Circulating Opinion

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Washington Legal Foundation
Advocate for Freedom and Justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

State of ARIZONA, et al.

v.

Joseph R. BIDEN, et al.

No. 22-3272, Decided April 7, 2022

U.S. Court of Appeals for the Sixth Circuit

Opinion Topic: Judicial authority to issue nationwide injunctions

Introduction:

Three States filed suit in the Southern District of Ohio alleging that a Department of Homeland Security memorandum revising the agency's immigration enforcement priorities is contrary to law, arbitrary and capricious, and should have undergone notice and comment under the Administrative Procedure Act (APA). The district court rejected the government's justiciability arguments, found that the memo likely violated the APA, and imposed a nationwide preliminary injunction.

A unanimous Sixth Circuit panel, per Chief Judge Sutton, stayed the injunction. The court found that the government made a strong showing that it would likely succeed on the merits of the questions of Article III standing, administrative reviewability, and the substantive APA claims. Chief Judge Sutton concurred in his own opinion, pointedly arguing that nationwide injunctions disserve the rule of law and, if unchecked, will become "a springing easement on the customary deliberative process for dealing with issues of national importance."

Opinion Digest:

SUTTON, Chief Judge, concurring:

*** The district court's remedy—universally enjoining the National Government from enforcing the Guidance in any State in the country—also likely exceeded its authority. I do not take issue with the court's decision to extend the remedy beyond the Southern District of Ohio as to the three state claimants. When "exercising its equity powers," a district court "may command persons properly before it to cease or perform acts outside its territorial jurisdiction." *Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952). But it is one thing to honor a federal court judgment issued in favor of, say, Arizona by the Southern District of Ohio anywhere in the country. It is quite another to do so for the 47 States that did not participate in the lawsuit. I am not the first to question nationwide (or universal) injunctions (or remedies) that bar the federal government from enforcing a law or regulation anywhere and against anyone. *See, e.g.*, *Trump v. Hawaii*, —— U.S. ——, 138 S. Ct. 2392, 2424–29 (2018) (Thomas J., concurring); *Dep't of Homeland Sec. v. New York*, —— U.S. ——, 140 S. Ct. 599, 599–601 (2020) (mem.) (Gorsuch, J., concurring); *CASA de Md., Inc. v. Trump*, 971 F.3d 220, 256–63 (4th Cir. 2020) (vacated on other grounds); Samuel Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 457–82 (2017).

The **Honorable Jeffrey S. Sutton** is Chief Judge of the U.S. Court of Appeals for the Sixth Circuit. *Chief Judge Sutton had no role in WLF's selecting or editing this opinion for our* CIRCULATING OPINION *feature.*

I meet this concept with considerable skepticism. Article III grants the "judicial Power," which extends only to specified "Cases" and "Controversies." U.S. Const., art. III, § 2. Standing limitations, a prohibition on advisory opinions, distinctions between judgments and opinions all grow out of this language and the history behind it.

The same is true of remedies, which emerge from a federal court's equitable power. A valid Article III remedy "operate[s] with respect to specific parties," not with respect to a law "in the abstract." *California v. Texas*, ––– U.S. ––––, 141 S. Ct. 2104, 2115 (2021) (quotation omitted). That is why courts generally grant relief in a party-specific and injury-focused manner. *See Gill v. Whitford*, ––– U.S. ––––, 138 S. Ct. 1916, 1934 (2018). In this same way, we do not remove—"erase"—from legislative codes unconstitutional provisions. Jonathan Mitchell, *The Writ–of–Erasure Fallacy*, 104 Va. L. Rev. 933, 1016–17 (2018). We merely refuse to enforce them in a case, thereby exercising "the negative power to disregard an unconstitutional enactment." *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923). After a court has remedied a claimant's injury, it is fair to ask what controversy remains for a court to adjudicate or remedy.

Call them what you will—nationwide injunctions or universal remedies—they seem to take the judicial power beyond its traditionally understood uses, permitting district courts to order the government to act or refrain from acting toward nonparties in the case. The law already has a mechanism for applying a judgment to third parties. That is the role of class actions, and Civil Rule 23 carefully lays out the procedures for permitting a district court to bind nonparties to an action. Nationwide injunctions sometimes give States victories they did not earn and sometimes give States victories they do not want. They always sidestep Rule 23's requirements.

Such injunctions create practical problems too. The effect of them is to prevent the National Government from enforcing a rule or executive order without (potentially) having to prevail in all 94 district courts and all 12 regional courts of appeals. They incentivize forum shopping. They short-circuit the decisionmaking benefits of having different courts weigh in on vexing questions of law and allowing the best ideas to percolate to the top. They lead to rushes to judgment. And all of this loads more and more carriage on the emergency dockets of the federal courts, a necessary feature of any hierarchical court system but one designed for occasional, not incessant, demands for relief.

At a minimum, a district court should think twice—and perhaps twice again—before granting universal anti-enforcement injunctions against the federal government. Even if it turns out that the three States in this case are entitled to relief, it is difficult to see why an injunction applicable only to them would not do the trick.

The States' contrary arguments are unconvincing. The Administrative Procedure Act, it is true, says that a reviewing court may "hold unlawful and set aside" agency actions that violate the law. 5 U.S.C. § 706(2). But that raises a question; it does not answer it. The question is whether Congress meant to upset the bedrock practice of case-by-case judgments with respect to the parties in each case or create a new and far-reaching power through this unremarkable language. We presume that statutes conform to longstanding remedial principles. *Nken v. Holder*, 556 U.S. 418, 433 (2009); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982). And it is far from clear that Congress intended to make such a sweeping change. *Compare* Bray, *supra*, at 438 n.121, 129 S.Ct. 1749; *and* John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 37 Yale J. Reg. Bull. 37, 41–47 (2020); *with* Mila Sohoni, *The Power to Vacate a Rule*, 88 Geo. Wash. L. Rev. 1121, 1191–92 (2020). Use of the "setting aside" language does not seem to tell us one way or another whether to nullify illegal administrative action or not to enforce it in the case with the named litigants. For that reason, I would be inclined to stand by the long-understood view of equity—that courts issue judgments that bind the parties in each case over whom they have personal jurisdiction.

The district court separately feared that a narrower injunction "would create a patchwork immigration enforcement system," R.44 at 78, instead of a "comprehensive and unified" one, *Arizona v. United States*, 567 U.S. 387 (2012). But that justification lacks a limiting principle and would make nationwide injunctions the rule rather than the exception with respect to all actions of federal agencies. That is especially troubling in the domain of immigration law, where the federal Legislative and Executive Branches, not the Judicial Branch, are the key drivers of national policy.

What of the district court's and States' fears that "aliens that DHS illegally fails to arrest or remove can travel" anywhere, making universal relief necessary to "fully redress the States' injuries"? R.34 at 40. That argument, again, would permit a nationwide injunction for any immigration-related claim by any one State. No less importantly, the States have not offered any evidence to back up the point or to concretely illustrate its consequences. Even if this alleged injury were not speculative, it is doubtful that a nationwide remedy was the narrowest way to cure it. Relatedly, the district court worried that the Guidance could not "be applied on a state-by-state basis." R.44 at 78. But that is initially the National Government's problem, not ours, and it indeed acknowledged that severed policy enforcement remains a feasible alternative.

All in all, nationwide injunctions have not been good for the rule of law. Left unchecked, such nationwide injunctions have become a springing easement on the customary deliberative process for dealing with issues of national importance. The sooner they are confined to discrete settings or eliminated root and branch the better.