 U.S. at 601; *see also Hill v. Wallace*, 259 U.S. 44, 62 (1922) (issuance of injunction protecting plaintiffs, and nonparties, from enforcement of the 1921 Future Trading Act).[5]

During this period, the Court also affirmed a lower court's injunction that applied to parties and nonparties. In *Pierce v. Society of Sisters*, the Court considered Oregon's public school law, and an injunction enjoining enforcement of the statute. 268 U.S. 510 (1925). Two private schools sued state government agencies to stop enforcement of the law in any fashion. *See* Sohoni, 133 HARV. L. REV. at 959, n.249 (summarizing transcripts and pleadings in district court). The district court preliminarily enjoined "defendants from threatening or attempting to enforce the act complained against," without limiting the scope of the injunction to the two plaintiff schools. *Soc'y of Sisters of Holy Names v.*

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[5] It is of no moment that, in the *Lewis Publishing Co.* and *Hill* cases, it was this Court that issued an injunction encompassing nonparties, rather than a district court. *See* Section III.B., below.

Pierce, 296 F. 928, 938 (D. Or. 1924). Oregon appealed the ruling to this Court, and the Court affirmed the district court's decrees, specifically noting that the injunction, which provided relief to nonparties, was an "appropriate" "prayer." *Pierce*, 268 U.S. at 530, 533.

D. The Civil Rights Era Provided Widespread Injunctive Relief to Address Harm to Broad Populations.

Separate from the cases discussed above, injunctions that apply beyond the parties have been an important form of equitable relief to the American civil rights movement. From Reconstruction through and after passage of the Civil Rights Act of 1968, civil rights plaintiffs asked courts to apply their equitable authority broadly, to end unconstitutionally discriminatory practices and policies. In these cases, plaintiffs needed both a declaration of illegality, *and* a vehicle to provide a basis for strong enforcement—injunctions applied to parties and nonparties alike. *See* J. Altman, *Implementing a Civil Rights Injunction: A Case Study of NAACP v. Brennan*, 78 COLUM. L. REV. 739, 739-40 (1978) (summarizing use of injunctions to address civil rights violations).

For example, plaintiffs in *Bailey v. Patterson*, 323 F.2d 201 (5th Cir. 1963), alleged that Mississippi unlawfully discriminated against African Americans by enacting and enforcing state and local statutes and ordinances mandating racial segregation in public accommodations. Several transportation carriers—including local, interstate, and international carriers—also allegedly discriminated against African Americans by requiring racial

segregation in their facilities. *Id.* at 203, n.2. Residents of Jackson, Mississippi sought a declaratory judgment that the statutes and ordinances violated the U.S. Constitution and the Interstate Commerce Act, *and* sought an order enjoining the carriers from continuing their unlawful segregation. *Id.* at 203.

The district court granted declaratory relief, but declined to issue an injunction, reasoning that, because the suit was not a class action, no relief could be granted beyond that to which each named plaintiff was specifically entitled. *Id.* at 202, 204. On appeal, the Fifth Circuit enjoined the City of Jackson and its officials from "seeking to enforce or encouraging" racial segregation in the transportation facilities, and granted injunctions against the transportation carrier defendants. *Id.* at 202, 204, 207-08. Importantly, the Fifth Circuit declined to limit relief simply because the case was not a class action:

> Appellants . . . seek the right to use facilities which have been desegregated, that is, which are open to all persons, appellants and others, without regard to race. *The very nature of the rights appellants seek to vindicate requires that the decree run to the benefit not only of appellants but also for all persons similarly situated.*

Id. at 205-06 (emphasis added). The court further held that denying the injunction was improper given the "threat of continued or resumed violations of appellant's federally protected rights remains actual." *Id.* (citing *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953)). This example of the many

cases in more recent times granting injunctions as a remedy that applied to parties *and nonparties* shows that nationwide injunctions are constitutional.

III. NATIONWIDE INJUNCTIONS THAT GRANT RELIEF TO NONPARTIES ARE NECESSARY FOR EQUITY'S ROLE OF PROVIDING COMPLETE JUSTICE

Critics of nationwide injunctions argue that their use creates the possibility of procedural chaos or conflicting injunctions; stifles debate; and results in forum shopping or "gamesmanship." *See, e.g., Dep't of Homeland Sec.*, 140 S. Ct. at 600-01. But these arguments ignore the purpose of equity, and, in any event, do not go to whether federal courts have the power under ARTICLE III to issue nationwide injunctions.

Equity is rooted in achieving just *outcomes*, and the potential for procedural complexities should not be allowed to prevent such just results. Indeed, "a just outcome, *ex aequo et bono*—is precisely a matter of equity." *Soaring Wind Energy, L.L.C. v. Catic USA Inc.*, 946 F.3d 742, 758 (5th Cir. 2020) (citing a later edition of POMEROY). This is especially true when *government* acts wrongfully, where the impact can be throughout the community, the state, or the country. Indeed, such injunctions may be the *only* remedy available to redress the threat of immediate, irreparable harm.

These arguments also incorrectly presuppose that the scope of a district court's equitable powers is less geographically broad than that of this Court's, but a district court's ARTICLE III powers are not so cabined.

A. Equity Seeks Just Outcomes.

Equity dictates that principles of rightness, fairness, and equality control in the adjudication of a

dispute. *See* Black's Law Dictionary, 656-57 (10th ed. 2014). "[E]quity, in its true and genuine meaning, is the soul and spirit of the law; positive law is construed, and rational law is made by it. In this, equity is made synonymous with justice . . . ." 3 Bl. Com. 429. "[Equity] is the power granted to courts to craft special remedies in adjudicating disputes[.]" *Id*. It follows, then, that courts sitting in equity, *having decided relief is necessary*, are granted broad discretion and flexibility in fashioning remedies that achieve *complete* justice, rather than limit themselves based on potential procedural complexities. *See Hecht Co. v. Bowles,* 321 U.S. 321, 329-330 (1944) ("[a] District Court has discretion to evaluate a situation in its entirety to reach a fundamentally just outcome"); *Walters v. Marathon Oil Co.,* 642 F.2d 1098, 1100 (7th Cir. 1981) ("[a]n equity court possesses some discretionary power" to fashion a remedy "to do complete justice").

The issuance of nationwide injunctions by district courts—exercising discretion to craft remedies that achieve justice based on the courts' consideration of the merits of the disputes before them—may indeed cause procedural confusion, and even conflicting results between courts. *See Dep't of Homeland Sec.*, 140 S. Ct. at 601 (Justice Gorsuch noting size of federal judiciary). However, this complexity is not unique to nationwide injunctions—it pervades the judicial system as a whole. Differing conclusions between district courts within a Circuit, or between two or more of the 12 courts of appeals, are an anticipated and accepted reality of federal courts. And, when splits arise within or between Circuits, first courts of appeals, and then this Court, may resolve such conflicts. The same (sometimes messy)

process holds true for nationwide injunctions, despite opponents' criticisms that it creates unworkable uncertainties, and, conversely, their warnings that nationwide injunctions will prevent arguments from "percolating" in district courts and courts of appeals. *See*, *e.g.*, *Dep't of Homeland Sec.*, 140 S. Ct. at 599 (immigration rule reviewed by nine district courts); *Hawaii*, 138 S. Ct. at 2404 (travel ban reviewed in multiple courts).

But equity is not concerned with "how the sausage is made" in the process of getting to the right outcome; instead "it is the historic purpose of equity to secure complete justice[.]" *EEOC v. General Tel. Co. of Northwest, Inc.*, 599 F.2d 322, 334 (9th Cir. 1979), *aff'd*, 446 U.S. 318 (1980). Indeed, equity's goal of complete justice grants courts license to muddle through the process: "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. *Flexibility rather than rigidity has distinguished it*." *Hecht Co.,* 321 U.S. at 329-30 (emphasis added). This flexibility, and equity's focus on fairness, practicality, and just results makes critics' objections to potential procedural uncertainty or complexity secondary concerns. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. ENC Corp.*, 464 F.3d 885, 891-92 (9th Cir. 2006) (Noonan, J.) ("in its earlier usage, equity brought to mind a fairness sought by the chancery courts that transcended statutory law"); 3 Bl. Com. 429 ("[i]n a moral sense, that is called equity which is founded, *ex aequo et bono*, in natural justice, in honesty, and in right").

B. ARTICLE III Confers the Same Scope of Equitable Powers on *All* Federal Courts.

A related critique focuses on each of the dozens of district courts having the ability to issue an injunction that could apply to the entire country, thus, opponents say, greatly increasing the likelihood of a procedural morass. *See*, *e.g.*, Br. for N. Bagley & S. Bray as *Amici Curiae* Supporting Petitioners at 23-25.

However, ARTICLE III confers the *same* scope of judicial power to this Court, to courts of appeals, and to district courts: ARTICLE III vests the "judicial Power" of the U.S. in "one Supreme Court, *and* in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST., ART. III, § 1 (emphasis added). That judicial power authorizes ARTICLE III courts—district courts, courts of appeals, and this Court—to decide "all Cases, in Law and Equity." *Id.* at § 2, cl. 1. Notably, the language in ARTICLE III does *not* differentiate between courts in its conferral of power.

> [ARTICLE III] does not carve up the judicial power over a case in equity depending on the particular type of plaintiff, the particular type of defendant, or the particular form or effect of the equitable relief sought. It does not distinguish between injunctions that reach a single district, a single circuit, or every circuit. It does not distinguish between injunctions affecting enforcement of state law and injunctions affecting enforcement of federal law.

Sohoni, 133 HARV. L. REV. at 934. Thus, if the Court has the ability to issue nationwide injunctive relief to

parties and to nonparties when necessary to afford complete justice, so too does each district court.

CONCLUSION

The power to grant broad equitable relief, including to nonparties, nationwide, is well within the traditional powers of courts of equity, and consistent with federal courts' powers under ARTICLE III.

Respectfully submitted,

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APRIL 8, 2020

APPENDIX

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