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# Why There Should Be a Presumption Against Nationwide Preliminary Injunctions

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## WHY THERE SHOULD BE A PRESUMPTION AGAINST NATIONWIDE PRELIMINARY INJUNCTIONS\*

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### INTRODUCTION

Nationwide judicial power is a strong tool with far-reaching consequences. It is clear that the United States Supreme Court, as the highest court in the land, can exercise its power nationwide. But what about when a single federal district court judge makes a ruling that applies to the entire country? Instinctively, and described in these terms, this feels suspicious. Nationwide power is a strong authority for one judge to wield, as opposed to a panel of three judges or nine justices. This power is magnified when a nationwide scope is applied to preliminary injunctions. A preliminary injunction is an “extraordinary” remedy,<sup>1</sup> and the type of relief it provides is “drastic medicine.”<sup>2</sup> The practical effect of a nationwide preliminary injunction is that a single, unelected federal district court judge makes a ruling that applies to the entire nation prior to a full trial on the merits. Using a nationwide scope with an already remarkable form of

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1. *Munaf v. Green*, 553 U.S. 674, 689 (2008). *But see Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399, 1408 (D.C. Cir. 1998) (“[D]istrict courts enjoy broad discretion in awarding injunctive relief.”).

2. *Gearhart Indus., Inc. v. Smith Int’l, Inc.*, 741 F.2d 707, 715 (5th Cir. 1984).

relief creates a one-two punch of extraordinary and far-reaching judicial power.

Despite the extreme nature of this remedy, there have been five different instances of various federal district court judges in Texas granting a nationwide preliminary injunction in the past two years.<sup>3</sup> This practice, however, is not unique to Texas. After the election of President Trump and his issuance of several controversial executive orders, district court judges granted nationwide preliminary injunctions in Washington,<sup>4</sup> Maryland,<sup>5</sup> Hawaii,<sup>6</sup> California,<sup>7</sup> and Illinois.<sup>8</sup> Each of these preliminary injunctions has enjoined the federal government from implementing a policy or regulation across the entire country.<sup>9</sup> This type of remedy is meant to be temporary, but in the interim, it can have a substantial impact on people's day-to-day lives.<sup>10</sup> For example, people in New York and Illinois had their employment authorization revoked as a result of the *Texas v. United*

3. See generally *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016) (enjoining the Department of Health and Human Services from enforcing its rule pursuant to the Affordable Care Act that prohibits discrimination on the basis of gender identity or termination of pregnancy); *Nevada v. U.S. Dep't of Labor*, 218 F. Supp. 3d 520 (E.D. Tex. 2016) (enjoining the Department of Labor from implementing and enforcing a rule that increases the minimum salary level required for exemption from Fair Labor Standards Act's overtime requirements for executive, administrative, and professional employees); *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016) (enjoining the Department of Education from enforcing its interpretation of "sex" to include gender identity within the scope of Title VII and Title IX); *Nat'l Fed'n Indep. Bus. v. Perez*, No. 5:16-cv-00066, 2016 WL 3766121 (N.D. Tex. June 27, 2016) (enjoining the Department of Labor from implementing its new interpretation of the Advice Exemption Rule, which requires an attorney to disclose confidential client communications related to a unionization matter to the Department of Labor); *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (enjoining the United States and Department of Homeland Security from implementing the Deferred Action for Parents of Americans and Lawful Permanent Residents program, which provides legal status to undocumented immigrants in the United States), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271 (2016).

4. *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at \*2 (W.D. Wash. Feb. 3, 2017), *motion for stay pending appeal denied*, 847 F.3d 1151, 1156 (9th Cir. 2017), *appeal dismissed*, No. 17-35105 (9th Cir. Mar. 8, 2017).

5. *Int'l Refugee Assistance Program v. Trump*, 241 F. Supp. 3d 539, 565 (D. Md. 2017), *aff'd in part, vacated in part*, 857 F.3d 554 (4th Cir. 2017), *vacated and remanded*, \_\_\_ S. Ct. \_\_\_, 2017 WL 4518553 (Oct. 10, 2017) (mem.), *dismissed as moot*, No. 17-1351 (4th Cir. Nov. 20, 2017).

6. *Hawaii v. Trump*, 245 F. Supp. 3d 1227, 1237-38 (D. Haw. 2017), *aff'd in part*, 859 F.3d 741 (9th Cir. 2017), *judgment vacated*, \_\_\_ S.Ct. \_\_\_, 2017 WL 4782860 (Oct. 24, 2017) (mem.).

7. *City of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 508-09 (N.D. Cal. 2017), *appeal docketed*, No. 17-16887 (9th Cir. Sept. 18, 2017).

8. *City of Chicago v. Sessions*, No. 17 C 5720, \_\_\_ F. Supp. 3d \_\_\_, \_\_\_, 2017 WL 4081821, at \*14 (N.D. Ill. Sept. 15, 2017).

9. See *supra* notes 3-8 and accompanying text.

10. See *infra* note 11 and accompanying text.

*States (Texas I)*<sup>11</sup> preliminary injunction granted by a judge in the Southern District of Texas.<sup>12</sup> Moreover, the rationale for these nationwide preliminary injunctions is often conclusory and overbroad, and they rest on justifications used for permanent injunctions, a similar yet distinct remedy.<sup>13</sup> The use of nationwide preliminary injunctions has not gone unnoticed by scholars,<sup>14</sup> and it will likely receive even more attention given the rapid pace at which nationwide preliminary injunctions are being granted, the recent litigation surrounding President Trump’s immigration executive orders, and the Supreme Court’s grant of certiorari, and subsequent dismissal as moot, in *Trump v. International Refugee Assistance Project*,<sup>15</sup> a case involving a nationwide preliminary injunction.<sup>16</sup> There are a number of issues that arise when considering the implementation of nationwide preliminary injunctions, including

11. 86 F. Supp. 3d 591 (S.D. Tex. 2015). In *Texas I*, the plaintiffs sought to enjoin the United States and the Department of Homeland Security from enacting “Deferred Action for Parents of American and Lawful Permanent Residents,” a program that would provide legal status and various benefits for undocumented immigrants. *Id.* at 604.

12. Complaint, *Lopez v. Richardson*, No. 1:16-cv-09670 (N.D. Ill. Oct. 12, 2016) (challenging the application of a preliminary injunction issued in the Southern District of Texas to residents of Illinois, which caused the revocation of complainant’s employment authorization); Amended Complaint, *Make the Road N.Y. v. Baran*, No. 1:16-cv-04756 (E.D.N.Y. Sept. 29, 2016) (challenging the application of a preliminary injunction issued in the Southern District of Texas to residents of New York, which caused the revocation of complainant’s employment authorization).

13. See *Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015) (“[T]he Constitution vests the District Court with ‘the judicial Power of the United States.’ That power is not limited to the district wherein the court sits but extends across the country.” (quoting U.S. CONST. art. III, § 1)), *aff’d by an equally divided court*, 136 S. Ct. 2271 (2016) (mem.); *Nevada v. U.S. Dep’t of Labor*, 218 F. Supp. 3d 520, 534 (E.D. Tex. 2016) (“A nationwide injunction is proper in this case. The Final Rule is applicable to all states. Consequently, the scope of the alleged irreparable injury extends nationwide. A nationwide injunction protects both employees and employers from being subject to different EAP exemptions based on location. This Court is not alone in its decision.”) (citing *Texas v. United States*, 201 F. Supp. 3d 810, 835–36 (N.D. Tex. 2016); *Nat’l Fed’n. Indep. Bus. v. Perez*, No. 5:16-cv-00066-C, 2016 WL 3766121, at \*46 (N.D. Tex. June 27, 2016)); see also *infra* Part II.

14. See e.g., Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 118 HARV. L. REV. (forthcoming 2017); 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, 487–556 (2016); Zayn Siddique, *Nationwide Injunctions*, 118 COLUMBIA L. REV. (forthcoming 2018); Daniel J. Walker, Note, *Administrative Injunctions: Assessing the Propriety of Non-Class Collective Relief*, 90 CORNELL L. REV. 1119, 1119–52 (2005).

15. \_\_\_ S. Ct. \_\_\_, 2017 WL 4518553 (Oct. 10, 2017).

16. 137 S. Ct. 2080, 2083 (2017).

collateral estoppel,<sup>17</sup> forum shopping,<sup>18</sup> venue,<sup>19</sup> and the doctrine of allowing multiple lower courts to develop the law more robustly within their respective circuits.<sup>20</sup>

This Comment explores the normative value of nationwide preliminary injunctions granted by a federal district judge against the federal government.<sup>21</sup> Given the combination of the preliminary nature and the broad scope of a nationwide remedy, there should be a presumption against nationwide preliminary injunctions. When a judge truly believes a nationwide scope is necessary, she should implement procedural safeguards to protect against the concerns that result from a determination prior to a hearing on the merits that affects parties not before the court.

The analysis proceeds in three parts. Part I explains the purpose and history of preliminary injunctions and the development of the now-popular nationwide scope. Part II addresses the concerns of granting nationwide preliminary injunctions. Section II.A distinguishes between preliminary and permanent injunctions and explains both why the distinction is crucial and why it is inappropriate to rely on justifications for nationwide permanent injunctions when implementing nationwide preliminary injunctions. Section II.B discusses the concerns that arise with nationwide preliminary injunctions that affect uninvolved nonparties and draws a parallel to the concerns behind third-party standing. Part III discusses recommendations that could address the concerns with nationwide preliminary injunctions and provides input on which recommendations would alleviate the concerns highlighted in this Comment.

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17. Walker, *supra* note 14, at 1134.

18. Bray, *supra* note 14 (manuscript at 10–11).

19. Kate Huddleston, *Nationwide Injunctions: Venue Considerations*, 127 YALE L.J.F. 242, 244 (2017).

20. 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, 944–45 (2012).

21. This Comment focuses solely on cases in which the federal government is the defendant. Even before President Trump's administration, there was a political aspect to the practice of granting nationwide preliminary injunctions when the defendant is the federal government. It is not a coincidence that the lawsuits challenging actions made by President Obama's administration took place in Texas, and a similar pattern of injunctions occurred in California during President Bush's administration. Bray, *supra* note 14 (manuscript at 9–10). The political implications of this practice are beyond the scope of this Comment. For more discussion on the topic, see *id.* (manuscript at 9–12).

## I. PURPOSE AND HISTORY OF PRELIMINARY INJUNCTIONS AND NATIONWIDE SCOPE

To understand why there should be a presumption against nationwide preliminary injunctions, it is useful to first review the origins of preliminary injunctions and how they have evolved to exist with a nationwide scope.

### A. *Preliminary Injunctions*

A preliminary injunction is “[a] temporary injunction issued before or during trial to prevent an irreparable injury from occurring before the court has a chance to decide the case.”<sup>22</sup> It is used to prevent the plaintiffs from suffering harm while the litigation takes place.<sup>23</sup> Preliminary injunctions “merely . . . preserve the relative positions of the parties until a trial on the merits can be held.”<sup>24</sup> The extraordinary nature of a preliminary injunction stems from the courts’ general reluctance to change the parties’ positions prior to the plaintiff fully establishing his case.<sup>25</sup> Because preliminary injunctions are “a drastic and extraordinary remedy,” they should not be granted routinely.<sup>26</sup> However, federal district court judges have substantial discretion in determining whether or not to grant a preliminary injunction.<sup>27</sup> Once the district court decides to grant a preliminary injunction, appellate courts review the decision only for abuse of discretion.<sup>28</sup>

Rule 65 of the Federal Rules of Civil Procedure gives federal courts the power to grant preliminary injunctions.<sup>29</sup> However, “[t]he circumstances in which a preliminary injunction may be granted are not prescribed by the Federal Rules.”<sup>30</sup> Because Rule 65 does not

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22. *Preliminary Injunction*, BLACK’S LAW DICTIONARY (10th ed. 2014).

23. See 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2947 (3d ed. 2016).

24. Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981).

25. Rachel A. Weisshaar, Note, *Hazy Shades of Winter: Resolving the Circuit Split over Preliminary Injunctions*, 65 VAND. L. REV. 1011, 1022 (2012).

26. Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 165 (2010).

27. Richmond Tenants Org., Inc. v. Kemp, 956 F.2d 1300, 1308 (4th Cir. 1992).

28. McCreary Cty. v. ACLU of Ky., 545 U.S. 844, 867 (2005). *But see* Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 773–78 (1982) (“There need be no concern that such a retraction of the [abuse of] discretion rule would lead to an ossification of equity; the necessary leeway is built into the governing equitable principles themselves.”).

29. FED. R. CIV. P. 65.

30. WRIGHT ET AL., *supra* note 23, § 2947, at 114.

provide guidance on this issue, “[d]istrict judges still are guided by traditional equity doctrines.”<sup>31</sup>

Federal courts derive their equity jurisdiction from the Constitution and the Federal Judiciary Act.<sup>32</sup> The Constitution vests “[t]he judicial Power of the United States . . . in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish,”<sup>33</sup> and “[t]he judicial power shall extend to all Cases, in Law and Equity.”<sup>34</sup> Congress established the rest of the federal judiciary system through the Judiciary Act of 1789.<sup>35</sup> The Judiciary Act gives federal courts the jurisdiction over “all suits of a civil nature . . . in equity.”<sup>36</sup> The Supreme Court has

long held that “[t]he ‘jurisdiction’ thus conferred [in the Judiciary Act] . . . is an authority to administer in equity suits 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.”<sup>37</sup>

Therefore, principles from the English Court of Chancery guide the determination of the propriety of federal courts’ equity power.

Equity developed in England as an alternative system to common law when common law courts could not provide plaintiffs with adequate relief.<sup>38</sup> When a plaintiff wanted to be heard before a court, he had to purchase a writ from the Chancellor, who acted on behalf of the king.<sup>39</sup> This writ was the plaintiff’s golden ticket to gain access to the court, and once it was presented to the court, the court would hear the case and decide whether to grant relief.<sup>40</sup> At this time, the types of cases heard by the court primarily involved property rights and interests.<sup>41</sup> As England’s economy evolved from agricultural to commercial, new types of disputes and rights arose for which no writs existed.<sup>42</sup> This was problematic because the Provisions

31. *Id.* § 2942, at 38.

32. *See* U.S. CONST. art. III, § 1; Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78.

33. U.S. CONST. art. III, § 1.

34. *Id.* § 2.

35. *See* Judiciary Act of 1789, § 11, 1 Stat. at 78.

36. *Id.*

37. *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (quoting *Atlas Life Ins. Co. v. W.I.S., Inc.*, 306 U.S. 563, 568 (1939)).

38. Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard*, 22 REV. LITIG. 495, 500 (2003).

39. WILLIAM Q. DE FUNIAK, *HANDBOOK OF MODERN EQUITY* 3 (2d ed. 1956).

40. *Id.*

41. *Id.* at 4.

42. *Id.*

of Oxford of 1258 did not allow the Chancellor to create new writs unless he had the consent of the king and his council.<sup>43</sup> Therefore, when a person sought to resolve a dispute for which no writ, and thus no relief, existed, “it became common to resort to the king, through the person of the Chancellor, for relief under the king’s prerogative of grace, that arbitrary power of the king to do good and dispense justice.”<sup>44</sup> This practice resulted in the evolution of the Chancellor’s role as a judicial officer and the creation of the Court of Chancery, as well as and a system of equity that was distinct from the common law.<sup>45</sup> Although this evolution occurred gradually and slowly, “by the 15th century the chancellor was clearly a judge, recognized as such and acting as such.”<sup>46</sup>

Subsequently, the English legal system operated as a dual system of common law and equity.<sup>47</sup> One of the main differences between a common law court and the Court of Chancery was the manner in which the Chancellor enforced judgments.<sup>48</sup> Unlike a court of law, the Chancellor could use the power of contempt to force the defendant to act or refrain from acting in a certain way.<sup>49</sup> Therefore, the Court of Chancery could “prevent[] a threatened wrong or injury or proceed[] to repair an injury” through a writ of injunction.<sup>50</sup>

When the English colonized America, they brought both systems of common law and equity with them.<sup>51</sup> Because of the inefficiencies and cost of maintaining two court systems, most states merged “legal and equitable powers in one court with provision for one form of civil action.”<sup>52</sup> Early courts were very hesitant to grant preliminary

43. *Id.*; see also DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 29 (1973).

44. DE FUNIAK, *supra* note 39, at 4.

45. *Id.* at 4–5; DOBBS, *supra* note 43, at 31.

46. DOBBS, *supra* note 43, at 31.

47. *Id.* at 33.

48. See *id.* at 32.

49. *Id.*; see also DE FUNIAK, *supra* note 39, at 11. Given its in personam effect, an injunction may be enforced outside of a court’s territorial jurisdiction. HENRY L. MCCLINTOCK, HANDBOOK OF EQUITY 50 (1936). While this concept seems to support broader injunctions (i.e., applying outside of the federal district in which it is granted), it actually highlights a narrowing principle of preliminary injunctions—it applies to the parties, not to others uninvolved in the lawsuit. *Id.* When viewed from the perspective of the defendant, the federal government, the concept again seems to support nationwide injunctions because the federal government acts throughout the entire nation. However, it should be interpreted as applying to the defendant’s behavior with regard to the plaintiff(s) specifically because the in personam effect of a preliminary injunction highlights the importance of binding parties, not territories.

50. DE FUNIAK, *supra* note 39, at 15.

51. *Id.* at 6.

52. See *id.* at 7.

injunctions, noting that this type of relief “should be granted with great caution, and only when necessity requires.”<sup>53</sup> Like judges in England, American judges granted injunctions with a focus on property rights.<sup>54</sup>

The first preliminary injunction case<sup>55</sup> heard by the United States Supreme Court was *Parker v. Winnipiseogee Lake Cotton and Woollen Co.*<sup>56</sup> in 1862. The dispute in *Parker* arose over the use of the Winnipiseogee River in New Hampshire, and the appellant sought a preliminary injunction against an alleged nuisance by the appellee.<sup>57</sup> In considering whether to grant the preliminary injunction, the Court noted that “[t]he case must be one of strong and imperious necessity”<sup>58</sup> and “[i]f the evidence be conflicting and injury doubtful, this extraordinary remedy will be withheld.”<sup>59</sup> The Court ultimately denied the appellant’s request for a preliminary injunction because he did not show that he was entitled to immediate equitable relief.<sup>60</sup> With the exception of one other case,<sup>61</sup> the Supreme Court did not hear a case focused on preliminary injunctions again until the 1920s. The three cases heard by the Court during this time period all focused on the trial court’s discretion to grant preliminary injunctions.<sup>62</sup>

The Supreme Court dove further into its analysis of preliminary injunctions in the 1940s. In *Yakus v. United States*,<sup>63</sup> the Court discussed the appropriateness of preliminary injunctions that enjoined the implementation of price regulations during wartime.<sup>64</sup> The Court noted that when an injunction harms a public interest, “the court may . . . withhold relief until a final determination of the rights of the

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53. *Bronk v. Riley*, 3 N.Y.S. 446, 447 (N.Y. Gen. Term 1888); *see also* *Whiting Mfg. Co. v. Joseph H. Bauland Co.*, 56 N.Y.S. 114, 114 (N.Y. Sup. Ct. 1898); *Delaware, L & W.R. Co. v. Cent. Stock-Yard & Transit Co.*, 12 A. 374, 375 (N.J. 1888).

54. *See* Walker, *supra* note 14, at 1129.

55. This determination is based on the Supreme Court cases that are in the Westlaw Key section for “Preliminary, Temporary, and Interlocutory Injunctions in General, k1071–k1120.”

56. 67 U.S. (2 Black) 545 (1862).

57. *Id.* at 546.

58. *Id.* at 552 (quoting *Olmstead v. Loomis*, 6 Barb. 152, 160 (N.Y. Gen. Term 1849)).

59. *Id.*

60. *Id.* at 553.

61. This case, *Buffington v. Harvey*, briefly discusses the fact that “[t]he granting or dissolution of a temporary injunction” is within the discretion of a trial court. 95 U.S. 99, 100 (1877).

62. *See* *Alabama v. United States*, 279 U.S. 229, 230–31 (1929); *Rice & Adams Corp. v. Lathrop*, 278 U.S. 509, 514 (1929); *Meccano, Ltd. v. Wanamaker*, 253 U.S. 136, 141 (1920).

63. 321 U.S. 414 (1944).

64. *Id.* at 441–42.

parties, though the postponement may be burdensome to the plaintiff.”<sup>65</sup> Throughout the rest of the twentieth century, the Supreme Court heard several other cases involving preliminary injunctions, but scope was never a primary issue.<sup>66</sup>

*B. Nationwide scope*

Rule 65 also addresses the scope of preliminary injunctions, albeit briefly. It describes the scope as binding “the parties; the parties’ officers, agents, servants, employees, and attorneys; and other persons who are in active concert or participation with anyone described in [the aforementioned groups].”<sup>67</sup> However, this is the extent of guidance on the permissible scope of preliminary injunctions,<sup>68</sup> and the Federal Rules do not explicitly discuss the authority of federal district courts to grant preliminary injunctions that apply to the entire nation.<sup>69</sup> Given this lack of guidance and the drastic nature of preliminary injunctions, courts typically apply a limiting principle to the scope of preliminary injunctions and advise narrowly tailored injunctions with limited applicability.<sup>70</sup> Allowing a broad right to a preliminary injunction creates various concerns for a court, such as “an institutional reluctance to undertake the supervision of specific relief, a social bias against interference with private ordering, and a fear of encouraging unscrupulous litigants to institute unfounded actions.”<sup>71</sup> As with the decision to grant a preliminary injunction, district court judges use traditional equity doctrines to guide their determination of the proper scope of preliminary injunctions.<sup>72</sup>

Nationwide injunctions did not exist within the realm of traditional equity because “there were no injunctions against the

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65. *Id.* at 440.

66. *See generally* Univ. of Tex. v. Camenisch, 451 U.S. 390 (1981) (questioning whether a preliminary injunction should have been granted); Granny Goose Foods, Inc. v. Bhd. of Teamsters Local No. 70, 415 U.S. 423 (1974) (discussing a conflict between state law and the Federal Rules of Civil Procedure); Bhd. of Locomotive Eng’rs v. Mo.-Kan.-Tex. R.R. Co., 363 U.S. 528 (1960) (raising jurisdictional issue); De Beers Consol. Mines v. United States, 325 U.S. 212 (1945) (raising jurisdictional issues).

67. FED. R. CIV. P. 65(d)(2).

68. *See* WRIGHT ET AL., *supra* note 23, § 2955 (noting Rule 65(d) does not clearly address the issue of overly broad injunctions).

69. CONG. RESEARCH SERV. LEGAL SIDEBAR, NATIONWIDE INJUNCTIONS: RECENT RULINGS RAISE QUESTIONS ABOUT NATIONWIDE REACH OF A SINGLE FEDERAL COURT (2015), <https://fas.org/sgp/crs/misc/nationwide.pdf> [<https://perma.cc/9A97-T96D>].

70. Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs., Inc., 528 U.S. 167, 193 (2000); Gearhart Indus., Inc. v. Smith Int’l, Inc., 741 F.2d 707, 715 (5th Cir. 1984).

71. *Developments in the Law: Injunctions*, 78 HARV. L. REV. 994, 1056 (1965).

72. WRIGHT ET AL., *supra* note 23, § 2942.

Crown.”<sup>73</sup> This is largely due to the structure of the Court of Chancery (in that only one Chancellor existed) and the underlying fact that the Chancellor was closely associated with the king.<sup>74</sup> Nationwide preliminary injunctions are relatively new to the American legal system. According to Samuel Bray, *Wirtz v. Baldor Electric Company*,<sup>75</sup> decided in 1963, appears to be the first instance of a court granting a nationwide preliminary injunction.<sup>76</sup> The issue in *Wirtz* was whether the Secretary of Labor relied on improper information when setting the minimum wages.<sup>77</sup> The plaintiffs sought to enjoin the Secretary’s determination through a preliminary injunction, and the D.C. Circuit held that “if one or more of the plaintiffs-appellees is or are found to have standing to sue, the District Court should enjoin the effectiveness of the Secretary’s determination with respect to the entire industry[,]” not just with respect to the named plaintiffs.<sup>78</sup>

The issue of a nationwide preliminary injunction was raised again a decade later in *Harlem Valley Transportation Ass’n v. Stafford*.<sup>79</sup> In *Harlem Valley*, the plaintiffs sought a preliminary injunction against the Interstate Commerce Commission, its chairman, and the Administrator of the EPA for alleged violations related to abandoned rail lines under the National Environmental Policy Act of 1969.<sup>80</sup> In determining the scope of the injunction, District Court Judge Frankel stated, in a footnote, that

[o]ne of the court’s main concerns during the hearing of the motion for a preliminary injunction was the question whether the plaintiffs, if they could prove entitlement to any relief, could legitimately seek a restraint of nationwide effect when their alleged interests might be of narrower geographic scope. Both the United States and the ICC have now not only conceded, but

73. Bray, *supra* note 14 (manuscript at 20); see also Samuel Bray, *The Case Against National Injunctions, No Matter Who is President*, LAWFARE (Feb. 4, 2017, 4:00 PM), <https://lawfareblog.com/case-against-national-injunctions-no-matter-who-president> [<http://perma.cc/U584-D5XW>] (“[T]he national injunction has no basis in the tradition of equity. For the first century and a half of the federal courts, there were no national injunctions.”).

74. See Bray, *supra* note 14 (manuscript at 20–21, 39). For a fascinating discussion on the impact of the shift from one chancellor in traditional English equity to multiple-chancellor system in the United States, see *id.* (manuscript at 40–43).

75. 337 F.2d 518 (D.C. Cir. 1963).

76. Bray, *supra* note 14 (manuscript at 33).

77. *Wirtz*, 337 F.2d at 520.

78. *Id.* at 535.

79. 360 F. Supp. 1057, 1059 (S.D.N.Y. 1973), *aff’d*, 500 F.2d 328 (2d Cir. 1974).

80. *Id.* at 1059–60.

insisted, that a preliminary injunction in this case would “affect the agency in the entire scope of its authority and jurisdiction.”<sup>81</sup>

The U.S. Court of Appeals for the Second Circuit affirmed the nationwide scope of the injunction,<sup>82</sup> and in doing so, therefore “[t]he court had backed into a national injunction without any real consideration.”<sup>83</sup> Since that time, courts have been willing to grant nationwide preliminary injunctions enjoining the federal government in a multitude of cases.<sup>84</sup> For example, in *In re EPA*,<sup>85</sup> the petitioners challenged the “Clean Water Rule,” claiming that the United States Army Corps of Engineers and the EPA changed the definition of “waters of the United States” in a manner that would unlawfully expand the agencies’ jurisdiction and upset the current federal-state balance.<sup>86</sup> The district court enjoined the Clean Water Rule nationwide because the burden of following the new rule would be felt nationwide.<sup>87</sup> And over the past two years, federal district court judges have been granting nationwide preliminary injunctions at an alarmingly frequent rate.<sup>88</sup>

## II. CONCERNS ASSOCIATED WITH NATIONWIDE PRELIMINARY INJUNCTIONS

The concern with an order as drastic as a nationwide preliminary injunction is twofold: first, the decision is made prior to a trial on the merits, and second, the broad scope affects the interests of parties not before the court. When a decision occurs after the full presentation of information at a trial on the merits, a nationwide scope may perhaps be appropriate. But when the standard to receive injunctive relief is low, as it is with preliminary injunctions, a court should be more cautious with the scope of its relief.<sup>89</sup> Narrowing the scope alleviates

81. *Id.* at 1060 n.2.

82. *Harlem Valley Transp. Ass’n v. Stafford*, 500 F.2d 328, 337 (2d Cir. 1974).

83. *Bray*, *supra* note 14 (manuscript at 35).

84. *See, e.g., In re EPA*, 803 F.3d 804, 808–09 (6th Cir. 2015) (issuing a nationwide stay, a remedy similar to an injunction); *Texas v. United States*, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015); *Earth Island Inst. v. Pengilly*, 376 F. Supp. 2d 994, 999 (E.D. Cal. 2005), *aff’d in part, rev’d in part*, 490 F.3d 687 (9th Cir. 2007), *aff’d in part, rev’d in part*, 555 U.S. 488 (2009).

85. 803 F.3d 804 (6th Cir. 2015).

86. *Id.* at 805–06.

87. *Id.* at 808–09.

88. *See supra* notes 3–8.

89. *Walker*, *supra* note 14, at 1147–48 (“Because it is easier, as an evidentiary matter, to obtain a preliminary injunction, courts should conduct a more searching inquiry into the appropriate scope of such an order.”).

the issue of nonparties being affected by the preliminary injunction, a concern that runs parallel to those raised by third-party standing, and it prevents district court judges from interfering with the development of law in other circuits.<sup>90</sup>

*A. Distinction between Preliminary and Permanent Injunctions*

The issue that arises with nationwide preliminary injunctions is grounded in the fact that the injunctions are preliminary. While it may be true that nationwide injunctions are necessary in certain situations, those situations should be limited to instances of permanent injunctions.<sup>91</sup> To understand why the type of injunction impacts the scope, it is important to understand the difference between a preliminary and permanent injunction. Despite what some discussion in case law might suggest,<sup>92</sup> there is a meaningful difference between a preliminary and permanent injunction.

Preliminary and permanent injunctions “are distinct forms of equitable relief that have different prerequisites and serve entirely different purposes.”<sup>93</sup> A preliminary injunction occurs prior to or during trial, while a permanent injunction is granted after a hearing on the merits.<sup>94</sup> Due to the difference in procedural posture of the two remedies, the standards for granting a preliminary injunction and for granting a permanent injunction are slightly different.<sup>95</sup> The key difference between these two standards is that a preliminary injunction only requires that the plaintiff is *likely to win* the case on

90. See *infra* Section II.B.

91. See *infra* notes 93–95 and accompanying text.

92. See *infra* text accompanying notes 157–68.

93. *Lermer Germany GmbH v. Lermer Corp.*, 94 F.3d 1575, 1577 (Fed. Cir. 1996).

94. See *Permanent Injunction*, BLACK’S LAW DICTIONARY (10th ed. 2014); *Preliminary Injunction*, BLACK’S LAW DICTIONARY (10th ed. 2014); see also JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 367 (A.E. Randall ed., 3d ed. 1920) (“The perpetual injunction is in effect a decree, and concludes a right. The interlocutory injunction is merely provisional in its nature, and does not conclude a right.”).

95. A preliminary injunction requires that the plaintiff “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 v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). There is, however, currently a circuit split over how to apply these factors. See *Weisshaar*, *supra* note 25, at 1014–15. The standard of permanent injunctions is similar in that the plaintiff must show “(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.” *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156–57 (2010).

the merits, while a permanent injunction is to be granted after a party has *already won* on the merits.<sup>96</sup> This difference creates a lower evidentiary standard for preliminary injunctions as compared to the standard for permanent injunctions.<sup>97</sup> The distinction is one that some courts have noticed,<sup>98</sup> and it is one that scholars have asserted is a meaningful difference.<sup>99</sup>

Instances in which nationwide injunctions have been granted, and in which courts have made arguments for a nationwide scope, are typically permanent, not preliminary, injunctions.<sup>100</sup> Considering the robust decision-making process that occurs prior to the issuance of a permanent injunction, a nationwide scope may be warranted. Because a permanent injunction occurs after a full hearing on the merits, a judge has found the challenged action to be unlawful, and therefore the drastic remedy of an injunction may be appropriate because the action, now confirmed to be illegal, needs to be stopped.<sup>101</sup> Since the trial on the merits occurs prior to the decision about the appropriate remedy, a judge makes her decision about the remedy with complete information.

However, in the case of a preliminary injunction, a judge has not actually found the challenged action to be unlawful nor has she seen

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96. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 394 (1981) (noting the impropriety of equating “likelihood of success” with “success”); see *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546 n.12 (1987) (“The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.”).

97. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 755–56 (1986), *overruled on other grounds*, *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992); see also Walker, *supra* note 14, at 1147–48.

98. See, e.g., *Bresgal v. Brock*, 843 F.2d 1163, 1169 (9th Cir. 1987) (distinguishing the injunctions in *Nat’l Ctr. for Immigrants’ Rights v. INS*, 743 F.2d 1365 (9th Cir. 1984) and *Zepeda v. INS*, 753 F.2d 719 (9th Cir. 1985) from the case at hand by noting that they were preliminary).

99. Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 692 (1990) (“Preliminary relief is best considered as a separate issue, only distantly related to the choice of remedy at final judgment.”); Walker, *supra* note 14, at 1147–48 (advocating for consideration of the type of injunction when determining the scope of the injunction).

100. See generally *Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399 (D.C. Cir. 1998) (providing an example of an instance in which the Court issued a permanent injunction with nationwide scope).

101. *Doe v. Rumsfeld*, 341 F. Supp. 2d 1, 17 (D.D.C. 2004) (“Government-wide injunctive relief for plaintiffs and all individuals similarly situated can be entirely appropriate and it is ‘well-supported by precedent, as courts frequently enjoin enforcement of regulations ultimately held to be invalid.’”) (quoting *Sanjour v. EPA*, 7 F. Supp. 2d 14, 17 (D.D.C. 1998)); see also *Planned Parenthood Fed’n of America, Inc. v. Heckler*, 712 F.2d 650, 665 (D.C. Cir. 1983) (enjoining enforcement of Title X regulations that the court found to be unlawful).

the parties' full evidence and arguments.<sup>102</sup> She makes her decision on less formal procedures and incomplete information prior to the parties' full opportunity to be heard.<sup>103</sup> The information presented at the preliminary injunction stage may include "sketchy motion papers and affidavits" that rely on incomplete or unreliable information, and the defendant may not have sufficient time to prepare and present a defense.<sup>104</sup> The combination of an incomplete presentation of the parties' cases and the speed at which the judge must decide the issue makes it more likely for the court to make an error.<sup>105</sup> For this reason, any findings at the preliminary injunction stage are not binding at the trial on the merits.<sup>106</sup> This acknowledges that findings made during the preliminary injunction phase of litigation are not fully informed findings. The practice of making these findings on incomplete information is accepted for preliminary injunctions due to their time-sensitive nature.<sup>107</sup>

The distinction between preliminary and permanent injunctions is highlighted in *Harmon v. Thornburgh*.<sup>108</sup> In *Harmon*, the D.C. Circuit modified a permanent injunction issued by the district court that prevented the Department of Justice from conducting random drug tests on its employees.<sup>109</sup> When discussing the appropriate

102. DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 111 (1991); John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 525 (1978).

103. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Federal Rule of Civil Procedure 65 does require a hearing prior to granting a preliminary injunction. *See* FED. R. CIV. P. 65(a)(2); *see also* WRIGHT ET AL., *supra* note 23, § 2941 (noting that temporary-restraining order may proceed without hearing but preliminary injunction requires one). However, the standard for a preliminary injunction requires a *likelihood* of success, not a *showing* of success. *See supra* text accompanying notes 94–95. This lower standard normally results in a less robust presentation of the parties' cases. *See Consolidation Coal Co. v. Disabled Miners*, 442 F.2d 1261, 1267 (4th Cir. 1971) ("Whenever the extraordinary writ of injunction is granted, it should be tailored to restrain no more than what is reasonably required to accomplish its ends. Particularly is this so when preliminary relief, on something less than a full record and full resolution of the facts, is granted.").

104. LAYCOCK, *supra* note 102, at 111.

105. *Id.*; *see also* ACLU of Ill. v. City of St. Charles, 794 F.2d 265, 269 (7th Cir. 1986) (noting how preliminary injunctions put judges in "the awkward position of having to make a judgment, with potentially serious consequences for the litigants and perhaps others as well, on an incomplete, because hastily compiled, record"); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 760 (8th ed. 2011) ("Because the judge is being asked to rule in a hurry, on the basis of incomplete information, the risk of error is great.").

106. *Camenisch*, 451 U.S. at 395; *see also* *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 316 (1940).

107. *Camenisch*, 451 U.S. at 395.

108. 878 F.2d 484 (D.C. Cir. 1989).

109. *Id.* at 485, 493.

remedy, the court noted that “[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.”<sup>110</sup> Therefore the rule is vacated with regard to everyone, not just the named plaintiffs. However, this only occurs once a court determines the agency regulation to be unlawful after a full trial on the merits, as the district court held in *Harmon*.<sup>111</sup> The district court’s decision was made based on complete information after the parties had a full opportunity to present their evidence and be heard.<sup>112</sup> Yet courts frequently cite this case as support of nationwide preliminary injunctions<sup>113</sup> in instances which the parties have not had a full trial on the merits. The rule articulated in *Harmon* should not be applied to a preliminary injunction because the reviewing court has not yet found the agency regulation to be unlawful. It has simply found that the party is likely to succeed on the merits, a lower standard and one based on less information than the permanent injunction standard.

Despite the distinction between preliminary and permanent injunctions, courts frequently and interchangeably cite to cases involving preliminary injunctions and cases involving permanent injunctions, like *Harmon*, to support a nationwide preliminary injunction.<sup>114</sup> In some instances, a court will solely cite cases involving permanent injunctions to justify a nationwide preliminary injunction. For example, in the appeal of *Texas I*, the Fifth Circuit opinion cites several cases as support for its affirmance of the district court’s nationwide preliminary injunction, but all of the cited cases involve permanent injunctions.<sup>115</sup> It may be true that “[i]t is not beyond the

110. *Id.* at 495 n.21 (emphasis added).

111. *Id.* at 493.

112. *See id.* at 487.

113. *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 695 (N.D. Tex. 2016); *Nat’l Fed’n of Indep. Bus. v. Perez*, No. 5:16-cv-00066, 2016 WL 3766121, at \*46 (N.D. Tex. June 27, 2016).

114. *See, e.g., Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501–02 (9th Cir. 1996) (citing *Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1983) (involving a preliminary injunction); *Bresgal v. Brock*, 843 F.2d 1163, 1170–71 (9th Cir. 1987) (involving the use of a permanent injunction to justify the scope of the permanent injunction in the instant case)); *see also Perez*, 2016 WL 3766121, at \*46. *Perez* cites: *Califano v. Yamaski*, 442 U.S. 682, 702 (1979) (analyzing propriety of nationwide class); *Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015) (involving a preliminary injunction); *Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399, 1407–09 (D.C. Cir. 1998) (involving a permanent injunction); and *Harmon*, 878 F.2d at 495 n.21 (involving a permanent injunction).

115. 809 F.3d 134, 188 (5th Cir. 2015) (citing *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2006) (issuing permanent injunction); *Chevron Chem. Co. v. Voluntary Purchasing Grps. Inc.*, 659 F.2d 695, 705–06 (5th Cir. 1981) (issuing permanent

power of a court, *in appropriate circumstances*, to issue a nationwide injunction.”<sup>116</sup> However, courts should take greater care to understand the distinctions between preliminary and permanent injunctions when considering a nationwide scope.

### *B. Nonparty Concerns*

When preliminary injunctions are nationwide in scope, not only is the decision to grant the injunction based on incomplete information, but the decision can also affect those across the nation who are uninvolved in the litigation. While the uninvolved parties are not technically bound by the preliminary injunction,<sup>117</sup> they are nevertheless affected by it. Specifically, they are likely people who benefited from a federal rule or regulation that was subsequently enjoined by a preliminary injunction, like employees who would have been entitled to overtime wages had the Department of Labor’s new overtime rule not been enjoined.<sup>118</sup> These parties effectively have their rights adjudicated without any opportunity to participate in the adjudication,<sup>119</sup> despite the fact that a court “may not attempt to determine the rights of persons not before the court.”<sup>120</sup>

The concerns of nonparties being affected by nationwide preliminary injunctions without participating in the litigation parallel the concerns that arise with third party standing, which governs whether a party indirectly affected by litigation has standing due to its closely aligned interests with one of the parties. The prohibition on third party standing is a prudential limitation, which means a principle that “embodies ‘judicially self-imposed limits on the exercise of federal jurisdiction.’”<sup>121</sup> Prudential limitations ensure that courts are not “called upon to decide abstract questions of wide public

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injunction); *Brennan v. J.M. Fields, Inc.*, 488 F.2d 443, 449–50 (5th Cir.1973) (issuing permanent injunction); *Hodgson v. First Fed. Sav. & Loan Ass’n*, 455 F.2d 818, 826 (5th Cir. 1972) (issuing permanent injunction)).

116. 809 F.3d at 188 (emphasis added).

117. The federal government is the only party that is specifically enjoined.

118. *See Nevada v. U.S. Dep’t of Labor*, 218 F. Supp. 3d 520, 525 (E.D. Tex. 2016). While parties may also be harmed by the enjoined rule or regulation, and therefore benefit from the injunction, this Comment is primarily concerned with the parties who are negatively affected by the practice of nationwide injunctions.

119. *See Morley*, *supra* note 14, at 529.

120. *Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1983); *see also Singleton v. Wuff*, 428 U.S. 106, 113 (1976) (“Federal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation.”).

121. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11–12 (2004) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.”<sup>122</sup> Specifically with regard to third party standing, courts are generally hesitant to “resolv[e] a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation.”<sup>123</sup> The Supreme Court has given two reasons for this hesitance: “courts should not adjudicate [third party] rights unnecessarily,” and “third parties themselves usually will be the best proponents of their own rights.”<sup>124</sup> However, third party standing may be permissible when the “underlying justifications” for the prudential limitation do not exist.<sup>125</sup>

There are many similarities between third party standing and nationwide preliminary injunctions. Both are discretionary.<sup>126</sup> Both doctrines involve considering the interests of parties not before the court,<sup>127</sup> and they both require courts to exercise restraint,<sup>128</sup> especially when presented with a constitutional issue.<sup>129</sup> These similarities are meaningful considering the ill-fated future of third party standing and other prudential limitations on standing.<sup>130</sup> Given the fact that the concerns articulated about prudential standing and potential impropriety of third party standing can be translated to nationwide preliminary injunctions, a move away from third party

122. *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

123. *Singleton v. Wulff*, 426 U.S. 106, 113 (1976).

124. *Id.* at 113–14.

125. *See id.* at 114.

126. *Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399, 1408 (D.C. Cir. 1998) (“[D]istrict courts enjoy broad discretion in awarding injunctive relief.”); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1359–60 (2000).

127. *See Nat’l Mining Ass’n*, 145 F.3d at 1409; Fallon, *supra* note 126, at 1359–60.

128. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 27 (2008); *Barrows v. Jackson*, 346 U.S. 249, 255 (1953).

129. *U.S. Dep’t of Labor v. Triplett*, 494 U.S. 715, 732 n.2 (1990); *Converse Const. Co. v. Mass. Bay Transp. Auth.*, 899 F. Supp. 753, 767 (D. Mass. 1995).

130. In *Lexmark International Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), the Supreme Court recently suggested that the end of prudential standing is near. *See id.* at 1387 n.3; 33 CHARLES ALAN WRIGHT, CHARLES H. KOCH, JR. & RICHARD MURPHY, *FEDERAL PRACTICE & PROCEDURE* § 8413 (3d. ed. Supp. 2017) (discussing *Lexmark*). *Lexmark* purports to not address third party standing, 134 S. Ct. at 1387 n.3, but scholars have hypothesized that this case represents a shift away from the use of prudential standing. *See* Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1, 28 n.131 (2016) (noting that *Lexmark* “cast[s] doubt on the framing of . . . prohibitions on third-party standing”); Ernest A. Young, *Prudential Standing After Lexmark International, Inc. v. Static Control Components, Inc.*, 10 DUKE J. CONST. L. & PUB. POL’Y 149, 152–53 (2014).

standing suggests a similar need to move away from nationwide preliminary injunctions.

When considering the similarities between third party standing and nationwide preliminary injunctions, it is worth noting that the two doctrines do not perfectly align. In third party standing cases, the plaintiff brings a suit in order to represent the rights of someone not party to the suit,<sup>131</sup> and “the enjoyment of the right [asserted by the litigant on behalf of the third party]” has to be “inextricably bound up with the activity the litigant wishes to pursue.”<sup>132</sup> For example, in *Singleton v. Wulff*,<sup>133</sup> physicians brought suit challenging a Missouri state law that excluded abortions from Medicaid eligibility.<sup>134</sup> The Supreme Court allowed the physicians to bring suit on behalf of their patients seeking abortions because even though the physicians were not the parties seeking to have abortions covered by Medicaid, the physicians are necessary for the patients to obtain the abortions; therefore, their interests were sufficiently close.<sup>135</sup> In addition, these types of suits generally challenge government action on behalf of parties who are harmed by the action.<sup>136</sup> With nationwide preliminary injunctions, the concern is for nonparties to the suit whose interests do not align with the plaintiffs’ because they actually benefit from the government action. Nationwide preliminary injunctions do not implicate third party standing in a direct sense, as the plaintiffs are not bringing suit on behalf of the people who benefit from the challenged regulation.

Furthermore, a party affected by a nationwide preliminary injunction may not have an issue with or actually benefit from the enjoined practice. Nonparties to a lawsuit often purposely do not assert their rights because they can exercise their rights regardless of the outcome of litigation, or they simply do not want to assert them.<sup>137</sup> For example, Jose Lopez and Martín Jonathan Batalla Vidal both benefited from the Deferred Action for Childhood Arrivals (“DACA”) program as it allowed them to obtain employment

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131. See *Powers v. Ohio*, 499 U.S. 400, 410–11 (1991).

132. *Singleton v. Wulff*, 428 U.S. 106, 114 (1976).

133. 428 U.S. 106 (1976).

134. *Id.* at 108.

135. *Id.* at 117.

136. See, e.g., *id.* at 108 (finding that physicians have standing to assert the rights of their patients while challenging a state statute).

137. See *id.* at 113–14.

authorization.<sup>138</sup> However, their right to obtain their employment authorization was adjudicated before a Texas court without an opportunity to be heard.<sup>139</sup> The nationwide preliminary injunction enjoining the implementation of the DACA program turned Lopez, Vidal, and many others who were not parties before the court into “members of an implied class, despite the fact that they have not been brought before the court, been notified about the case, or consented to such representation.”<sup>140</sup> With nationwide preliminary injunctions, nonparties who may have an important stake in the litigation simply do not matter and are not taken into consideration.<sup>141</sup>

Beyond the comparison to third party standing, an important distinction to make when discussing the rights of nonparties is that the parties are being affected by the injunction, but they are not technically bound by the injunction because they are not parties to the litigation.<sup>142</sup> Instead, they are affected by the ruling through the party who is enjoined from acting.<sup>143</sup> Rule 65(d)(2) states that the preliminary injunction binds the parties and any party that acts in concert with the bound parties.<sup>144</sup> It is inaccurate to use Rule 65 as support for the consideration of nonparties because the rule only discusses who is bound, or forced to refrain from acting by the injunction.<sup>145</sup> The Ninth Circuit adopted this misguided viewpoint in *Zepeda v. INS*,<sup>146</sup> quoting Rule 65 and then noting “[t]he district court must, therefore, tailor the injunction to affect only those persons over which it has power.”<sup>147</sup> In his dissent, Judge Norris took issue with this interpretation. He noted that Rule 65 “only provides that an injunction may not *bind* non-parties,” and it “does not address the question whether an injunction may *benefit* non-parties.”<sup>148</sup> This distinction is a logical one, and it is important to note that using this

138. See Complaint at 2, *Lopez v. Richardson*, No. 1:16-cv-09670 (N.D. Ill. Oct. 12, 2016); Amended Complaint at 2, *Make the Road N.Y. v. Baran*, No. 1:16-cv-04756 (E.D.N.Y. Sept. 29, 2016).

139. See *Texas v. United States*, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015).

140. Morley, *supra* note 14, at 527–28.

141. See Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 COLUM. L. REV. 599, 648 (2015) (“[N]either the ability of the plaintiff to assert the claim nor the scope of the prospective injunctive relief will depend on whether any other similarly situated plaintiffs consent to the action or join in seeking similar relief.”).

142. See FED. R. CIV. P. 65(d)(2).

143. See, e.g., *Texas I*, 86 F. Supp. 3d at 677.

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

145. *Id.*

146. 753 F.2d 719 (9th Cir. 1983).

147. *Id.* at 727.

148. *Id.* at 733 (Norris, J., dissenting).

Rule 65 line of reasoning is not particularly useful in justifying concerns for the rights of nonparties in nationwide preliminary injunctions. Judge Norris further noted “[t]he question before us for decision is not whether the injunction is overly broad because it may benefit persons other than the plaintiffs; the question is whether the injunction is broader in scope than reasonably necessary to protect the rights of the individual plaintiffs.”<sup>149</sup> While his refocusing of the issue places emphasis on the predominant question of determining the scope of a preliminary injunction, the effect on nonparties should not be ignored. Judge Norris’s framing of the effect makes the effect appear to be harmless because his discussion only mentions benefits that can be obtained from the injunction.<sup>150</sup> Focusing on a beneficial effect aligns with justifications for third party standing.<sup>151</sup> But he did not consider effects that place a burden on nonparties, which is arguably more important than benefits because it harms the nonparties.

Courts may consider nonparty interests when issuing nationwide preliminary injunctions, but the consideration likely takes place only during the decision as to whether an injunction should be granted, not during the determination of the scope of the injunction. One of the factors to be used in considering the appropriateness of a preliminary injunction is whether the injunction “is in the public interest.”<sup>152</sup> Because injunctions are an “extraordinary remedy,” precedent has cautioned that “courts of equity should pay particular regard for the public consequences in employing . . . [an] injunction.”<sup>153</sup> When analyzing this factor, courts weigh the harm of the practice that is the focus of the injunction (i.e., the rule or regulation) with the harm that could result from the preliminary injunction.<sup>154</sup> For example, in *Nevada v. U.S. Department of Labor*,<sup>155</sup> the district court weighed the harm to the public that could result from enjoining the overtime rule.<sup>156</sup> The plaintiffs pointed to the potential for harm to the public if the rule was not enjoined, including layoffs, increased state budgets,

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149. *Id.*

150. *See id.*

151. 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3531.9.3 (3d. ed. 2017).

152. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

153. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

154. *See, e.g., Nevada v. U.S. Dep’t of Labor*, 218 F. Supp. 3d 520, 533 (E.D. Tex. 2016).

155. 218 F. Supp. 3d 520 (E.D. Tex. 2016).

156. *Id.* at 533.

and interference with government operations.<sup>157</sup> The defendants identified the harm that the rule sought to fix, the denial of overtime pay to workers.<sup>158</sup> These workers are the affected nonparties with whom this Comment is concerned. The district court found that an injunction would best serve the public interest, relying on the idea that a preliminary injunction is meant to preserve the status quo, and “if the [overtime rule] is valid, then an injunction will only delay the regulation’s implementation.”<sup>159</sup> This reasoning is logical for determining whether or not an injunction is warranted. However, recognizing that harm may occur to parties affected by the preliminary injunction, like the workers who would be denied additional pay, should be taken into account when defining the scope of the preliminary injunction. A more narrowing principle to limit the harm should be encouraged.

There are instances in which a court can properly exercise its power that affects parties who are not before it. In *National Mining Association v. U.S. Army Corps of Engineers*,<sup>160</sup> the D.C. Circuit affirmed the district court’s invalidation of a U.S. Army Corps of Engineers regulation and the district court’s implementation of a nationwide permanent injunction preventing enforcement of the regulation.<sup>161</sup> In discussing the scope of the injunction, the court explained that when “[an agency] rule is invalidated, . . . a single plaintiff, so long as he is injured by the rule, may obtain ‘programmatically’ relief that affects the rights of parties not before the court.”<sup>162</sup> This makes sense. If a court finds an agency rule to be unlawful, the rule should not be applied to anyone, not just solely the party who challenged it in court. But again, this relates back to the point that this ruling applies to parties who are not before the court after a full hearing on the merits in which the rule was found to be unlawful.<sup>163</sup>

An additional issue that arises with nonparties being affected by nationwide preliminary injunctions occurs when the nonparties are involved in litigating the same issue in another district or another

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157. *Id.*

158. *Id.*

159. *Id.*

160. 145 F.3d 1399 (D.C. Cir. 1998).

161. *Id.* at 1401.

162. *Id.* at 1409 (quoting *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 913 (1990) (Blackmun, J., dissenting)). The court also noted that Justice Blackmun wrote “in dissent but apparently express[ed] the view of all nine Justices” on this topic. *Id.* at 1409 (citing *Lujan*, 497 U.S. at 890 n.2 (majority opinion)).

163. *See supra* Section II.A.

circuit, creating confusion as to which court's ruling the nonparty is bound by. The tension between *Texas v. United States (Texas II)*<sup>164</sup> and *Carcaño v. McCrory*<sup>165</sup> is illustrative of this issue. Both cases involved the Department of Education's guidance regarding its interpretation of the word "sex" to include gender identity in Title IX.<sup>166</sup> In *Texas II*, the federal district court judge in the Northern District of Texas granted a nationwide preliminary injunction that enjoined the federal government from enforcing its interpretation of "sex."<sup>167</sup> Days later, a federal district judge in the Middle District of North Carolina granted a limited preliminary injunction to the named plaintiffs that had the opposite effect.<sup>168</sup> The *Carcaño* preliminary injunction allowed agencies to follow the Department of Education guidance with respect to the named plaintiffs,<sup>169</sup> relying on Fourth Circuit precedent. The judge acknowledged the nationwide preliminary injunction by the Texas judge, but he essentially ignored it for jurisdictional purposes.<sup>170</sup> This results begs the question—is the Texas judge's nationwide preliminary injunction truly nationwide if a district court judge in another circuit can simply ignore it?

Courts attempt to address these nonparty concerns and frequently cite *Califano v. Yamasaki*<sup>171</sup> as support for creating nationwide preliminary injunctions;<sup>172</sup> however, reliance on this case for nationwide preliminary injunctions without a class action is improper. *Califano* primarily deals with certifying a nationwide class,<sup>173</sup> so the nonparty concerns are addressed by the class certification process.<sup>174</sup> A frequently cited phrase from *Califano* is

164. 201 F. Supp. 3d 810 (N.D. Tex. 2016).

165. 203 F. Supp. 3d 615 (M.D.N.C. 2016).

166. *Id.* at 636; *Texas II*, 201 F. Supp. 3d at 815–16.

167. *Texas II*, 201 F. Supp. 3d at 836.

168. *See Carcaño*, 203 F. Supp. 3d. at 653. Interestingly, the preliminary injunction in *Carcaño* applied only to the named plaintiffs because "the current complaint asserts no claim for class relief." *Id.*

169. *See id.* at 636, 653 (citing *G.G. v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017) (mem.)).

170. *Carcaño*, 203 F. Supp. 3d. at 635 n.22 ("Because Texas is a district court opinion from outside the Fourth Circuit, however, and because the court's order was issued after the initiation of this case, this court remains bound by G.G. and the Texas order has no direct effect on this litigation.").

171. 442 U.S. 682 (1979).

172. *See, e.g.,* *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 539 (N.D. Cal. 2017); *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 565 (D. Md. 2017); *Nevada v. U.S. Dep't of Labor*, 218 F. Supp. 3d 520, 533 (E.D. Tex. 2016); *Texas II*, 201 F. Supp. 3d at 836; *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 695 (N.D. Tex. 2016).

173. *Califano*, 442 U.S. at 684.

174. *Id.* at 701.

“the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class.”<sup>175</sup> A complete reading is required to prevent a skewed perspective of this rule: “*Nor is a nationwide class inconsistent with principles of equity jurisprudence*, since the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class.”<sup>176</sup> The premise of this rule about the scope of injunctive relief is supported by the underlying requirement of a nationwide class. The paragraph in which this rule is discussed in context of a class action and relates to the geographical scope of a plaintiff class.<sup>177</sup> Moreover, the following sentence supports the precondition of a class certification when applying this rule:

*[i]f a class action is otherwise proper, and if jurisdiction lies over the claims of the members of the class, the fact that the class is nationwide in scope does not necessarily mean that the relief afforded the plaintiffs will be more burdensome than necessary to redress the complaining parties.*<sup>178</sup>

Courts have also claimed authority to grant nationwide preliminary injunctions<sup>179</sup> using language in *Califano* that says “[a]bsent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction.”<sup>180</sup> The court does not specify what type of jurisdiction it is referring to in the *Califano* opinion; however, the cases it cites to support its proposition involve equity jurisdiction.<sup>181</sup> Equity jurisdiction

does not refer to jurisdiction in the sense of the power conferred by the sovereign on the court over specified subject-matters or to jurisdiction over the res or the persons of the parties in a particular proceeding but refers rather to the merits. The want of equity jurisdiction does not mean that the court

175. *Id.* at 702; *see, e.g., Nevada*, 218 F. Supp. 3d at 533–34; *Texas II*, 201 F. Supp. 3d at 836.

176. *Califano*, 442 U.S. at 702 (emphasis added).

177. *Id.*

178. *Id.* (emphasis added).

179. *See, e.g., Nevada*, 218 F. Supp. 3d at 533–34; *Texas II*, 201 F. Supp. 3d at 835–36.

180. *Califano*, 442 U.S. at 705 (citing *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 9–11 (1942)).

181. *See Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) (“Such a jurisdiction is an equitable one. Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction.”).

has no power to act but that it should not act, as on the ground, for example, that there is an adequate remedy at law.<sup>182</sup>

Therefore, the *Califano* opinion simply reiterates that the court has the equitable power to issue injunctions. This was a concern in the case because the Secretary of the Department of Health, Education, and Welfare made a statutory argument that the Court did not have jurisdiction to grant injunctive relief given the limited jurisdiction provided by the Social Security Act.<sup>183</sup> The Court noted that “[n]othing in either the language or the legislative history of [the Social Security Act] indicates that Congress intended to preclude injunctive relief in § 205(g) suits.”<sup>184</sup> Therefore this rule does not stand for the proposition that district courts have the power to issue nationwide preliminary injunctions. Rather, it simply stands for the fact that courts retain their ability to grant injunctive relief unless Congress explicitly limits them from doing so.

### III. RECOMMENDATIONS

The unappealing nature of nationwide preliminary injunctions and the lack of guidance in determining the scope of preliminary injunctions can leave courts with a conundrum as to what to do when a party requests a preliminary injunction against the federal government. Some scholars have proposed creating a requirement that nationwide preliminary injunctions should only be issued when they are necessary to provide complete relief to the plaintiffs.<sup>185</sup> Others have suggested practical solutions such as adopting different standards of review, treating declaratory judgments as legal, and no longer allowing the plaintiff to draft the injunction.<sup>186</sup>

While these proposed solutions are meaningful and could prove to be effective, they do not directly address the nonparty concerns raised in this Comment. They aim to restrict the power of a federal district court judge and limit the scope of the injunction, but they still allow for the possibility of parties not before the court to be affected

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182. DE FUNIAK, *supra* note 39, at 38.

183. See *Califano*, 442 U.S. at 704–05 (discussing section 205(g) of the Social Security Act, which provides: “The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing.” 42 U.S.C. § 405(g) (2012)).

184. *Id.* at 705.

185. Siddique, *supra* note 14 (manuscript at 40–41). However, Siddique does acknowledge the difficulty of creating a standard that determines what “complete relief” entails. *Id.* at 43.

186. Bray, *supra* note 14 (manuscript at 19, 61).

by the preliminary injunction. However, several proposed reforms do address those concerns. One such reform includes the creation of a system of notice for parties who may be affected by a nationwide injunction.<sup>187</sup> This type of system would allow parties who would be affected by a nationwide preliminary injunction to have an opportunity to become involved in the action, giving them the chance to represent their interests. Yet depending on the case, it may be impractical to provide notice to every potential party who may be affected by an injunction. For example, it would be difficult to provide notice and opportunity to intervene to every person in the United States who is no longer entitled to overtime wages as a result of the Department of Labor Rule being enjoined in *Nevada v. U.S. Department of Labor*.

Another potential reform advocates for a rule requiring an injunction that enjoins the enforcement of a federal law or regulation to be narrowly tailored to only apply to the plaintiffs.<sup>188</sup> Again, this would prevent nonparties to the lawsuit from being affected by the preliminary injunction. A frequent criticism of this solution is that parties who were uninvolved in the narrowly tailored preliminary injunction would bring duplicative suits in order to also obtain a preliminary injunction, opening a “floodgate” of litigation.<sup>189</sup> This concern is understandable, especially in the D.C. Circuit, where a great amount of challenges to federal agency action takes place.<sup>190</sup> However, when considering the purpose of a preliminary injunction, the actual likelihood of duplicative litigation seems low. Preliminary injunctions are meant to be temporary until a trial on the merits is held. If the plaintiff succeeds after a full trial on the merits, then a court can grant a permanent injunction that applies nationwide, preventing duplicative litigation. Any nonparties would be covered by the permanent injunction.<sup>191</sup> They may be left without relief in the interim while the issue is being litigated, but knowing that the matter is in the process of being resolved in the near future is reassurance that they do not need to go through the hassle of litigation. Moreover, scholars have noted that in practice “[c]ourts do not generally get

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187. Thank you to Zayn Siddique for this idea.

188. Bray, *supra* note 14 (manuscript at 51).

189. See Laura W. Stein, *The Court and the Community: Why Non-Party Interests Should Count in Preliminary Injunctions*, 16 REV. LITIG. 27, 62 (1997); Walker, *supra* note 14, at 1148–49.

190. Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1409–10 (D.C. Cir. 1998).

191. See, e.g., Harmon v. Thornburgh, 878 F.2d 484, 494–95 (D.C. Cir. 1989).

bogged down dealing with a multiplicity of interests in preliminary injunction cases.”<sup>192</sup>

An additional solution—requiring plaintiffs to re-file the case as a class action if a court determines that a nationwide injunction is unavoidable—would ensure all parties with a stake in the litigation have the opportunity to represent their interests.<sup>193</sup> This solution provides the procedural safeguards of the class certification process. Class actions are a meaningful way to ensure the procedural safeguards, such as notice and opportunity to be heard, are in place prior to granting a nationwide preliminary injunction. This approach was taken in *National Center for Immigrants Rights, Inc. v. INS*,<sup>194</sup> in which the defendants sought to reverse the grant of a preliminary injunction to stop the implementation of a new INS regulation.<sup>195</sup> The district court granted the preliminary injunction without certifying a class.<sup>196</sup> The Ninth Circuit remanded the case, finding the scope of the preliminary injunction to be too broad.<sup>197</sup> The court held that “in the absence of class certification, the preliminary injunction may properly cover only the named plaintiffs.”<sup>198</sup> Class action certification allows the opportunity for nonparties to have an opportunity to assert their rights before the court in the adjudication of the preliminary injunction.<sup>199</sup> When no class action exists, courts should tend to be more cautious in granting nationwide preliminary injunctions.<sup>200</sup> In addition, limiting the class to the region of appellate jurisdiction would create further assurance that a federal district court would not intrude on the precedent or judicial independence of other circuits.<sup>201</sup>

192. Stein, *supra* note 189, at 62.

193. See Morley, *supra* note 14, 553–54. *But see* Slack, *supra* note 20, at 946 (advocating for “a narrowly-focused and rebuttable presumption against nationwide class certification in actions against the federal government.”). However, most of the reasoning in *Separation of Powers and Second Opinions* applies to the argument against nationwide preliminary injunctions. See *id.* at 995 (discussing the importance of developing the law through different lower court decisions).

194. 743 F.2d 1365 (9th Cir. 1984), *vacated*, 481 U.S. 1009 (1987).

195. *Id.* at 1367.

196. *Id.* at 1371.

197. *Id.* at 1371–72.

198. *Id.* at 1371.

199. *But see* Williams, *supra* note 141, at 651 (“Nothing in Rule 23(b)(2) [of the Federal Rules of Civil Procedure] requires that all members of an injunctive class agree with the litigation’s goals, and courts and commentators generally agree that “[a]ll the class members need not be aggrieved by or desire to challenge the defendant’s conduct in order for some of them to seek relief under Rule 23(b)(2).”)

200. See, e.g., *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011) (asserting that the rule in *Califano* mandating properly tailored relief “applies with special force where there is no class certification.”).

201. Morley, *supra* note 14, at 555.

This would limit issues such as the one that arose with the contradictory results in *Texas II* and *Carcaño v. McCrory*.<sup>202</sup>

#### CONCLUSION

It is difficult to think of a remedy more “extraordinary and drastic”<sup>203</sup> than a nationwide preliminary injunction granted by a federal district court judge, whose jurisdiction is usually limited to one state or a district within one state. This type of injunctive relief spreads beyond the borders of the judge’s territorial jurisdiction and encroaches on people who live thousands of miles from the judge in significant and meaningful ways. This practice is concerning given the incomplete information used to grant preliminary injunctions and the potential for a substantial effect on nonparty interests. Given these concerns, this Comment suggests that there should be a presumption against nationwide preliminary injunctions. Should there be a sufficient showing that a nationwide preliminary injunction is unavoidable, this Comment recommends the requirement of additional procedural safeguards, such as a notice system or class certification, to alleviate the nonparty concerns that arise with this practice.

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202. *See supra* Part II.

203. *Munaf v. Green*, 553 U.S. 674, 689 (2008).

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