

# Nationwide Injunctions and the Practice of Forum Shopping



November 15, 2022

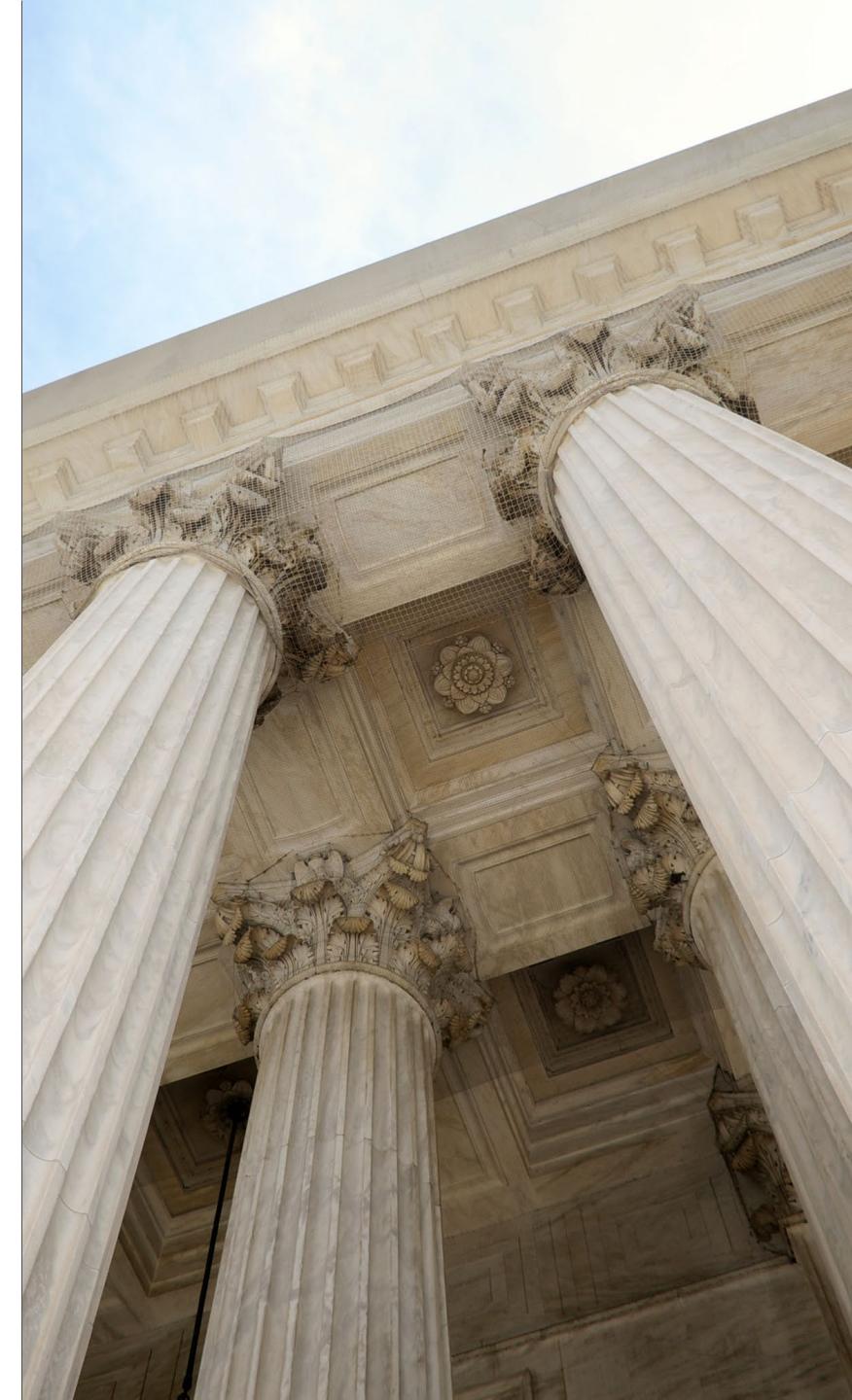
GIBSON DUNN

# Nationwide Injunctions and the Practice of **Forum Shopping**

Please note that the enclosed materials have been prepared for general informational purposes only and are not intended as legal advice.

## CLE Credit:

- Approved for 1 hour General PP Credit
- CLE credit form must be submitted by [Tuesday, November 22nd](#)
- Form Link: [https://gibsondunn.qualtrics.com/jfe/form/SV\\_3Rb7xrdaJ5ZIT5k](https://gibsondunn.qualtrics.com/jfe/form/SV_3Rb7xrdaJ5ZIT5k)



# **Nationwide Injunctions and the Practice of Forum Shopping Agenda**

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- 01    The Rise of Nationwide Injunctions in Public Law Cases**

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  - 02    Nationwide Injunctions in Private Law Cases**

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  - 03    Arguments for and Against Nationwide Injunctions**

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  - 04    Increased Appellate Skepticism and Proposals for Reform**
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# The Rise of Nationwide Injunctions in Public Law Cases

01

# The Rise of Nationwide Injunctions in Public Law Cases

- 1. File Suit in District with Favorable Judges (or, better yet, a single judge)**
- 2. Make Sure the Circuit Is Also Favorable**
- 3. Seek a Nationwide Injunction**
- 4. If Successful, Issue Is Resolved Once and for All**

# The New Deal



1600 Separate  
Injunctions Against  
Single Provision of  
the Agricultural  
Adjustment Act

# Nationwide Injunctions Against Obama Policies Entered by Texas **Federal** **District Courts**



- Deferred Action for Parents of Americans and Lawful Permanent Residents
- FLSA Overtime Exemption
- DOL Fair Pay and Safe Workplaces Rule
- HHS ACA Antidiscrimination Regulation
- Title IX Gender Guidance
- DOJ/DOE Guidance on Transgender Students
- DOL Rule Defining Spouse Under the FMLA

# Nationwide Injunctions Against Trump Policies



- Travel Ban
- Repeal of Deferred Action for Childhood Arrivals
- Withholding Funds from “Sanctuary” Cities
- New Expedited Removal Policy
- Military Transgender Ban
- Limits on Asylum Eligibility

# Nationwide Injunctions in Private Law Cases

02

# Nationwide Injunctions in Private Law Cases

- The “Nationwide Injunction” controversy is peculiarly a phenomenon of litigation against the federal government, and, particularly, of challenges to actions to regulatory actions and Executive Orders.
- Private parties suing each other routinely get “nationwide” injunctions if their disputes are nationwide in scope. E.g., an injunction prohibiting infringing the plaintiff’s mark anywhere in the U.S. But these types of injunctions are rarely controversial.
- Of course, many of the “nationwide” injunctions against government that are controversial affect regulated industries, not merely individuals. E.g., Challenges to wage or vaccine mandates, immigration, environmental permitting regulations, etc.
- A nationwide injunction that orders the government not to enforce a new measure going forward itself does not necessarily remove the legal effect of that measure as between private parties. For example, a new DOL FLSA rule raising overtime standards might be enjoined by a court as to DOL in a nationwide injunction, but an employee might still seek to sue her own employer on the basis that the rule itself has not been set aside, even if DOL itself cannot enforce it.

# Nationwide Injunctions in Private Law Cases

- In private litigation, courts grant nationwide injunctions when an individual plaintiff can show nationwide harm, or when a nationwide class of plaintiffs can show individual harm.
- In these cases, courts find that nationwide injunctions are necessary to provide complete relief to the plaintiffs.
- District courts grant these nationwide injunctions primarily in two kinds of cases:
  1. Intellectual property litigation
  2. Lawsuits brought by a nationwide class of plaintiffs

# Nationwide Injunctions in Private Law Cases

- Nationwide injunctions most commonly arise in **intellectual property litigation**, when the intellectual property owner can show nationwide harm stemming from an infringement.
  - E.g., in trademark cases, where infringing products are sold nationwide, courts have issued injunctions that similarly apply nationwide to afford meaningful relief.
- Nationwide injunctions are also granted in lawsuits brought by a **nationwide class of plaintiffs**.
  - E.g., in Americans with Disabilities Act nationwide class actions, where the defendant has a nationwide presence, courts have issued injunctions that apply to all of a defendant's facilities nationwide.

# Arguments for and Against Nationwide Injunctions

03

# Arguments Favoring Nationwide Injunctions



- Amanda Frost (American), [In Defense of Nationwide Injunctions](#), NYU L. Rev. (2018)

- Ensures equal treatment
- May be necessary for complete relief

# Arguments Favoring Nationwide Injunctions

Responds to Growing Executive State



Protects Nonparties from Irreparable Injury



# Arguments Favoring Nationwide Injunctions

Ensure Uniformity



Some Historical Support?



- Mila Sohoni (San Diego), [Lost History of the 'Universal' Injunction](#), Harv. L. Rev. (2020)

# Arguments Against Nationwide Injunctions

- Article III justiciability requirements generally preclude federal courts from granting relief to persons not before the Court, whose standing or other justiciability requirements have not been established.
- As a historical matter, the equitable power of the federal courts also has not been thought broad enough to give relief beyond the parties before the Court, except in rare situations where some right or property is indivisible.
- Although modern preclusion doctrines generally do not permit a defendant who loses a case to litigate the same issue against other litigants, this rule does not apply to the U.S. government. See [United States v. Mendoza, 464 U.S. 154 \(1984\)](#). In Mendoza, the Supreme Court held that the government can lose an issue in Circuit Number 1 and, refusing the acquiesce in its loss, litigate the same issue in every other circuit, until the issue gets to the Supreme Court, because there is an affirmative social benefit to the U.S. Supreme Court when important public-law issues are allowed to “percolate” in the lower courts and the Supreme Court gets the benefit of different perspectives. Universal injunctions are inconsistent with Mendoza.
- These points have been recounted at length by various scholars. See Samuel Bray, Multiple Chancellors: Reforming the National Injunction, [131 Harv. L. Rev. 417, 425 \(2017\)](#).

# Arguments Against Nationwide Injunctions

They also formed the basis for this [September 2018 memorandum](#) by then- Attorney General Sessions directing DoJ attorneys to oppose nationwide or universal injunctions. **According to AG Sessions, such injunctions:**

1. exceed constitutional limitations on federal judicial power;
2. deviate from longstanding historical exercise of equitable power;
3. impede reasoned discussion of legal issues among the lower courts;
4. undermine orderly resolution of disputed issues;
5. interfere with judgments that properly rest with other branches of government; and
6. undermine public confidence in the judiciary.

# Increased Appellate Skepticism and Proposals for Reform

04

# Increased Appellate Skepticism and Proposals for Reform



- Injunctive Authority Clarification Act
- Assigning Proper Placement of Executive Action Lawsuits Act
- A three-Judge Court

# Increased Appellate Skepticism and Proposals for Reform

*No persuasive defense has yet been offered for the practice. Defenders of these injunctions contend that they ensure that individuals who did not challenge a law are treated the same as plaintiffs who did, and that universal injunctions give the judiciary a powerful tool to check the Executive Branch.*

*But these arguments do not explain how these injunctions are consistent with the historical limits on equity and judicial power. They at best “boil[] down to a policy judgment” about how powers ought to be allocated among our three branches of government. But the people already made that choice when they ratified the Constitution.*

– [Justice Thomas' concurring opinion in Trump v. Hawaii \(2018\)](#)

# Increased Appellate Skepticism and Proposals for Reform

On January 27, 2020, the Supreme Court stayed an injunction that had blocked the [U.S. Department of Homeland Security](#) (DHS) from enforcing a new rule — the « public charge » rule— that allowed the government to deny immigrants a visa or a green card if they would rely on government services.

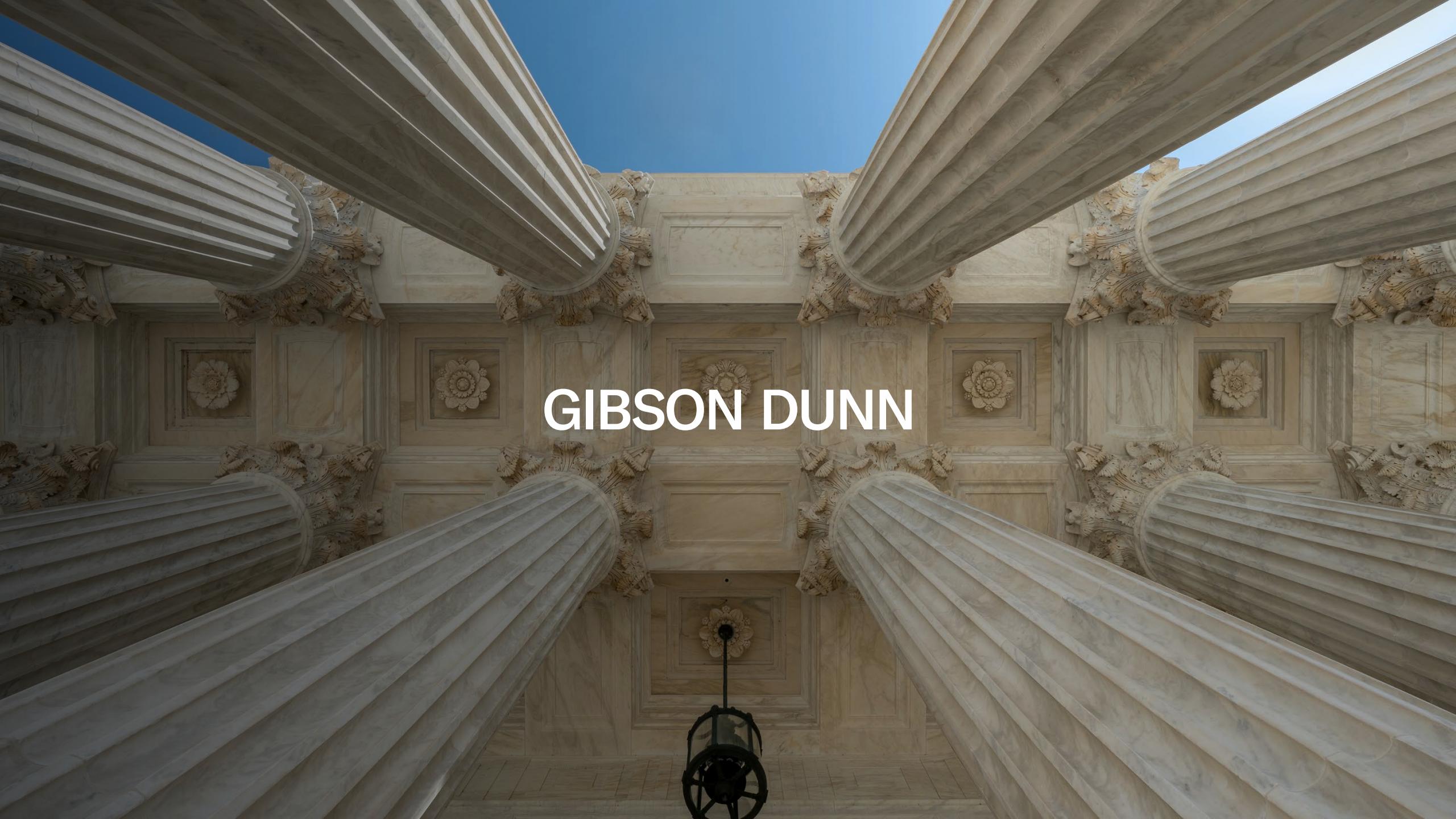
Justice Gorsuch concurred, joined by Justice Thomas. He argued that « [i]t has become increasingly apparent that this Court must, at some point, confront \* \* \* this increasingly widespread practice. ». In his view, “universal injunctions tend to force judges into making rushed, high-stakes, low-information decisions.” He also claimed that when a court orders “the government to take (or not take) some action with respect to those who are strangers to the suit, it is hard to see how the court could still be acting in the judicial role of resolving cases and controversies.”

Justice Gorsuch further argued that a judicial system that produces frequent nationwide injunctions might prevent any new federal policy from going into effect. He wrote, “If a single successful challenge is enough to stay the challenged rule across the country, the government’s hope of implementing any new policy could face the long odds of a straight sweep, parlaying a 94-to-0 win in the district courts into a 12-to-0 victory in the courts of appeal. A single loss and the policy goes on ice.”

- [Department of Homeland Security v. New York, No.19A785 \(Jan 27, 2020\)](#)

# Additional Resources

- Amanda Frost (American), *In Defense of Nationwide Injunctions*, NYU L. Rev. (2018)
- Mila Sohoni (San Diego), *Lost History of the ‘Universal’ Injunction*, Harv. L. Rev. (2020)
- Samuel Bray, Multiple Chancellors: Reforming the National Injunction, 131 Harv. L. Rev. 417, 425 (2017).
- United States v. Mendoza, 464 U.S. 154 (1984).
- AG Sessions September 2018 memorandum
- Department of Homeland Security v. New York, No.19A785 (Jan 27, 2020)
- Justice Thomas' concurring opinion in Trump v. Hawaii (2018)



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