**"Rule by District Judge: The Challenges of Universal Injunctions"**

**United States Senate**
**Committee on the Judiciary**

**Testimony of Mila Sohoni, Professor of Law, University of San Diego School of Law**

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Chairman Graham, Ranking Member Feinstein, and members of the Committee, I am honored to be invited here today to testify. I am a professor of law at the University of San Diego School of Law. My research and teaching focuses on administrative law, civil procedure, and federal courts. Previously, I was a law clerk for Judge Judith W. Rogers of the D.C. Circuit. I recently wrote an article about universal injunctions and Article III,[1] and I am in the process of writing another article about the "universal vacatur" of regulations and the Administrative Procedure Act (APA).[2] I would like to speak to you today about that research and how it may inform the Committee's approach to universal injunctions.

I am glad that the Committee has chosen to frame its hearing in terms of the "universal" injunction, rather than the "nationwide" injunction. That term—"universal"—helpfully emphasizes the feature of these injunctions that matters the most: these injunctions extend beyond just the plaintiff to grant injunctive relief to those similarly situated to the plaintiff or even to anyone at all.

I have argued—and I firmly believe—that the universal injunction is both constitutional and legitimate. Article III allows federal courts to issue injunctions that protect non-plaintiffs and, in suits to which it applies, the APA authorizes universal preliminary injunctions against, and the universal vacatur of, federal rules. There are nevertheless three objections made to such injunctions. The first is that they are unconstitutional because they exceed the powers of an Article III court to decide "cases … in equity." The second is that no statute explicitly authorizes their issuance—not even the APA. And the third is a suite of policy objections, among them that these injunctions promote forum shopping, thwart percolation, circumvent the Rule 23 class action device, and allow one district court's adverse order to effectively nullify the federal government's victories in other lower courts of equal dignity—what the Department of Justice calls the "running the table" problem.

In my testimony today, I will first explain why universal injunctions comport with both Article III and the APA, and then offer some thoughts on how Congress should go about dealing with the policy objections levied against universal injunctions.

*1. The Article III Objection:* The lynchpin of the Article III case against the universal injunction is that such injunctions are a recent invention. Critics of these injunctions have

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[1] Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920 (2020).
[2] Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. __ (2020).

claimed that the first universal injunction against federal officers did not emerge until the 1960s and that, before then, the federal courts uniformly limited equitable relief to the parties before them. That recent historical vintage, Justice Thomas contended in *Trump v. Hawaii*, means that such injunctions exceed the traditional limits upon the equitable powers of Article III courts.

But are these injunctions truly new? And do they exceed the Article III power? The answers to those questions are "not really" and "no." Federal courts have been issuing injunctions that reach beyond the plaintiffs for over a century—indeed, for just about as long as federal courts have been issuing *purely plaintiff-protective* injunctions against the enforcement of federal or state laws.[3] As far back as 1913, the Supreme Court itself issued a universal preliminary injunction that barred the Wilson Administration from enforcing a federal law affecting newspapers against not just the two plaintiffs but also against "other newspaper publishers" throughout the country,[4] pending the Court's disposition of the case. In the 1920s, the Court issued two other preliminary injunctions that barred the enforcement of federal laws beyond the plaintiffs (though not universally) within a single, critical judicial district, in the run-up to its decisions in *Hill v. Wallace* (1921) and *Chicago Board of Trade v. Olsen* (1923). In one of those cases (*Hill*), it specified that similarly broad final relief should issue. And in *Wallace v. Thomas* (1935), a single federal district court judge in Texas preliminary enjoined federal officers from all four districts in Texas from enforcing the Bankhead Cotton Control Act against "every cotton ginner in the State of Texas," conditional on the posting of a $100,000 injunction bond.[5] The fact of the matter is that federal courts have long issued injunctions against federal officers that shielded non-plaintiffs—and I have found no evidence that their authority to do so was questioned.

The history of federal court injunctions against *state* laws also matters for the Article III analysis. Let me pause for a moment to explain why. Injunctions against state officers run against a different sovereign than injunctions against federal officers. Article III's grant of judicial power, however, does not distinguish between injunctions against federal officers and injunctions against state officers. From an Article III perspective, there is no difference between such injunctions. That is why it is noteworthy that there are cases dating back to the 1910s in which three-judge federal courts issued injunctions against state laws that reached well beyond the plaintiffs and even universally. In one such case—the landmark decision of *Pierce v. Society of Sisters* (1925)—the Supreme Court affirmed a universal injunction barring the enforcement of Oregon's compulsory public-schooling law in suits brought by two schools suing for themselves alone. In another well-known case—*West Virginia Board of Education v. Barnette* (1943)—the Supreme Court affirmed an injunction that reached beyond the plaintiff class of Jehovah's Witnesses to also shield "any other children having religious scruples" from a state law requiring students to salute the American flag. That aspect of the decree would have mattered to, for example, a *Mennonite* child in West Virginia—not least because "the

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[3] *See* Philadelphia Co. v. Stimson, 223 U.S. 605 (1912); American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902); Ex parte Young, 209 U.S. 123 (1908).

[4] Journal of Commerce & Commercial Bulletin v. Burleson, 229 U.S. 600, 600 (1913) (per curiam), *available at* https://perma.cc/4KDR-J4HA.

[5] *See* Order Granting Temporary Injunction at 3–4, Wallace v. Thomas (No. 152 in Equity) (filed July 19, 1935) [https://perma.cc/YM2XPTY8].

Mennonites' doctrine of non-resistance would not allow them to even act as plaintiffs in a court of law."[6] By reaching beyond the plaintiff class, the *Barnette* decree protected non-parties who could not have obtained relief for themselves.

These cases (and others I describe in my article[7]) span many courts, many decades, and many different domains of law. But their implication for the Article III analysis is straightforward. Federal courts may issue injunctions that protect non-plaintiffs. Article III confers a single judicial power upon federal courts to decide "cases … in equity." It doesn't allocate different types of equitable remedial power to courts at different levels of the federal judicial hierarchy. It doesn't distinguish between injunctions that reach a single district, a single circuit, or every circuit. It doesn't distinguish between injunctions against enforcement of state laws and injunctions against enforcement of federal laws. If the Supreme Court can issue a non-plaintiff-protective or a universal injunction against enforcement of a federal law in a suit by a single plaintiff, then so can a federal district court *as an Article III matter*. If a federal district court can issue a non-plaintiff-protective or a universal injunction against enforcement of a state law in a suit by a single plaintiff, a federal district court must also have the power to issue such an injunction against enforcement of a federal law *as an Article III matter*. There is only one "judicial power," and that power includes the power to issue injunctions that protect those who are not plaintiffs.

This is why it is unfortunate that modern-day discourse concerning such injunctions often criticizes these decrees as lawless judicial arrogance, as abuses of judicial power, or as threats to our constitutional order. They are none of those things. Article III empowers federal courts to issue universal injunctions.

*2. The Statutory Objection:* This brings me to the next objection raised against the universal injunction—the contention that no statute or rule authorizes their issuance. The most relevant statute here is the APA, though other sources of law are also relevant.[8]

The APA matters to the discussion of the universal injunction for the simple reason that many cases involving requests for universal injunctions also involve challenges to federal agency action and in particular to federal rules. Section 706 of the APA authorizes federal courts to "set aside" unlawful federal "agency action"—a term that Section 551 defines to include "the whole or a part of an agency rule." That language brings the lofty constitutional debate about universal injunctions down to statutory brass tacks. If Section 706 allows federal courts to vacate a rule universally, then the APA allows federal courts to provide exactly the kind of relief that critics of universal injunctions say they should *not* be able to provide: equitable relief that reaches beyond the parties to *anyone*.[9] Moreover, if a court can ultimately vacate a rule universally once it reaches the merits, then the APA plainly authorizes the court

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[6] *See* DAVID R. MANWARING, RENDER UNTO CAESAR: THE FLAG SALUTE CONTROVERSY 12 (1962).

[7] *See supra* note 1.

[8] *See, e.g.*, the All Writs Act, 28 U.S.C. 1651(a) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."); Fed. R. Civ. P. 65 (injunctions and restraining orders).

[9] Vacatur is a form of equitable relief, but the Court has called it a "less drastic remedy" that should be preferred to the injunction. Monsanto v. Geertson Seed Farms, 561 U.S. 139, 165–66 (2010).

to issue a *preliminary* injunction that suspends the enforcement of the contested rule against anyone pending its merits decision on whether to vacate the rule universally.[10]

In case after case, the federal courts have concluded that the APA authorizes universal vacatur of rules. Universal vacatur is the "normal remedy"[11] or the "usual result"[12] when a reviewing court holds that a rule is unlawful. Indeed, the remedy of universal vacatur is so well-established that some courts have expressed frank bewilderment at the DoJ's recent contentions that a rule may be vacated only as to the plaintiffs.[13] Let me set out three points in chronological order to explain why these courts have got it right.

First, consider the background law of equitable remedies at the time the APA was enacted—a body of law that the APA is understood to have subsumed. As I have just outlined, by the early twentieth century, federal courts had granted broad-scale equitable relief that reached well beyond the plaintiffs—and occasionally universally—against both federal and state laws. In addition, three-judge courts had issued final decrees that universally set aside and permanently enjoined federal rules (though those rules were formally promulgated as orders) in the *Assigned Car Cases* (1927) and in *United States v. Balt. & Ohio Railroad* (1935); the Court affirmed the latter decree. In the early 1940s, partly as a result of an extended sequence of stays issued by the lower court and the Supreme Court, the new chain-broadcasting regulations initially announced by the FCC in 1941 did not go into effect at all as to *any* network or station, *plaintiff or non-plaintiff*, until ten days after the Supreme Court eventually upheld their validity in 1943.

This background law has important implications for how we should understand the APA. At a bare minimum, this account wholly negates any claim that, at the time of the APA's enactment in 1946, the notion of universal vacatur was a heretical fancy or that the first

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[10] *See* 5 U.S.C. 705 (authorizing "the reviewing court" to "issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings").

[11] Allina Health Servs. v. Sebelius, 746 F.3d 1102, 1110 (D.C. Cir. 2014) ("vacatur is the normal remedy…").

[12] Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (when "agency regulations are unlawful, the ordinary result is that the rules are vacated"); Harmon v. Thornburgh, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989) ("When a reviewing court determines that agency [action] [is] unlawful, the ordinary result is that the [action is] vacated—not that [its] application to the individual [plaintiffs] is proscribed.").

[13] *See, e.g.*, O.A. v. Trump, 404 F. Supp. 3d 109, 153 (D.D.C. 2019) ("To the extent [the DoJ] argue[s] that the vacatur remedy should be limited to the plaintiffs in this case, that contention is … difficult to comprehend. …. [T]he Court would be at a loss to understand what it would mean to vacate a regulation, but only as applied to the parties before the Court. As a practical matter, for example, how could this Court vacate the Rule with respect to the organizational plaintiffs in this case without vacating the Rule writ large? What would it mean to 'vacate' a rule as to some but not other members of the public? What would appear in the Code of Federal Regulations?"); New Mexico Health Connections v. HHS, 340 F. Supp. 3d 1112, 1183 (D.N.M. 2018) ("The Court does not know how a court vacates a rule only as to one state, one district, or one party. The main Department of Justice lawyer advised that he was not sure if the department had ever asked for relief to be limited to one state before doing so in this case and did not know of anyone else in the United States asking for such relief.").

universal injunction against federal officers lay decades in the future. In fact, we should go one step further: this picture of the background law in the run-up to the APA should guide how we read the APA. The APA was not an explicit prospective delegation to the federal courts to elaborate new equitable remedies.[14] But it *was* an incorporation of an existing system of equitable remedies that could be used—and in fact *had been* used—to grant sweeping relief to non-plaintiffs, to set aside federal agency action universally, and to suspend federal agency action universally for extended periods of time. If Congress had wished to *divest* the federal courts of their powers to set aside and enjoin rules universally, Congress would have said so clearly when it enacted the APA. Instead, because the APA said nothing on that point, the correct inference is that the APA made no departure from the pre-existing baseline, under which it was established that federal courts could universally enjoin, as well as universally vacate, federal rules.

Second, the text of the APA straightforwardly authorizes universal vacatur. The APA says that if "agency action" runs afoul of any of the provisions set out in Section 706, the reviewing court "shall hold unlawful and set aside" the "agency action"—a term that Section 551 defines to include "the whole or a part of an agency rule, … or the equivalent or denial thereof." As the Court explained in *Lujan v. Nat'l Wildlife Federation*,[15] in a generic APA challenge to a rule, the *rule* is the reviewable agency action, not the *application* of the rule.[16] Before the merits are reached, that reviewable agency action—the rule—may be enjoined by the court, universally if necessary, in order to preserve the status quo pending judicial review.[17] And if and when the rule is found to be unlawful on the merits, the court may set aside or vacate the rule universally. In administrative law, as Jonathan Mitchell has recognized, it is not a "fallacy" for a court to issue a "writ of erasure"—it is the relief that Congress chose.[18]

Third, Congress has not disturbed this remedy in the decades since the APA was enacted. By 1967, *Abbott Labs v. Gardner*[19] had eliminated any doubt that the APA allowed pre-enforcement facial challenges to regulations. Justice Fortas's dissent could not have been clearer: the decision in *Abbott Labs*, he wrote, "authorize[d] threshold or pre-enforcement

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[14] For an example of an explicit prospective delegation to courts to elaborate the law through doctrinal development, see Fed. R. Evid. 501 ("[t]he common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege"). *See* Mila Sohoni, *The Power to Privilege*, 163 U. PA. L. REV. 487, 549 n.264 (2015).

[15] 497 U.S. 871 (1990).

[16] *See id.* at 891 (stating that "a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately" is reviewable "agency action," "whether or not explicit statutory review apart from the APA is provided").

[17] *See* 5 U.S.C. 705 (authorizing "the reviewing court" to "issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings").

[18] Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 1017 (2018) (noting that "in cases involving judicial review under the APA, … the court is truly functioning as a formal veto-gate for the challenged agency action"); *see also* Admin. Conf. of the U.S., Recommendation 2013-6, Remand Without Vacatur, 78 Fed. Reg. 76,272, 76,273 (Dec. 17, 2013) (recommending that agencies should "work with the Office of the Federal Register to remove vacated regulations from the Code of Federal Regulations").

[19] 387 U.S. 136 (1967).

challenge by action for injunction and declaratory relief to suspend the operation of the regulations in their entirety and without reference to particular factual situations."[20] Yet nine years later, when Congress enacted amendments to the APA's judicial review provisions, Congress left intact Sections 705 and 706—and it has not touched them since. In addition, Congress has enacted several other laws that specifically authorize pre-enforcement challenges to rules, for example the Clean Air Act and the Toxic Substances Control Act. Like the APA, these statutes do not *expressly* state that rules may be set aside as *to anyone*, as opposed to set aside *just* as to the parties. Yet, like the APA, these statutes have long been interpreted as authorizing courts to vacate rules universally.[21]

In sum, the APA authorizes universal vacatur of regulations, as well as universal preliminary injunctions against them. I mentioned earlier that it is unfortunate to hear modern-day condemnations of federal judges as behaving in a lawless or abusive fashion when they issue universal injunctions. I add that it is especially dismaying to hear such criticisms levied at federal judges adjudicating APA suits. The APA authorizes both the universal vacatur of rules and universal preliminary injunctions against them.

3. *The Policy Objections:* The foregoing discussion establishes the legality of universal injunctions and universal vacatur. That point is mainly relevant for federal courts adjudicating cases seeking these types of relief. But it also has relevance for this Committee's work, and in particular for how it may address the policy objections to universal injunctions.

The policy objections to universal injunctions—perhaps most notably the "running the table" issue—have been well-ventilated by the DoJ and by various commentators. I would caution that these policy issues do not attain the catastrophic, crisis-level proportions that some portrayals depict, and that the elimination of the universal injunction would not by itself eliminate those issues.[22] Should Congress nevertheless choose to legislate in response to these policy objections, it should keep in mind that there are also important policy values that are *protected* by universal injunctions—values that Congress also ought to shield. These values include, among other things, avoiding wasteful, repetitive litigation of identical questions of law by many courts; securing uniformity in federal law; avoiding the distributive inequity of a regime in which only litigants with the wherewithal to sue can secure relief against unlawful statutes or executive branch action; preventing the entrenchment of potentially unlawful legal regimes by their piecemeal implementation; and placing brakes upon laws or regulations that cause abrupt, avulsive legal change and that may have irreversible consequences for those

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[20] Toilet Goods Ass'n v. Gardner, 387 U.S. 167, 175 (1967) (Fortas, J., dissenting in *Abbott Labs*).

[21] *See, e.g.*, Nat. Res. Def. Council v. E.P.A., 489 F.3d 1250, 1262 (D.C. Cir. 2007) (vacating two rules "in their entirety").

[22] On "running the table," *see*, *e.g.*, Sullivan v. Zebley, 493 U.S. 521 (1990) (affirming a Third Circuit decision granting relief to a nationwide class action in a case involving regulations earlier deemed valid or enforceable by *four* other circuits); on forum shopping, *see* Kate Huddleston, *Nationwide Injunctions: Venue Considerations*, 127 YALE L. J. F. 242, 252 (2017) (explaining how forum shopping would persist even in the absence of nationwide injunctions); on the objection that the universal injunction forces the DoJ to seek emergency relief from the Court, *see* Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 153 (2019) (examining numerous cases in which "the government's applications for emergency or extraordinary relief have had nothing to do with nationwide injunctions").

subject to them.[23] Protecting percolation, reducing forum shopping, and raising the odds that the executive branch will be able to continue to enforce its policies in the interval before the Supreme Court decides on their validity: these are, by and large, good things.[24] But they are not the *only* good things. They are desiderata to be balanced against other desiderata.

The question then becomes how Congress can go about most sensibly striking the balance between these competing concerns. Congress has a wide range of legislative options here. Congress does not have to pass a sledgehammer statute that outright bars *all* injunctions that protect non-parties from *any* law or regulation, as it considered doing in 2018 with the Injunctive Authority Clarification Act. Indeed, such a blanket measure would be both disruptive and undesirable, for it would strip the federal courts of a remedial device that they have used for over a century and that they sometimes *must* use in order to craft a remedy that is complete, fair, and sensible.

I do not have a specific legislative reform proposal to advance. What I wish to stress, however, is that there are at least three important areas in which the impact of any proposed legislation should be examined carefully, so that Congress does not inadvertently enact a law that unduly restricts judicial authority or that places into disarray long-settled law, practice, and understandings. These three areas are: (1) interim or final equitable relief in suits in federal court against *non*-federal laws and regulations (i.e., state or local laws and regulations); (2) interim or final equitable relief in suits in federal court challenging federal agency action, whether those suits allege causes of action under the APA or under other agency organic acts; and (3) interim equitable relief in suits in federal court involving emergency situations implicating constitutional violations, including in suits involving executive orders. In addition, Congress should be forewarned that there is unlikely to be a silver-bullet solution. A conservative list of the sources of law potentially implicated here would include not just the APA, but also the All Writs Act, Rules 23 and 65 of the Federal Rules of Civil Procedure, various provisions of Title 28, the many statutes that cross-reference the judicial review provisions of the APA, and the still other statutes that contain language that is in sum and substance identical to the APA's. For these reasons, I would urge that Congress consider the views of the Judicial Conference's Rules Committee and the Administrative Conference of the United States before drafting any legislative reforms. Congress should perhaps even consider charging a committee to study this question, as it did when it created the Federal Courts Study Committee in 1988.

The bottom line is that Congress must make sure that whatever reforms it chooses to enact are thoroughly vetted. To borrow a term from critics of universal injunctions, this whole question of legislative reform could benefit from a great deal more "percolation." Legislation addressing such a fundamental, complex, and important subject should not be rushed through the process under the mistaken supposition that these injunctions are toxic and lawless

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[23] *See also* Amanda Frost, *In Defense of Nationwide Injunctions*, 93 NYU L. Rev. 1065, 1069 (2018) (noting the important role played by nationwide injunctions in "an era when major policy choices are increasingly made through unilateral executive action affecting millions").

[24] *But cf.* William Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 11 (2017) ("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.").

usurpations of executive-branch authority by power-mad federal judges. Notwithstanding the policy costs of universal injunctions, there are policy benefits to such injunctions as well, and the federal courts issuing these decrees are acting within the ambit of the powers conferred by Article III and (where it is relevant) by the text of the APA.