Generals of the Resistance: Multistate Actions and Nationwide Injunctions

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State attorneys general (AGs) have become leaders of the political resistance against recent presidential administrations. They are suing the federal government with increasing frequency, seeking nationwide injunctions that thwart presidential priorities and shape national policies. Nationwide injunctions have sparked considerable debate among jurists, scholars, and policymakers. However, the largely court-centric debate has overwhelmingly overlooked the role that state litigants and litigators play in shaping criticisms of the nationwide injunction. States and AGs have unique attributes, advantages, and incentives that allow them to frequently seek and successfully secure nationwide injunctions. And these advantages are enhanced when states litigate together. Because states and AGs contribute to common criticisms of the nationwide injunction, reforms to the remedy should consider this special class of litigants and litigators.

INTRODUCTION

In President Biden's first one hundred days of office, Republican AGs filed almost twenty lawsuits against the new administration.[1] Just two days after Biden's inauguration, Texas AG Ken Paxton sued the new Biden administration, challenging an executive order that enacted a one-hundred-day moratorium on immigration deportations.[2] Shortly after filing suit, Texas

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1. *See* Tyler Olson, *GOP AGs Bring Barrage of Suits Against Biden in First 100 Days, After Dems Touted Litigation Against Trump*, FOX NEWS (Apr. 26, 2021), https://www.foxnews.com/politics/republican-attorneys-general-biden-administration-lawsuits-100-days [https://perma.cc/LJT7-GS73].

2. *See* Complaint, Texas v. United States, No. 6:21-cv-00003 (S.D. Tex. Jan. 22, 2021); Nick Miroff & Maria Sacchetti, *Texas Sues Biden Administration over 100-Day Deportation 'Pause'*, WASH. POST (Jan. 22, 2021), https://www.washingtonpost.com/national/texas-biden-

successfully obtained a preliminary nationwide injunction against the moratorium from a federal district court in Texas.[3] Paxton immediately celebrated the victory by tweeting that Texas was "the FIRST state in the nation to bring a lawsuit against the Biden Admin. AND WE WON."[4]

Nationwide injunctions empower a single federal district court judge to halt the implementation of a federal policy nationwide.[5] An injunction is a "nationwide injunction"[6] when it "controls the federal defendant's conduct

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lawsuit-ice-deportations/2021/01/22/4548eec2-5cea-11eb-aaad-93988621dd28_story.html [https://perma.cc/H795-3RAW]; Press Release, Texas Off. of Att'y Gen., AG Paxton Sues Biden Administration, Demanding Immediate Halt to Unlawful Deportation Freeze (Jan. 22, 2021).

3. *See* Order Granting Plaintiff's Emergency Application for a Temporary Restraining Order at 1–2, 14–17, Texas v. United States, No. 6:21-cv-00003 (S.D. Tex. Jan. 26, 2021). For Texas' application for the nationwide injunction, see Emergency Application for a Temporary Restraining Order, Texas v. United States, No. 6:21-cv-00003 (S.D. Tex. Jan. 22, 2021).

4. *See* Nick Miroff, *Trump-Appointed Federal Judge in Texas Blocks Biden's Deportation 'Pause'*, WASH. POST (Jan. 26, 2021), https://www.washingtonpost.com/national/federal-court-in-texas-blocks-bidens-100-day-deportation-pause/2021/01/26/7c311b10-6011-11eb-ac8f-4ae05557196e_story.html [https://perma.cc/E2LU-UJMK]. In the same vein, AG Paxton's wife a few years earlier publicized his litigation record against the Obama administration during campaign events by singing, "I'm a pistol-packin' mama, and my husband sues Obama." Emma Platoff, *America's Weaponized Attorneys General*, ATLANTIC (Oct. 28, 2018), https://www.theatlantic.com/politics/archive/2018/10/both-republicans-and-democrats-have-weaponized-their-ags/574093/ [https://perma.cc/26AP-Q5KZ].

5. In 2017, then-U.S. Attorney General Jeff Sessions famously declared that he was "amazed" that a single "judge sitting on an island in the Pacific" could enjoin President Trump's travel ban. Charlie Savage, *Jeff Sessions Dismisses Hawaii as 'an Island in the Pacific'*, N.Y. TIMES (Apr. 20, 2017), https://www.nytimes.com/2017/04/20/us/politics/jeff-sessions-judge-hawaii-pacific-island.html [https://perma.cc/Y3QZ-T46K]. Sessions captured a "widespread sentiment about the seeming oddity that one district court judge could declare a federal statute, regulation, or policy invalid and prevent the Executive Branch from enforcing it anywhere or against anyone." Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67, 68 (2019).

6. The term "nationwide injunction" is an imperfect term for the phenomenon because it emphasizes territorial breadth where the real point of distinction is that the injunction applies to nonparties. *See* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 419 n.5 (2017). This imperfection has influenced efforts to capture the dynamic through alternative terminology. *See, e.g.*, Trammell, *supra* note 5, at 72 n.23 (noting different terms that scholars and jurists have suggested); Zachary D. Clopton, *National Injunctions and Preclusion*, 118 MICH. L. REV. 1, 2–3 n.1 (2019) (listing several different names used for the remedy); 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, 490–91 (2016) (using the term "defendant-oriented injunction"); Howard M. Wasserman, *"Nationwide" Injunctions Are Really "Universal" Injunctions and They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. 335, 349–53 (2018) (arguing that "universal injunction" is the appropriate term). For purposes of this Article, I use the term "nationwide injunction" because it is the most familiar nomenclature in the literature, not because it is an endorsement of a particular term.

against everyone, not just against the plaintiff."[7] Importantly, nationwide injunctions are often issued as preliminary injunctions, prior to a court deciding on the merits of the case.[8]

Nationwide injunctions are at the center of a firestorm of criticism. Scholars have argued that they are unconstitutional[9] and raised concerns that they encourage forum shopping, limit percolation, and risk conflicting injunctions.[10] Supreme Court justices have criticized the remedy as "tak[ing] a toll on the federal court system" and "sowing chaos for litigants, the government, courts, and all those affected by these conflicting decisions."[11]

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7. Bray, *supra* note 6, at 425. "Nationwide injunction" refers to "an injunction at any stage of the litigation that bars the defendant from taking action against individuals who are not parties to the lawsuit in a case that is not brought as a class action. That term is somewhat misleading, however, because no one denies that district courts have the power to enjoin a defendant's conduct anywhere in the nation (indeed, the world) as it relates to *the plaintiff*; rather, the dispute is about *who* can be included in the scope of the injunction, not *where* the injunction applies or is enforced. For that reason, some scholars refer to injunctions that bar the defendant from taking action against nonparties as 'universal injunctions,' 'global injunctions,' or 'defendant-oriented injunctions.' Despite its potential to confuse, . . . the term 'nationwide injunction' . . . is the name that courts repeatedly use when issuing this type of injunction." Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1071 (2018).

8. A preliminary injunction is temporary and is issued by a court before or during trial to prevent irreparable injury to the plaintiff before the court is able to decide the case. *See* Katherine B. Wheeler, *Why There Should Be a Presumption Against Nationwide Preliminary Injunctions*, 96 N.C. L. REV. 200, 204 (2017). Its purpose is to preserve the relative positions of the parties until a full trial on the merits takes place. *See id.* Federal courts' power to grant preliminary injunctions stems from Rule 65 of the Federal Rules of Civil Procedure. *See id.* However, Rule 65 does not specify the circumstances under which a preliminary injunction may be granted; accordingly, district courts are guided by traditional equity doctrines in doing so. *See id.* at 204–05. In contrast, a permanent injunction is granted after a hearing on the merits. *See id.* at 211.

9. In so doing, scholars have contended that nationwide injunctions are not founded in history. *See, e.g.*, Bray, *supra* note 6, at 425–45 (laying out a history that "shows the absence of the national injunction from traditional equity"); Wasserman, *supra* note 6, at 339 (arguing that "[u]niversal injunctions remain inconsistent with the historic scope of courts' equity powers"). *But see* Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920 (2020) (rebutting the proposition that nationwide injunctions are a recent invention). Scholars have also argued that nationwide injunctions violate due process, the definition of "judicial powers" under Article III, and fundamental notions of judicial hierarchy. *See, e.g.*, Morley, *supra* note 6, at 522–23; Bray, *supra* note 6, at 471–72; Michael T. Morley, *Nationwide Injunctions, Rule 23(B)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615, 647–53 (2017); Getzel Berger, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. REV. 1068, 1088, 1101 (2017).

10. *See, e.g.*, Bray, *supra* note 6, at 457–64; Berger, *supra* note 9, at 1085–93.

11. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring); DHS v. New York, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring).

Some scholars,[12] jurists,[13] and policymakers[14] have argued that nationwide injunctions should be abolished altogether. However, despite the onslaught of criticism, there is a growing scholarship defending nationwide injunctions, while also arguing that they should be limited to address concerns.[15]

Up to this point, the debate over the nationwide injunction has been largely focused on courts, overwhelmingly overlooking the important role of state litigants and litigators in public law litigation.[16] States and AGs have unique attributes, advantages, and incentives that enable them to frequently sue the federal government and successfully secure nationwide injunctions.[17] These

12. *See, e.g.*, Bray, *supra* note 6, at 420 (proposing a new "plaintiff-protective injunction" because, "[n]o matter how important the question and no matter how important the value of uniformity, a federal court should not award a national injunction"); Wasserman, *supra* note 6, at 353 (arguing that "universal injunctions are normatively inappropriate").

13. *See Trump*, 138 S. Ct. at 2429 (Thomas, J., concurring) (referring to these injunctions as "legally and historically dubious" and contending that "[i]f federal courts continue to issue them, this Court is dutybound to adjudicate their authority to do so").

14. Congress has considered legislation to strip federal courts of the power to issue nationwide injunctions. For example, the Nationwide Injunction Abuse Prevention Act of 2019, introduced to the Senate Judiciary Committee, would prohibit federal courts from issuing injunctions to nonparties to the litigation or the judicial district where the litigation is pending. Nationwide Injunction Abuse Prevention Act, S. 2464, 116th Cong. (2019). The Injunctive Authority Clarification Act of 2018, introduced in the House of Representatives, would prevent federal courts in non-class action lawsuits from issuing injunctive orders that bar enforcement of a federal law or policy against nonparties. Injunctive Authority Clarification Act, H.R. 6730, 115th Cong. (2019).

15. *See, e.g.*, Trammel, *supra* note 5, at 103–13 (proposing that nationwide injunctions be limited to instances where plaintiffs can demonstrate bad faith behavior by the government); Clopton, *supra* note 6, at 42–44 (arguing that nationwide injunctions are justified when a category of potential plaintiffs cannot intervene through class action); Frost, *supra* note 7, at 1098–1101 (defending nationwide injunctions in cases where they are "the only practicable method of providing relief and can avoid the cost and confusion of piecemeal injunctions"); Spencer E. Amdur & David Hausman, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. F. 49, 51–52 (2017) (arguing that courts should balance the likelihood of widespread irreparable harm with the government's potential harm in issuing nationwide injunctions); Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095, 2140–44 (2017) (proposing that Rule 65 of the Federal Rules of Civil Procedure be amended to expressly include the requirement that nationwide injunctions should only issue in cases where they are necessary to provide a plaintiff complete relief).

16. *See* Charlton C. Copeland, *Seeing Beyond Courts: The Political Context of the Nationwide Injunction*, 91 U. COLO. L. REV. 789, 790–91 (2020). This Article adopts the following definition of "public law litigation": "(1) litigation activity (not only filing lawsuits but also defending them and participating as amici) (2) by states that is (3) intended to have a legal and/or political impact that transcends the individual case and the jurisdiction where the action takes place." Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 66–67 (2018).

17. *See* Paul Nolette & Colin Provost, *Change and Continuity in the Role of State Attorneys General in the Obama and Trump Administrations*, 48 PUBLIUS 469, 471–72 (2018).

advantages are enhanced when states litigate together.[18] This dynamic allows states and AGs to uniquely contribute to common criticisms of nationwide injunctions. Thus, reforms to the remedy require consideration of this special class of litigants and litigators.

States are suing the federal government with increased frequency, seeking nationwide injunctions that thwart presidential priorities and shape national policy.[19] During the Obama administration, a distinctive trend of Republican AG activism emerged in litigation against the federal government.[20] Republican AGs halted the Obama administration's Clean Power Program[21] and deferred immigration initiatives.[22] Suing the Obama administration became part of daily operations for Republican AGs. Then-Texas AG, and current Governor, Greg Abbott famously described his average day in office during the Obama administration: "I go to the office. I sue the federal government. And then I go home."[23]

Democratic AGs borrowed Republican AGs' litigation strategy and amplified it during the Trump administration. The Trump administration experienced a dramatic upswing in an already rising trend of lawsuits brought by states.[24] Democratic AGs frustrated executive actions by obtaining nationwide injunctions against the travel bans, repeal of the Deferred Action for Childhood Arrivals (DACA) program, and withholding of funds from jurisdictions that resisted assisting with certain federal immigration

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18. *See id.* at 472.

19. *See Multistate Lawsuits vs. the Federal Government - Totals*, STATE LITIG. & AG ACTIVITY DATABASE, https://attorneysgeneral.org/multistate-lawsuits-vs-the-federal-government/statistics-and-visualizations-multistate-litigation-vs-the-federal-government/ [https://perma.cc/V9TT-8DZ7] [hereinafter *Multistate Litigation Database*] (displaying visualizations of AGs suing the federal government with greater frequency over time); Bray, *supra* note 6, at 457 ("National injunctions have increasingly thwarted the policies of the Federal Executive.").

20. *See* Paul Nolette, *The Dual Role of State Attorneys General in American Federalism: Conflict and Cooperation in an Era of Partisan Polarization*, 47 PUBLIUS 342, 355–60 (2017).

21. *See id.* at 357–60 (describing Republican AG challenges to the Clean Power Plan).

22. *See* Texas v. United States, 809 F.3d 134, 146 (5th Cir. 2015) (affirming preliminary injunction that barred implementation of the Deferred Action for Parents of Americans and Lawful Permanent Residents program (DAPA)), *aff'd*, 579 U.S. 547 (2016); Nolette, *supra* note 20, at 350–56 (discussing Republican AG challenges to key Obama administration immigration initiatives).

23. Paul Nolette, *State Litigation During the Obama Administration: Diverging Agendas in an Era of Polarized Politics*, 44 PUBLIUS 451, 451 (2014). Arkansas AG Leslie Rutledge echoed that sentiment with respect to the Biden administration: "I wake up every morning wondering how I will have to sue President Biden over his out-of-touch policies." Olson, *supra* note 1.

24. *See Multistate Litigation Database*, *supra* note 19 (showing 157 lawsuits against the Trump administration during its sole term compared to 78 throughout both terms of the Obama administration).

policies.[25] From the outset of the Trump presidency, some dubbed Democratic AGs the "resistance"[26] on the "front line" [27] of opposing the administration, declaring them to play "among the most pivotal roles [in] slowing and stopping the march of the Trump agenda."[28]

Republican AGs are returning to their Obama-era litigation tactics to oppose the Biden administration. They have challenged vaccine mandates,[29] climate change regulations,[30] and immigration executive actions,[31] and they will likely continue to impact federal policies through litigation. Thus, nationwide injunctions will play an important ongoing role in partisan strategies to frustrate presidential policy priorities.

State litigants and litigators uniquely contribute to common criticisms of nationwide injunctions. Doctrines of state standing in federal courts and flexible venue choices enable states to engage in forum shopping.[32] Groups of ideologically-aligned, multistate plaintiffs exacerbate this concern by strategically filing lawsuits in multiple hand-picked jurisdictions, increasing

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25. *See* Nolette & Provost, *supra* note 17, at 470.

26. *See, e.g.*, Laura Krantz & Jim O'Sullivan, *Blue-State Attorneys General Lead Trump Resistance*, BOS. GLOBE (Feb. 6, 2017), https://www.bostonglobe.com/metro/massachusetts/2017/02/06/state-ags-lead-charge-against-trump/LCHc5CQrZMzV1JUd4c027M/story.html [https://perma.cc/733E-SHZF] ("[S]tate attorneys general have emerged as the vanguard of resistance to the new presidency."); Platoff, *supra* note 4 (referring to Democratic AGs as "fighters of the Trump resistance").

27. *See* Lauren Dezenski, *In Fight Against Trump, Democratic AGs Take a Page from GOP*, POLITICO (Feb. 7, 2018), https://www.politico.com/story/2018/02/07/democratic-attorneys-general-trump-393651 [https://perma.cc/8NWW-SFZQ] (quoting Massachusetts AG Maura Healey).

28. Alan Neuhauser, *State Attorneys General Lead the Charge Against President Donald Trump*, U.S. NEWS & WORLD REP. (Oct. 27, 2017), https://www.usnews.com/news/best-states/articles/2017-10-27/state-attorneys-general-lead-the-charge-against-president-donald-trump [https://perma.cc/NG9G-2WAD].

29. *See* Elysa M. Dishman, *Calling the Shots: Multistate Challenges to Federal Vaccine Mandates*, (BYU J. Reuben Clark L. Sch. Legal Stud. Rsch. Paper Series, Paper No. 22-17, available on SSRN) [hereinafter *Calling the Shots*]; Todd Gregory, *Ten Republican-Led States Sue over Biden's Vaccination Mandate for Federal Contractors*, N.Y. TIMES (Oct. 29, 2021), https://www.nytimes.com/2021/10/29/world/vaccine-mandate-states-sue.html [https://perma.cc/E4QY-YYWD].

30. *See* Robert Barnes & Dino Grandoni, *Supreme Court Will Hear Cases that Could Undercut Biden's Goals on Climate, Immigration*, WASH. POST (Oct. 29, 2021), https://www.washingtonpost.com/politics/courts_law/supreme-court-epa-greenhouse-gas/2021/10/29/33d2740e-38f6-11ec-91dc-551d44733e2d_story.html [https://perma.cc/4B8J-VKU3].

31. *See id.*

32. *See* Trammell, *supra* note 5, at 106 ("[S]trong evidence suggests that litigants challenging Bush- and Trump-era policies channeled cases to courts in the Ninth Circuit, whereas challenges to Obama Administration policies not only proceeded in Texas courts but sometimes before specifically targeted judges.").

the odds of winning the prized nationwide injunction.[33] However, this strategy also increases the chance that courts will issue conflicting injunctions.[34] Both state plaintiffs and federal government defendants undermine the value of percolation and interfere with good judicial decision-making in the way they seek and appeal nationwide injunctions.[35] States and AGs also heighten concerns that nationwide injunctions politicize the judiciary and deepen political polarization.[36]

This Article tells the story of the rise of state activism in public law litigation alongside the increasing trend of courts ordering nationwide injunctions. It shifts the focus of the debate about nationwide injunctions from courts to litigants and litigators, and it argues that criticisms of the remedy are shaped by the states and AGs who frequently seek and secure nationwide injunctions. This Article is the first to directly link common criticisms of the nationwide injunction to states and AGs and to propose reforms focused on state litigants and litigators.

This Article proceeds in four parts. Part I discusses multistate actions and nationwide injunctions during the Obama, Trump, and Biden administrations. Part II analyzes unique attributes, advantages, and incentives of state litigants and litigators in obtaining nationwide injunctions. Part III discusses how states and AGs contribute to common criticisms of the nationwide injunction. Part IV discusses potential reforms focused on states and AGs that can mitigate concerns related to the nationwide injunction.

I. MULTISTATE ACTIONS AND NATIONWIDE INJUNCTIONS

States are bringing lawsuits against the federal government with increased frequency.[37] At the same time, federal district courts are increasingly issuing nationwide injunctions.[38] Multistate lawsuits against the federal government are overwhelmingly partisan, with coalitions of AGs from one political party

33. *See* Clopton, *supra* note 6, at 10 ("Even if plaintiffs' first-choice forum denied an injunction, other potential plaintiffs could keep shopping until a court issued one.").

34. *See* Trammell, *supra* note 5, at 81 ("As critics of nationwide injunctions correctly observe, if different district courts issue conflicting nationwide injunctions, those courts might impose inconsistent obligations, which can prove deeply problematic.").

35. *See* Morley, *supra* note 6, at 534 (arguing that nationwide injunctions freeze a decision on an issue and "effectively compel[] the government defendant to appeal, rather than waiting for a more favorable fact pattern or allowing the law to percolate through various courts").

36. *See* Lemos & Young, *supra* note 16, at 43 ("[L]ongstanding concerns about state litigation as a form of national policymaking that circumvents ordinary lawmaking processes have been joined by new concerns that state litigation reflects and aggravates partisan polarization.").

37. *See Multistate Litigation Database*, *supra* note 19.

38. *See* Jonathan Remy Nash, *State Standing for Nationwide Injunctions Against the Federal Government*, 94 NOTRE DAME L. REV. 1985, 1986 (2019).

suing the federal government when the president is a member of the opposing party.[39] Multistate actions during the Obama and Trump administrations resulted in nationwide injunctions that successfully frustrated key administration policies.[40] Multistate actions against the Biden Administration seeking nationwide injunctions have already begun to play a prominent role in national policymaking and will likely continue to do so.

A. Obama Administration

During the Obama administration, a distinctive trend emerged: Republican AGs grew more active in suing the administration, compared to relatively subdued litigation trends against previous Democratic presidential administrations.[41] The Obama administration heavily relied on executive actions to make policy changes in response to congressional opposition and gridlock.[42] Republican AGs successfully limited some of these executive actions through litigation, including in the areas of immigration and climate change.[43] The fact that Republican AGs succeeded in frustrating important components of President Obama's desired policy legacy demonstrates AGs' important national role in American politics.[44]

1. Deferred Action Immigration Initiatives

In 2015, Republican AGs successfully obtained a nationwide injunction against Obama Administration deferred immigration executive actions.[45] These executive actions, taken in the wake of Congress' failure to pass the DREAM Act,[46] would have permitted undocumented immigrants to apply to become lawful permanent residents.[47] The executive actions included new

39. *See* Nolette, *supra* note 20, at 342–43.

40. *See id.* at 345.

41. *See id.* at 347 ("Republican Ags attempted few multistate challenges to President Bill Clinton's regulatory and legislative program, and even most of these were bipartisan efforts.").

42. *See id.* at 351, 357.

43. *See id.* at 351–60.

44. *See id.* at 350.

45. Texas v. United States, 86 F. Supp. 3d 591, 677–78 (S.D. Tex. 2015).

46. The DREAM Act was reintroduced in Congress in 2021. *See* Hannah Miao, *Bipartisan Pair of Senators Reintroduces Immigration Reform Bill Protecting 'Dreamers'*, CNBC (Feb. 4, 2021), https://www.cnbc.com/2021/02/04/dream-act-lindsey-graham-dick-durbin-unveil-latest-version-of-immigration-reform-bill.html [https://perma.cc/6Y2J-NMV4]. The House passed its own version, the American Dream and Promise Act of 2021, and it is pending in the Senate Judiciary Committee. *See* H.R.6 -American Dream and Promise Act of 2021, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/house-bill/6/text [https://perma.cc/8ATG-B9EN].

47. *See* Nolette, *supra* note 20, at 351.

provisions to expand the Deferred Action for Childhood Arrivals (DACA) program[48] and establish a new Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program.[49]

Texas led a twenty-six-state coalition,[50] which challenged the DACA extensions and new DAPA program in a federal district court in Texas and sought a preliminary nationwide injunction.[51] In response, twelve states and the District of Columbia filed an amicus brief defending the Obama administration's actions and opposing the injunction.[52] Texas argued that if the executive actions were not preliminarily enjoined, Texas would suffer irreparable injury because DAPA recipients would be eligible for driver's licenses, the cost of which the state partially subsidized.[53] The district court found that if the executive actions were later struck down by courts, it would be practically impossible for Texas to rescind the subsidized driver's licenses once they had already been issued.[54] The court entered a nationwide preliminary injunction barring implementation of both DAPA and the DACA expansion.[55]

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48. The Department of Homeland Security (DHS) began the DACA program in 2012, allowing individuals who arrived in the United States as children to apply for deferred action status and two-year employment authorizations; in 2014, DHS sought to expand DACA by removing an age cap and extending work authorizations from two to three years. *See id.*

49. Alongside the DACA expansions, DHS announced the new DAPA program, which would indefinitely delay deportations of undocumented parents of U.S. citizens and permanent residents, insulating approximately four million undocumented immigrants from deportation despite no change in their legal status. *See id.*

50. The states and state representatives that joined Texas in the action were: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, West Virginia, Wisconsin, Michigan AG Bill Schuette, Mississippi Governor Phil Bryant, Maine Governor Paul R. LePage, North Carolina Governor Patrick L. McCrory, and Idaho Governor C.L. "Butch" Otter. *See* Texas v. United States, 86 F. Supp. 3d 591, 604 n.1 (S.D. Tex. 2015). All but one of the Ags who participated in this multistate action were Republicans. *See* Nolette, *supra* note 20, at 352.

51. *See* Texas v. United States, 86 F. Supp. 3d at 604.

52. The states that joined the amicus brief were: Washington, California, Connecticut, Hawaii, Illinois, Iowa, Maryland, Massachusetts, New Mexico, New York, Oregon, and Vermont. *See* States' Motion for Leave To Participate as Amici Curiae and Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction at 14–15, Texas v. United States, No. 1:14-cv-00254 (S.D. Tex. Jan. 12, 2015). Each state and the District of Columbia was led by a Democratic AG.

53. *See* Texas v. United States, 86 F. Supp. 3d at 616–17.

54. *See id.* at 673 ("[W]ithout a preliminary injunction . . . the States [would face] the substantially difficult—if not impossible—task of retracting any benefits or licenses already provided to DAPA beneficiaries. This genie would be impossible to put back into the bottle.").

55. *See id.* at 677–78.

The United States appealed the imposition of the injunction to the Fifth Circuit.[56] On appeal, a divided Fifth Circuit panel affirmed the district court decision to issue the nationwide injunction.[57] The Fifth Circuit found that a nationwide injunction was warranted in part because a geographically limited injunction would be ineffective since DAPA beneficiaries would be free to move among states.[58] The federal government appealed and the Supreme Court granted certiorari.[59] An evenly divided Supreme Court[60] affirmed the Fifth Circuit's ruling in a one-sentence per curiam opinion with no reasoning.[61]

As a result of obtaining a nationwide injunction, Republican AGs successfully delayed implementation of key immigration policies until the Trump administration took office and began to repeal them. The Trump administration rescinded the DAPA and DACA programs;[62] however, the recission was met with multiple lawsuits by states, private parties, advocacy groups, and public institutions.[63] In two of the lawsuits, including a consolidated multistate lawsuit, district courts entered preliminary nationwide injunctions.[64] The multistate action[65] was consolidated with other cases that were ultimately reviewed by the Supreme Court.[66] The Supreme

56. Pending appeal, the federal government sought to stay or narrow the scope of the district court's injunction, which a motions panel denied. *See* Texas v. United States, 787 F.3d 733, 743 (5th Cir. 2015).

57. *See* Texas v. United States, 809 F.3d 134, 146 (5th Cir. 2015).

58. *See id.* at 187–88.

59. *See* United States v. Texas, 577 U.S. 1101 (2016) (mem.).

60. After oral arguments, but before the Court could issue its opinion in the case, Justice Scalia passed away. The Court was reduced to eight justices, who issued an evenly divided order that upheld the Fifth Circuit's ruling. The Court refused to re-hear the case during the next term. *See* United States v. Texas, 137 S. Ct. 285 (2016) (mem.).

61. *See* United States v. Texas, 579 U.S. 547 (2016) (per curiam).

62. *See* DHS v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1903 (2020).

63. *See* Regents of the Univ. of Cal. V. DHS, 279 F. Supp. 3d 1011 (N.D. Cal. 2018); NAACP v. Trump, 298 F. Supp. 3d 209 (D.D.C. 2018); Batalla Vidal v. Duke, 295 F. Supp. 3d 127 (E.D.N.Y. 2017).

64. *See Regents*, 140 S. Ct. at 1904. While these injunctions did not require DHS to accept new applications, they did mandate that the agency permit existing DACA recipients to renew their enrollments. *See id.*

65. *See* Batalla Vidal v. Nielsen, 279 F. Supp. 3d 401 (E.D.N.Y. 2018). Sixteen states and the District of Columbia, all led by Democratic Ags, earlier brought a multistate action; those states were: New York, Massachusetts, Washington, Connecticut, Delaware, Hawaii, Illinois, Iowa, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, and Virginia. *See* Complaint for Declaratory and Injunctive Relief at 1, New York v. Trump, No. 1:17-cv-05228 (E.D.N.Y. Sept. 6, 2017). *New York v. Trump* was then consolidated with *Batalla Vidal v. Duke*, a previously filed case brought by private individuals and non-profit groups also challenging the rescission of the DACA program. *See Batalla Vidal*, 295 F. Supp. 3d at 127.

66. *See* DHS v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).

Court ultimately held that recission of the DACA program was arbitrary and capricious under the Administrative Procedures Act (APA).[67]

Another recent multistate lawsuit led by Republican AGs challenged DACA and a district court in Texas issued a nationwide injunction enjoining the federal government from approving new DACA applications.[68] The federal government has appealed the case and it is currently pending in the Fifth Circuit. The case will likely squarely bring the issue of DACA and nationwide injunctions back to the Supreme Court.

2. Clean Power Program

Republican AGs also successfully delayed Obama-era climate change initiatives. Similar to immigration reforms, climate change action during the Obama administration was initiated by executive action, not congressional legislation.[69] The Clean Power Program (CPP) consisted of a series of rules issued by the Environmental Protection Agency (EPA) requiring existing electricity generating utilities to reduce emissions levels.[70] The CPP was a central piece of President Obama's climate change reforms and was part of the U.S. pledge at the United Nations Paris Agreement.[71] President Obama stated that the CPP was "the single most important step America has ever taken in the fight against global climate change."[72]

After the EPA finalized CPP regulations,[73] a coalition of twenty-four AGs and state agencies filed a motion to stay the rules with the D.C. Circuit.[74]

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67. *See id.* at 1896.

68. *See* Texas v. United States, 549 F. Supp. 3d 572 (S.D. Tex. 2021).

69. *See* Nolette, *supra* note 20, at 357.

70. The Obama-era Clean Power Plan had mandated that power plants make 32 percent reductions in emissions below 2005 levels by 2030. *See* Janice Chon, *Clean Power Plan*, 7 BARRY U. ENV'T & EARTH L.J. 105, 107 (2017).

71. *See* Nolette, *supra* note 20, at 357; Chon, *supra* note 70, at 107.

72. President Barack Obama, Remarks Announcing the Environmental Protection Agency's Clean Power Plan, at 2 (Aug. 3, 2015).

73. Prior to finalization of the CPP regulations, Murray Energy, a coal company, brought suit against the EPA in the D.C. Circuit seeking to have the court declare the regulations invalid. *See* Murray Energy Corp. v. EPA, 788 F.3d 330, 335–36 (D.C. Cir. 2015). West Virginia and eleven other states filed an amicus brief supporting Murray Energy's position. See Final Brief of the States West Virginia, Alabama, Alaska, Indiana, Kansas, Kentucky, Louisiana, Nebraska, Ohio, South Dakota, and Wyoming in Support of Petitioner, Murray Energy Corp. v. EPA, 788 F.3d 330 (D.C. Cir. 2015) (Nos. 14-1112, 14-1151), 2015 WL 1022482. The D.C. Circuit ruled against Murray Energy, finding that court did not have the authority to review proposed agency rules, rather than final rules. *See Murray Energy Corp.*, 788 F.3d at 335–36; Nolette, *supra* note 20, at 358.

74. *See* State Petitioners' Motion for Stay, West Virginia v. EPA, No. 15-1363 (D.C. Cir. Oct. 23, 2015).

Other AGs filed separate but closely linked challenges, as did a large number of business associations, labor groups, and utilities.[75] The basic argument was that the states and other groups would suffer "immediate and irreparable harm" due to the tight timeline demanded by the EPA for states to implement the new rules.[76] A coalition of Democratic AGs intervened to support the EPA.[77]

The D.C. Circuit denied the motion to stay the CPP.[78] However, a coalition of Republican AGs and allied groups took the unprecedented action of petitioning the Supreme Court for a stay, even though no lower court had addressed the merits of the case.[79] By a five-four vote, the Supreme Court issued a stay of the program until the lower court decided the merits.[80] This was the first time that the Supreme Court stayed a regulation before a lower court had reviewed it.[81]

The Supreme Court's stay halted the implementation of CPP regulations until the D.C. Circuit resolved the merits of the dispute.[82] However, before the D.C. Circuit issued its opinion, President Trump won the presidential election.[83] President Trump issued an executive order directing the rollback of the CPP, and the EPA asked the D.C. Circuit to delay a ruling in the case until the agency had an opportunity to respond to President Trump's executive order.[84] The EPA under the Trump administration issued a new rule, the Affordable Clean Energy Rule, which rolled back the Obama administration's CPP.[85]

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75. Nolette, *supra* note 20, at 358.

76. *See* State Petitioners' Motion for Stay at 2, West Virginia v. EPA, No. 15-1363 (D.C. Cir. Oct. 23, 2015).

77. *See* Unopposed Motion for Leave To Intervene as Respondents, North Dakota v.EPA, No. 17-1014 (D.C. Cir. Jan. 27, 2017). The D.C. Circuit Court of Appeals consolidated several cases from states and business groups.

78. *See* Order Granting Expedition and Declining Stay, West Virginia v. EPA, No. 15-1363 (D.C. Cir. Jan. 21, 2016) (per curiam) (denying motions for stay).

79. *See* West Virginia v. EPA, 577 U.S. 1126, 1126 (2016) (mem.) (order granting stay).

80. *See id.* Justice Scalia passed away less than one week after his vote in granting the application for a stay. *See* Chon, *supra* note 70, at 117. The case was remanded back to the D.C. Circuit Court of Appeals and was scheduled for oral argument en banc in September of 2016. *See id.* at 118.

81. *See* Courtney Scobie, *Supreme Court Stays EPA's Clean Power Plan*, AM. BAR ASS'N (Feb. 17, 2016), https://www.americanbar.org/groups/litigation/committees/environmental-energy/practice/2016/021716-energy-supreme-court-stays-epas-clean-power-plan/ [https://perma.cc/Q39S-68F7].

82. *See* West Virginia v. EPA, 577 U.S. at 1126.

83. *See* Nolette, *supra* note 20, at 360.

84. *See id.*

85. *See Affordable Clean Energy Rule*, U.S. ENV'T PROT. AGENCY (Feb. 16, 2021), https://www.epa.gov/stationary-sources-air-pollution/affordable-clean-energy-rule [https://perma.cc/4S9T-JJK4].

Republican AGs' litigation strategy successfully delayed implementation of the CPP until President Trump took office and began repealing the program. However, Democratic AGs responded in kind by instigating litigation against the Trump administration's actions to repeal the CPP. The day before the inauguration of President Biden, the D.C. Circuit struck down the Trump administration's Affordable Clean Energy Rule.[86] The D.C. Circuit's ruling is currently on appeal in the Supreme Court.[87] The Biden Administration EPA has indicated that rather than reinstating the CPP, it will draft its own rules on greenhouse gas emissions from power plants.[88]

B. Trump Administration

Democratic AGs borrowed the Republican AGs' litigation strategy from the Obama administration and amplified it during the Trump administration. There was a dramatic upswing in the number of state lawsuits against the federal government during the Trump administration.[89] Even prior to President Trump's inauguration, Democratic AGs planned to frustrate the Trump administration's agenda through litigation.[90] They had considerable success obtaining nationwide injunctions that stalled controversial immigration policies such as the Travel Ban and Public Charge Rule.[91] In fact, during the Trump administration's first two years, the Justice Department reported that courts issued twenty-five nationwide injunctions or restraining orders against administration policies.[92]

1. Travel Bans

Democratic AGs were successful early in the Trump administration in halting travel ban executive orders by obtaining nationwide injunctions. One

86. *See id.*

87. *See* West Virginia v. EPA, No. 20-1530 (cert. granted Oct. 29, 2021).

88. See Brady Dennis & Juliet Eilperin, *EPA To Jettison Major Obama Climate Rule, as Biden Eyes a Bigger Push*, WASH. POST (Feb. 12, 2021), https://www.washingtonpost.com/climate-environment/2021/02/12/epa-jettison-major-obama-climate-rule-biden-eyes-bigger-push/ [https://perma.cc/BCM5-4FNB].

89. *See Multistate Litigation Database*, *supra* note 19.

90. *See* Nolette & Provost, *supra* note 17, at 470.

91. The overall win rate of Democratic Ags vs. the Trump administration is 78.5% as opposed to 60%, which was the overall win rate of Republican Ags vs. the Obama administration. *See Multistate Litigation Database*, *supra* note 19.

92. *See* Press Release, U.S. Dep't of Just., Attorney General Sessions Releases Memorandum on Litigation Guidelines for Nationwide Injunctions Cases (Sept. 13, 2018), https://www.justice.gov/opa/pr/attorney-general-sessions-releases-memorandum-litigation-guidelines-nationwide-injunctions [https://perma.cc/68SX-DMRN].

week after inauguration, President Trump signed an executive order, known as Travel Ban 1.0, that banned entry into the United States by nationals from seven designated predominantly-Muslim countries.[93] A multistate action led by the Washington AG[94] challenged the constitutionality of Travel Ban 1.0, and a district court granted a nationwide injunction halting the order.[95] The Ninth Circuit upheld the injunction.[96]

The Trump administration revoked Travel Ban 1.0 and signed a revised executive order known as Travel Ban 2.0.[97] Travel Ban 2.0 was challenged in several jurisdictions, including by the Hawaii AG in a district court in Hawaii[98] and a non-profit advocacy group, International Refugee Assistance Program (IRAP), in a district court in Maryland.[99] District courts in Hawaii[100] and Maryland[101] issued nationwide injunctions, which were affirmed by the

93. Travel Ban 1.0 is Executive Order No. 13769 and the order suspended entry to the United States for 90 days for nationals from seven countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. *See* Exec. Order No. 13,769, 82 Fed. Reg. 8977, 8977 (Jan. 27, 2017). Chaos erupted at airports as nationals from the listed countries were in transit when the order was signed and detained upon arrival to the United States. *See Muslim Ban Timeline*, ACLU OF N. CAL. (2018), https://www.aclunc.org/sites/muslim-ban/#:~:text=Status%3A%20Muslim%20Ban%201.0%20takes%20effect%20immediately.%20Travelers,their%20travel%20plans%20canceled%20at%20the%20last%20minute [https://perma.cc/WG2W-WWQF]. Many of the affected people were Lawful Permanent Residents of the United States. *See id.* Over the next 24 hours, federal judges granted writs of habeas corpus, and ordered release of those detained. *See id.*

94. Several states ultimately joined as plaintiffs including Minnesota, Oregon, California, New York, Maryland, and Massachusetts. *See* Washington v. Trump, No. 2:17-cv-00141-JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017) (granting temporary restraining order).

95. *See id.*

96. *See* Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017).

97. Exec. Order No. 13,780, 82 Fed Reg. 13,209 (Mar. 6, 2017) (revoking and replacing Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017)). The order called for a 90-day worldwide review to assess the risks of aliens entering the United States. *See id.* During this period, nationals from Iran, Libya, Sudan, Syria, Somalia, and Yemen were barred from the country. *See id.* The order noted that each of the six nations were selected because each was "a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones." *Id.* Lawful Permanent Residents were exempted from the order. *See id.*

98. *See* Hawaii v. Trump, 241 F.Supp.3d 1119 (D. Haw. 2017).

99. *See* Int'l Refugee Assistance Project v. Trump, 241 F.Supp.3d 539 (D. Md. 2017).

100. *See* Hawaii v. Trump, 245 F.Supp.3d 1227, 1239 (D. Haw. 2017).

101. *See Int'l Refugee Assistance Project*, 241 F.Supp.3d at 566.

Ninth[102] and Fourth Circuits,[103] respectively. The Solicitor General filed a petition for certiorari in the Fourth Circuit case[104] prior to the Ninth Circuit's ruling. The Solicitor General also filed applications for stays in the Fourth[105] and (forthcoming) Ninth Circuit[106] rulings, pending disposition on the petition for certiorari.

The Supreme Court granted the government's applications for stays in part and denied them in part.[107] To that end, the Court proceeded to grant certiorari in both cases,[108] consolidated the cases, and set them for oral argument in the next term.[109] Justice Thomas wrote an opinion concurring and dissenting in part, joined by Justices Alito and Gorsuch, stating that he would have stayed the preliminary injunctions in full.[110]

Before the Supreme Court heard oral arguments on the merits of Travel Ban 2.0, the order expired, making the case moot.[111] The Trump

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102. *See* Hawaii v. Trump, 859 F.3d 741, 789 (9th Cir. 2017). The Ninth Circuit held that Hawaii was likely to succeed on the merit that the Travel Ban violated the Immigration Naturalization Act. *See id.* at 779. The Ninth Circuit enjoined sections 6(a) and 6(b), which suspended all refugee admissions for 120 days and any refugee admission in excess of 50,000 for the year. *See id.* at 789.

103. *See* Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 605–06 (4th Cir. 2017) (en banc). The Fourth Circuit held that plaintiffs were likely to succeed on the merit that the Travel Ban violated the Establishment Clause. *See id.* at 572–73. The Fourth Circuit enjoined section 2I of the Executive Order, the provision suspending entry for ninety days for most noncitizens from six countries. *See id.*

104. *See* Petition for a Writ of Certiorari, Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017) (No. 16-1436) (per curiam).

105. *See* Application for Stay, *Trump*, 137 S. Ct. 2080 (No. 16A1190).

106. *See* Application for Stay, Trump v. Hawaii, 138 S. Ct. 49 (2017) (No. 16A1191).

107. *See* Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2088 (2017); *see also* Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 136 (2019).

108. The Supreme Court treated a supplemental brief in the Ninth Circuit case as a petition for certiorari. *See* Vladeck, *supra* note 107, at 137.

109. *See Trump*, 137 S. Ct. at 2086. The Court issued two addition stays in the interim when a question arose about the Court's June 26 stay. *See* Vladeck, *supra* note 107, at 137. Thus, the Court issued four separate stays (two in June; one in July; and one in September) just to preserve the status quo pending the October argument. *See id.*

110. *See Trump*, 137 S. Ct. at 2089 (Thomas, J., concurring in part and dissenting in part).

111. It has been argued that the government's "curious timing" on appeal to the Supreme Court could have been viewed as a play for time since Travel Ban 2.0 was set to expire in September, before the Court would have been able to hear argument on the merits. *See* Steve Vladeck, *How the Acting Solicitor General (Sort of) Saved the Travel Ban*, SCOTUSBLOG (July 12, 2017), https://www.scotusblog.com/2017/07/symposium-acting-solicitor-general-sort-saved-travel-ban/ [https://perma.cc/6JQX-DH9L].

administration issued a revised executive order, Travel Ban 3.0.[112] District courts in Maryland[113] and Hawaii[114] again entered preliminary nationwide injunctions. This time, the Solicitor General immediately sought stays of the district court injunctions in the Supreme Court pending appeal, and the Court granted both applications, allowing Travel Ban 3.0 to go into effect pending appeal.[115] Both the Ninth and Fourth Circuits invalidated Travel Ban 3.0 on the merits.[116]

The Supreme Court granted certiorari and, in a five-four decision, upheld the Travel Ban 3.0 in its entirety.[117] The Court found it "unnecessary to consider the propriety of the nationwide scope of the injunction" because plaintiffs did not show they were "likely to succeed on the merits of their claims."[118] However, Justice Thomas wrote separately in concurrence to address the remedy of nationwide injunctions. He derided them as "legally and historically dubious" and stated that "[i]f federal courts continue to issue them, this Court is dutybound to adjudicate their authority to do so."[119] In dissent, Justice Sotomayor wrote in a footnote that "the imposition of a nationwide injunction was necessary to provide complete relief to the plaintiffs."[120]

Even though the Supreme Court ultimately upheld Travel Ban 3.0, Democratic AGs and their allies stalled the implementation of earlier travel bans and forced the Trump administration to revise the order multiple times. Furthermore, President Biden repealed Travel Ban 3.0 as one of his first executive orders.[121]

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112. Travel Ban 3.0 was promulgated as Proclamation No. 9645 and placed entry restrictions on the nationals of eight foreign states whose systems for managing and sharing information about their nationals the President deems inadequate. *See* Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,161–62 (Sept. 24, 2017). Iran, Libya, Somalia, Syria, and Yemen remained on the list. *See id.* at 45,163. Sudan was removed from the list, but Chad, North Korea, and Venezuela were added. *See id.*

113. *See* Int'l Refugee Assistance Project v. Trump, 265 F.Supp.3d 570 (D. Md. 2017).

114. *See* Hawaii v. Trump, 265 F.Supp.3d 1140 (D. Haw. 2017).

115. *See* Trump v. Int'l Refugee Assistance Project, 138 S. Ct. 542 (2017) (mem.); Trump v. Hawaii, 138 S. Ct. 542 (2017) (mem.). Prior to the Supreme Court issuing its stays, the Ninth Circuit ordered a partial stay to the injunction of Travel Ban 3.0, consistent with the lines drawn in the Supreme Court's partial stay of Travel Ban 2.0. *See* Hawaii v. Trump, No. 17-17168, 2017 WL 5343014, at *1 (9th Cir. Nov. 13, 2017).

116. *See* Hawaii v. Trump, 878 F.3d 662, 662–63 (9th Cir. 2017); Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 236–37 (4th Cir. 2018) (en banc).

117. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2392–93 (2018).

118. *Id.* at 2423.

119. *Id.* at 2429 (Thomas, J., concurring).

120. *Id.* at 2446 n.13 (Sotomayor, J., dissenting) (citation omitted).

121. *See* Aishvarya Kavi, *Biden's 17 Executive Orders and Other Directives in Detail*, N.Y. TIMES (Jan. 20, 2021), https://www.nytimes.com/2021/01/20/us/biden-executive-orders.html [https://perma.cc/2KH9-FTFM].

2. Public Charge Rule

Democratic AGs also obtained nationwide injunctions to delay implementation of a new immigration Public Charge Rule.[122] Similar to the travel ban lawsuits, states, localities, and non-profit organizations quickly responded to the rule by suing the federal government in multiple district courts, courts of appeal, and the Supreme Court.[123] Injunctions delayed implementation of the rule, which ultimately went into effect nationally for less than a year before the new Biden administration requested that litigation be dismissed[124] as the administration revisited[125] and ultimately rescinded the rule.[126]

The Public Charge Rule is based on a ground of inadmissibility within the Immigration and Nationality Act (INA), which renders any non-citizen inadmissible who is "likely at any time to become a public charge."[127] The statute does not define "public charge."[128] However, for many years, agencies relied on guidance published in 1999 that defined a public charge as a person who received public cash benefits for their subsistence but did not include public non-cash benefits.[129]

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122. *See* New York v. DHS, 475 F. Supp. 3d 208, 208–09 (S.D.N.Y. 2020). Connecticut and Vermont joined New York in the lawsuit. *See id.* at 208.

123. *See* Camilo Montoya-Galvez, *Courts Block Trump Rule To Deny Green Cards and Visas to Low-Income Immigrants*, CBS NEWS (Oct. 15, 2019), https://www.cbsnews.com/news/public-charge-rule-judge-blocks-attempt-to-deny-green-cards-and-visas-to-low-income-immigrants/ [https://perma.cc/8TE4-J9CS].

124. *See* Amy Howe, *Cases Testing Trump's "Public Charge" Immigration Rule Are Dismissed*, SCOTUSBLOG (Mar. 9, 2021), https://www.scotusblog.com/2021/03/cases-testing-trumps-public-charge-immigration-rule-are-dismissed/ [https://perma.cc/DT4A-XR2T].

125. *See* Exec. Order No. 14012, 86 Fed. Reg. 8277, 8278 (Feb. 5, 2021).

126. *See* John Kruzel, *Biden Rescinds Trump's 'Public Charge' Rule*, THE HILL (Mar. 11, 2021), https://thehill.com/regulation/court-battles/542860-biden-rescinds-trumps-public-charge-rule [https://perma.cc/9TWJ-6E67].

127. 8 U.S.C. § 1182(a)(4)(A). The public charge ground for denying admissibility has been a feature of U.S. immigration law since 1882. *See* New York v. DHS, 969 F.3d 42, 51 (2nd Cir. 2020) (describing the public charge ground as "a constant feature of our immigration law" since that year).

128. *See* New York v. DHS, 969 F.3d at 51.

129. *See* Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (Mar. 26, 1999). The 1999 Guidance defined "public charge" to mean a person who is "primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense." *Id.* at 28,690. The Guidance identified four public benefits that could be taken as evidence of this dependence: (1) Supplemental Security Income (SSI); (2) Temporary Assistance for Needy Families (TANF); (3) state and local cash assistance programs; and (4) any program, including Medicaid, supporting people institutionalized for long-term care. *See id.* at 28,692.

In 2018, the Department of Homeland Security (DHS) announced proposed rulemaking to change the agency's interpretation of the definition of a public charge in order to expand the set of benefits to include some non-cash benefits[130] and establish the amount of time that usage of such benefits would deem a person a public charge.[131] After its proposal, the rule "garnered 266,077 comments during the notice and comment period, the vast majority of which opposed the rule."[132] Because non-citizens are generally not eligible for federal public benefits, the rule required immigration officers to predict whether the non-citizen would be likely to use the benefits for the prohibited amount of time in the future.[133] On August 14, 2019, DHS published its final rule, which was set to become effective on October 15, 2019.[134]

However, shortly before the final rule was scheduled to go into effect, states, localities, and non-profit organizations sued DHS in district courts across the country, challenging the new rule and seeking nationwide injunctions.[135] Democratic AGs filed multistate lawsuits challenging the rule in district courts in New York,[136] California,[137] and Washington.[138] District courts in New York, Washington, and Maryland issued nationwide

130. *See* Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114 (Oct. 10, 2018). Such proposed non-cash benefits included Nonemergency Medicaid, the Supplemental Nutrition Assistance Program (SNAP), federal Section 8 housing vouchers and assistance, and subsidized public housing. *See id.* at 51,159–60. These benefits were not included under the 1999 Guidance.

131. DHS proposed defining "public charge" to be a person who receives "one or more of [such public] benefits . . . for more than 12 months in the aggregate within a 36-month period (such that, for instance, receipt of two [such] benefits in one month counts as two months)." *Id.* at 51,290. Because the rule aggregates benefits usage, the result is that "a person could reach the 12-month threshold in six months or fewer." New York v. DHS, 969 F.3d at 55. For example, "an industrious, self-sufficient person who, by reason of a temporary injury or illness, used three benefits per month for four months would thereby be conclusively established as a public charge." *Id.*

132. New York v. DHS, 969 F.3d at 54–55 (citation omitted).

133. *See id.* at 56.

134. *See* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,292 (Aug. 14, 2019).

135. *See* Camilo Montoya-Galvez, *Courts Block Trump Rule To Deny Green Cards and Visas to Low-Income Immigrants*, CBS NEWS (Oct. 15, 2019), https://www.cbsnews.com/news/public-charge-rule-judge-blocks-attempt-to-deny-green-cards-and-visas-to-low-income-immigrants/ [https://perma.cc/7EYD-PW7R].

136. *See* New York v. DHS, 408 F. Supp. 3d 334, 334 (S.D.N.Y. 2019).

137. *See* City of San Francisco v. U.S. Citizenship & Immigr. Servs., 408 F. Supp. 3d 1057, 1057 (N.D. Cal. 2019). California, Maine, Oregon, Pennsylvania, and District of Columbia AGs, along with various California municipalities and organizations, brought suit in a California federal district court. *See id.* at 1072.

138. *See* Washington v. DHS, 408 F. Supp. 3d 1191, 1191 (E.D. Wash. 2019). Washington and twelve other states, all led by Democratic AGs, filed suit in a Washington federal district court. *See id.*

injunctions.[139] District courts in California and Illinois issued geographically limited injunctions.[140] The Ninth and Fourth Circuits granted stays of the nationwide injunctions pending appeal.[141] The Seventh Circuit denied the stay with respect to an injunction that only applied to Illinois.[142] The Second Circuit denied a stay of the nationwide injunction.[143] In response to the Second Circuit's denial, the federal government filed an application for a stay with the Supreme Court. In a five-four decision, the Supreme Court granted the stay.[144] The Supreme Court also granted a stay limited to Illinois, allowing the final rule to go into effect nationally on February 21, 2020.[145]

Supreme Court justices clashed in these stay decisions, filing concurring and dissenting opinions with respect to nationwide injunctions.[146] In a concurrence to the grant of the stay in *DHS v. New York*, Justice Gorsuch decried "the routine issuance of universal injunctions," writing that the practice is "patently unworkable, sowing chaos for litigants, the government, courts, and all those affected by these conflicting decisions."[147] In another decision, Justice Sotomayor dissented in the grant of a stay, arguing that the Court should not intervene in a case where there was a geographically limited injunction.[148]

After considerable litigation, delaying implementation for six months, the Public Charge Rule went into effect for less than a year before the new Biden administration announced it would revisit the rule.[149] The Biden administration dismissed a case, pending in the Supreme Court, reviewing the Public Charge Rule[150] and ultimately rescinded the rule, reverting back to

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139. *See* New York v. DHS, 408 F. Supp. 3d at 351–53; Washington v. DHS, 408 F. Supp. 3d at 1223–24; Casa de Maryland, Inc. v. Trump, 414 F. Supp. 3d. 760, 785–87 (D. Md. 2019).

140. *See* City of San Francisco v. U.S. Citizenship & Immigr. Servs., 408 F. Supp. 3d at 1130–31; Cook County v. McAleenan, 417 F. Supp. 3d 1008, 1030–31 (N.D. Ill. 2019).

141. *See* City of San Francisco v. U.S. Citizenship & Immigr. Servs., 944 F.3d 773, 807 (9th Cir. 2019); Casa de Maryland, Inc. v. Trump, 971 F.3d 220, 262–63 (4th Cir. 2020).

142. *See* Cook County v. Wolf, 962 F.3d 208, 234 (7th Cir. 2020).

143. *See* New York v. DHS, No. 19-3591, No. 19-3595, 2020 WL 95815, at *1 (2nd Cir. Jan. 8, 2020).

144. *See* DHS v. New York, 140 S. Ct. 599, 599 (2020).

145. *See* Wolf v. Cook County, 140 S. Ct. 681, 681 (2020).

146. *See* DHS v. New York, 140 S. Ct. at 599–601; Wolf v. Cook County, 140 S. Ct. at 681–84.

147. DHS v. New York, 140 S. Ct. at 600 (Gorsuch, J., concurring). After the stay was granted, the Second Circuit limited the injunction to participating states. *See* New York v. DHS, 969 F.3d 42, 88–89 (2nd Cir. 2020).

148. *See* Wolf v. Cook County, 140 S. Ct. at 681–84 (Sotomayor, J., dissenting).

149. *See* Exec. Order No. 14012, 86 Fed. Reg. at 8277, 8278.

150. *See* DHS v. New York, 141 S. Ct. 1292, 1292 (2021) (dismissing the petition for writ of certiorari).

the 1999 Guidance.[151] Democratic AGs played a substantial role in delaying and limiting the effect of the Public Charge Rule by pursuing multistate actions against the Trump administration.

The unprecedented number of lawsuits against the Trump administration sparked a political backlash against nationwide injunctions. The Justice Department issued litigation guidance and a memorandum opposing nationwide injunctions.[152] Congress also introduced legislation to abolish nationwide injunctions.[153] While the number of lawsuits was unprecedented during the Trump administration, it appears that Republican AGs are suing at an even faster rate during the Biden administration.[154]

C. Biden Administration

Since the outset of the Biden administration, AG activism and nationwide injunctions have continued to shape national policy. Even prior to President Biden taking office, the Republican Attorneys General Association (RAGA) announced their "Save and Defend" initiative, a planned legal strategy to oppose the incoming administration.[155] From President Biden's first day in office, there has been a strong reliance on executive orders, particularly in an effort to reverse Trump administration policies.[156] Republican AGs have revived their Obama-era litigation efforts to challenge the Biden administration and seek nationwide injunctions as remedies.

1. Immigration Deportation Moratorium

On Inauguration Day, President Biden issued an executive order directing agency heads to review agency actions in light of the new administration's

151. *See* Kruzel, *supra* note 126.

152. *See* Memorandum from Jeff Sessions, U.S. Att'y Gen., to Dep't of Justice Litigating Att'ys (Sept. 13, 2018), https://www.justice.gov/opa/press-release/file/1093881/download [https://perma.cc/E53K-M6ZC].

153. A Republican senator introduced the "Nationwide Injunction Abuse Prevention Act of 2019" to the Senate Judiciary Committee. The bill would prevent courts from issuing injunctions to non-parties to the litigation or the judicial district where the litigation is pending. *See* S. 2464, [11]6th Cong. (2019).

154. *See* Olson, *supra* note 1.

155. *See* Jeff Mordock, *Republican AGs Unveil New Initiative To Undercut Biden-Harris Agenda*, WASH. TIMES (Jan. 4, 2021), https://www.washingtontimes.com/news/2021/jan/4/republican-ags-unveil-new-initiative-undercut-bide/ [.

156. *See* Kavi, *supra* note 121.

immigration policy values.[157] That same day, DHS issued a memorandum directing a pause on deportations for 100 days.[158] Two days later, Texas filed suit against the Biden administration, challenging the 100-day moratorium on immigration deportations.[159] Texas argued that the executive order was unconstitutional, contrary to the APA, and violated a pact made between Texas and the Trump administration.[160] Texas claimed that the moratorium would cost the state millions of dollars in spending on public services for illegal aliens who were subject to deportation prior to the moratorium.[161] Texas filed an application for an emergency temporary restraining order to enjoin the administration from implementing the 100-day moratorium on deportation.[162] A federal judge in the southern district of Texas granted Texas's application for a nationwide restraining order against implementation of the 100-day deportation moratorium.[163] The district court specifically considered concerns about issuing a nationwide injunction, but nevertheless found that it was necessary to ensure a national uniform immigration policy.[164]

After the expiration of the temporary restraining order, Texas moved for a nationwide preliminary injunction that was also granted by the district court.[165] In response, Texas AG Ken Paxton issued a statement: "This is a big win for Texas and the nation."[166] The case was voluntarily dismissed by the parties after the hundred day pause on removals elapsed, and DHS announced

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157. *See* Exec. Order No. 13993, 86 Fed. Reg. 7051, 7051 (Jan. 25, 2021). This executive order also revoked the previous Trump administration executive order setting forth its immigration enforcement values and priorities. *Id.*

158. *See* Memorandum from David Pekoske, Acting Sec'y of Homeland Sec., to DHS Officials (Jan. 20, 2021), https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf [https://perma.cc/LB6W-SZ66].

159. *See* Complaint at 2, Texas v. United States, No. 6:21-cv-00003 (S.D. Tex. Jan. 22, 2021).

160. *See* Emergency Application for a Temporary Restraining Order at 2, Texas v. United States, No. 6:21-cv-00003 (S.D. Tex. Jan. 22, 2021).

161. *See id.* at 16–18.

162. *See id.*

163. *See* Order Granting Plaintiff's Emergency Application for a Temporary Restraining Order, Texas v. United States, No. 6:21-cv-0003 (S.D. Tex. Jan. 22, 2021).

164. *See id.* at 15–17.

165. *See* Memorandum Opinion and Order, Texas v. United States, No. 6:21-cv-00003 (S.D. Tex. Feb. 23, 2021).

166. *See* Press Release, Texas Off. of Att'y Gen., Paxton Victorious Against Biden Administration: Federal Government Must Follow Deportation Law (May 20, 2021), https://www.texasattorneygeneral.gov/news/releases/paxton-victorious-against-biden-administration-federal-government-must-follow-deportation-law [https://perma.cc/59M8-6B64].

that it would not extend or reinstate a policy requiring a pause on immigration deportations.[167]

2. Social Cost of Greenhouse Gasses

On inauguration day, President Biden signed an executive order re-establishing the Interagency Working Group (IGW), a working group to determine the social costs of greenhouse gases (SC-GHG).[168] The social costs of greenhouse gases refer to a measure of monetization of the net harm to society associated with adding greenhouse gases to the atmosphere.[169] Federal agencies have long-used this measurement in conducting the cost-benefit analysis of federal regulations.[170] This metric has fluctuated with administrations. To encourage consistency, President Obama convened the IGW to develop a method to quantify the costs of greenhouse gas emissions.[171] The IGW developed social cost estimates, and agencies relied on the estimates in their cost-benefit analysis of regulations.[172] Importantly, the IGW included global costs of greenhouse gas emissions in their SC-GHG estimates.[173]

The Trump administration disbanded the IGW and withdrew its SC-GHG estimates.[174] The Trump administration only considered domestic social costs in the United States instead of global costs thus significantly lowering the SC-GHG.[175] On his first day in office, President Biden ordered that the SC-

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167. *See* Stipulation of All Parties to Voluntary Dismissal of this Action, Texas v. United States, No. 6:21-cv-00003 (S.D. Tex. May 20, 2021).

168. *See* Exec. Order No. 13990, 86 Fed. Reg. 7,037 (Jan. 20, 2021). This executive order also revoked the permit for the controversial Keystone XL Pipeline. *See id.* at 7,041. States have also sued the federal government challenging the revocation of the permit. *See* Complaint, Texas v. Biden, No. 3:21-cv-00065 (S.D. Tex. March 17, 2021); *see also* CONG. RSCH. SERV., LSB10736, RECENT LITIGATION OVER THE SOCIAL COST OF GREENHOUSE GASES (2022).

169. Damages include property damage, human health, agricultural productivity, and impact to ecosystems. *See* Exec. Order 13990, 86 Fed. Reg. 7,037 (Jan. 20, 2021).

170. CONG. RSCH. SERV., R44657, FEDERAL CITATIONS TO THE SOCIAL COST OF GREENHOUSE GASES 1 (2017). Agencies are required to undergo a cost-benefit analysis for any "significant regulatory action." *See* Exec. Order 12866, 58 Fed. Reg. 12,866 (Sept. 30, 1993).

171. *See* CONG. RSCH. SERV., LSB10736, RECENT LITIGATION OVER THE SOCIAL COST OF GREENHOUSE GASES (2022).

172. *See id*.

173. *See* Cass R. Sunstein, *Biden Climate Regulation Is About to Get Tougher*, BLOOMBERG (Jan. 26, 2021), https://www.bloombergquint.com/gadfly/biden-climate-regulation-to-get-boost-from-carbon-cost [https://perma.cc/8UR4-TADG].

174. *See* CONG. RSCH. SERV., LSB10736, RECENT LITIGATION OVER THE SOCIAL COST OF GREENHOUSE GASES (2022).

175. *See* Niina Heikkinen, *EPA Revises the Social Cost of a Potent Greenhouse Gas*, SCI. AM. (Nov. 20, 2017), https://www.scientificamerican.com/article/epa-revises-the-social-cost-of-a-potent-greenhouse-gas/ [https://perma.cc/E5UX-JFGH].

GHG would return to including a global, rather than domestic cost measurement.[176] The IGW reinstated the SC-GHG estimates from the Obama administration after accounting for inflation.[177] This change drastically increased the SC-GHG estimate from the Trump administration's estimates.[178] As the SC-GHG estimate increases, it affects federal agencies' cost-benefit analysis with respect to regulation. When there is a higher SC-GHG estimate, more aggressive regulation is justified under a cost-benefit analysis.[179] However, a lower social cost estimate justifies more modest regulation.[180]

In response, coalitions of states filed two lawsuits in federal district courts, challenging the executive order and the IGW's estimates directly.[181] One lawsuit, led by Missouri and joined by eleven states, was filed in a federal district court in Missouri.[182] The other lawsuit, led by Louisiana and joined by nine states, was filed in a district court of Louisiana.[183] All participating states in both multistate lawsuits are represented by Republican AGs. And both lawsuits sought nationwide injunctions to prevent the federal government from using the SC-GHG estimates.[184] The district court in Missouri dismissed the lawsuit, holding that the states had not established

176. *See* Exec. Order No. 13990, 86 Fed. Reg. 7,037 (Jan. 20, 2021).

177. See Marianne Lavelle, *How Much Does Climate Change Cost? Biden Raises Carbon's Dollar Value, but Not by Nearly Enough, Some Say*, INSIDE CLIMATE NEWS (Feb. 26, 2021), https://insideclimatenews.org/news/26022021/carbon-cost-biden-climate-change/ [https://perma.cc/ZZ3R-79VD].

178. Cass R. Sunstein, *Biden Climate Regulation Is About To Get Tougher*, BLOOMBERG (Jan. 26, 2021), https://www.bloombergquint.com/gadfly/biden-climate-regulation-to-get-boost-from-carbon-cost [https://perma.cc/8UR4-TADG] ("Under President Barack Obama, the social cost of a ton of carbon was set at about $50 by a technical working group . . . . But in one of his first actions, President Donald Trump disbanded the working group and essentially sliced the social cost of carbon to a range of $2 to $7.").

179. *See id.*

180. *See id.*

181. See Cong. Rsch. Serv., LSB10736, RECENT LITIGATION OVER THE SOCIAL COST OF GREENHOUSE GASES (2022).

182. *See* Complaint, Missouri v. Biden, No. 4:21-cv-00287 (E.D. Mo. March 8, 2021). The other states that joined are Arizona, Arkansas, Indiana, Kansas, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Tennessee, and Utah. The lawsuit claims that the social cost calculation violates separation of powers and that interim estimates are arbitrary and capricious under the APA. *See id.*

183. *See* Complaint, Louisiana v. Biden, No. 2:21-cv-01074 (W.D. La. April 22, 2021). The other states that joined the lawsuit are Alabama, Florida, Georgia, Kentucky, Mississippi, South Dakota, Texas, West Virginia, and Wyoming. This lawsuit claims that the social cost estimates violate the APA by being arbitrary and capricious and fail to comply with notice and comment requirements. *See id.*

184. *See* Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction, Missouri v. Biden, No. 4:21-cv-00287, (E.D. Mo. May 3, 2021); Complaint, Louisiana v. Biden, No. 2:21-cv-01074 (W.D. La. April 22, 2021).

standing since their claimed harms were "inherently speculative" and based on hypothetical future regulations.[185] The states have appealed the decision to the Eighth Circuit where the case is currently pending.[186]

In contrast, the district court in Louisiana ordered a nationwide preliminary injunction prohibiting agencies from relying on the SC-GHG estimates in their regulatory process.[187] The Louisiana district court found that the states had standing to sue because the SC-GHG estimates increased regulatory burdens when states carry out cooperative federalism programs and harm states' rights to collect proceeds from oil and gas leases.[188] The court also found that the states were likely to be successful on the merits that the President lacked authority for the executive order and that it violated the APA.[189] On appeal, the Fifth Circuit ordered a stay of the district court's preliminary injunction.[190] Like the Missouri District Court, the Fifth Circuit found that the government was likely to succeed in its argument that the states lacked standing because their claimed injuries were "merely hypothetical" and not based on how the estimate was used in an actual regulation to harm states.[191] The Louisiana Attorney General has sought relief by applying to the Supreme Court to vacate the Fifth Circuit's stay.[192]

Trends across presidential administrations show that AGs are active litigants against the federal government. [193] During the Biden administration, AGs remain as committed as ever to the creative use of their expansive powers to achieve national public policy goals. The ability to access nationwide injunctions as a remedy contributes to AGs increased prominence

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185. .*See* Memorandum and Order, Missouri v. Biden, No. 4:21-cv-00287 (E.D. Mo. Aug. 31, 2021).

186. *See* Sebastien Malo, *Rep. AGs. Appeal Social Costs of Greenhouse Gas Lawsuit*, REUTERS (Sept. 3, 2021), https://www.reuters.com/legal/litigation/rep-ags-appeal-social-costs-greenhouse-gas-lawsuit-2021-09-03/ [https://perma.cc/S2L8-N5KS].

187. *See* Memorandum Ruling, Louisiana v. Biden, No. 2:21-cv-01074 (W.D. La. Feb. 11, 2022).

188. *See id*. at 19–20.

189. *See id*. at 33–36.

190. *See* Louisiana v. Biden, No. 22-30087 (5th Cir. Mar. 16, 2022).

191. *See id*. at 5, 7.

192. *See* Application to Vacate an Order of the United States Court of Appeals for the Fifth Circuit, No. 21-30087 (Apr. 27, 2022).

193. *See* Nolette, *supra* note 20, at 28.

as national policymakers. And yet, state litigants and litigators are overwhelmingly overlooked in the debate over nationwide injunctions.

II. STATE LITIGANTS AND LITIGATORS IN PUBLIC LAW LITIGATION

States and AGs have unique attributes, advantages, and incentives that empower them to frequently sue the federal government and successfully secure nationwide injunctions.[194] These advantages are enhanced when states litigate together against the federal government in multistate actions.

A. State Litigants

State litigants have unique characteristics and advantages that allow them to frequently sue the federal government and obtain nationwide injunctions as remedies. These advantages include enhanced ability to establish standing, expanded venue choices, greater resources, and the ability to represent the public interest. Multistate litigants enhance the advantages of states in public law litigation and increase the justification for courts to issue nationwide injunctions as opposed to more narrow remedies.

1. State Standing

"Standing is a litigant's ticket to federal court" and state litigants have a first-class ticket.[195] States have broad interests and access to the "special solicitude" standing doctrine, which provides states more avenues to establish standing in federal courts.[196] Since only federal courts can issue nationwide injunctions,[197] greater access to federal courts means that state litigants have greater access to nationwide injunctions than private litigants.

States have broad interests and unique attributes that allow them to establish standing across a wide spectrum of injuries. A litigant must demonstrate an injury that is "concrete, particularized, and actual or

194. *See* Nolette and Provost, *supra* note 17; *Nationwide Injunctions from District Courts*, SENATE REPUBLICAN POL'Y COMM. (Sept. 24, 2019), https://www.rpc.senate.gov/policy-papers/nationwide-injunctions-from-district-courts [https://perma.cc/4HZM-5AB2].

195. *See* Pennsylvania v. Trump, 281 F. Supp. 3d 553, 564 (E.D. Pa. 2017).

196. *See, e.g.*, Jonathan David Shaub, *Delegation Enforcement by State Attorneys General*, 52 U. RICH. L. REV. 653, 677–78 (2018) (providing an example from *Texas v. United States* in which the states attempted to establish standing on four bases, including special solicitude). *But see* Nash, *supra* note 38, at 2006 ("[I]t remains murky exactly what special solicitude is, and when it applies.").

197. *See* CONG. RSCH. SERV., R46902, NATIONWIDE INJUNCTIONS: LAW, HISTORY, AND PROPOSALS FOR REFORM 10–11 (2021).

imminent" to establish standing.[198] States are capable of experiencing a myriad of injuries because of their broad interests and unique status as sovereign entities. States are financial entities, employers, healthcare providers, property owners, educational institutions, and sovereign entities.[199] While private litigants, such as associations or non-profit groups are often limited to a single industry or issue, states have such broad interests that they can sue the executive branch "across a wide range of regulatory frameworks."[200] States also have sovereign, quasi-sovereign, and constitutional rights upon which to base a claim in addition to other rights they have in common with private litigants.[201]

Additionally, state claims are harder to moot by the federal government than claims brought by private parties. Private litigants' claims, in particular individual claims, can be easily mooted by the federal government by providing an individual with the requested relief. However, states' wide interests and representation of their citizenry makes it harder for the federal government to moot their claims. It is especially hard for the federal government to moot multistate litigants' claims because of the collective state interests and citizenries represented in the litigation.

States have special solicitude in federal courts which provides them another avenue to establish standing not available to private litigants.[202] The Supreme Court established the special solicitude doctrine in *Massachusetts v. EPA*. In *Massachusetts*, environmental organizations, several states, and localities sued the EPA in federal court after the EPA denied a petition to engage in rulemaking to regulate greenhouse gases.[203] A crucial question at the outset of the case was whether the plaintiffs had standing to sue the EPA.[204] That issue was appealed to the Supreme Court. In a five-four opinion, the Court held that one of the state plaintiffs, Massachusetts, had standing.[205] Importantly, only one plaintiff needs to meet the standing requirement for the

198. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). The Supreme Court has interpreted Article III's "case or controversy" language to require a plaintiff suing a defendant to establish: (i) that the plaintiff has been injured; (ii) that the injury was caused by the defendant; and, (iii) the court is capable of fashioning relief that will redress the plaintiff's injury. Constitutional standing most often turns on the injury requirement. *Id.* at 560–61.

199. *See* Shaub, *supra* note 196, at 676–77 .

200. *Id.*

201. *Id.*

202. *Id.*

203. *See* Massachusetts v. EPA, 549 U.S. 497, 497 (2007). Massachusetts, California, Connecticut, Illinois, Maine, New Jersey, New Mexico, Oregon, New York, Rhode Island, Vermont, Washington, and the District of Columbia joined the litigation. *Id.*

204. *Id.* at 498.

205. *Id.* at 526.

case to proceed in federal court.[206] The Court found that "it was of considerable relevance" that states were plaintiffs and recognized that "states are not normal litigants for the purposes of invoking federal jurisdiction."[207] The Court declared that states were "entitled" to "special solicitude" in the standing analysis when they were asserting a procedural right and protecting their quasi-sovereign interests.[208] Even though states are entitled to special solicitude, the Court found that Massachusetts met the traditional standing requirements of injury, causation, and redressability.[209] Because the Court applied the traditional standing analysis to the case, it is unclear what special solicitude means or how far it could be stretched in cases brought by states against the federal government in the future.[210]

Defining the contours of special solicitude standing doctrine was an issue in *Texas v. United States*, a multistate action against the Obama administration's deferred immigration programs.[211] The district court considered many grounds to support Texas's claim of standing, including the special solicitude doctrine.[212] The district court stated that the Supreme Court's opinion in *Massachusetts v. EPA* appeared to "establish new grounds for standing."[213] However, the district court ultimately defaulted to traditional standing doctrine finding that Texas had standing and ordered a nationwide injunction.[214]

On appeal, the Fifth Circuit affirmed the district court's finding that Texas had standing and refused to stay the nationwide injunction.[215] While the district court seemed to have several theories that supported state standing, the Fifth Circuit leaned more heavily on the concept of "special solicitude" in its analysis.[216] However, the Fifth Circuit ultimately found that Texas met traditional standing requirements, even though its "determination that Texas

206. *See id.* at 518.

207. *See id.*

208. *See id.* at 520. The procedural right in this case came from the Clean Air Act. *Id.* at 505.

209. *See id.* at 526.

210. *See* Nash, *supra* note 38, at 2006 ("[I]t remains murky exactly what special solicitude is, and when it applies.").

211. 809 F.3d. 134 (5th Cir. 2015).

212. *See* Texas v. United States, 86 F. Supp. 3d 591, 633 (S.D. Tex. 2015).

213. *Id.*

214. *See id.*

215. Texas v. United States, 809 F.3d 134 (5th Cir. 2015).

216. *See id.* The Fifth Circuit relied on *Massachusetts v. EPA* and found that Texas was asserting a procedural right under the APA and protecting its quasi-sovereign interests. *Id.* at 161.

has standing [was] based in part on the special solicitude."[217] A dissenting opinion prophetically warned that "[t]he majority's breathtaking expansion of state standing would inject the courts into far more federal-state disputes" and would "effectively enabl[e] the states, through the courts, to second-guess federal policy decisions . . . ."[218]

The Supreme Court granted certiorari. However, due to the death of Justice Scalia, an equally divided court issued a per curiam opinion affirming the Fifth Circuit.[219] The lack of Supreme Court review left the issue of state standing and special solicitude for lower courts to continue to grapple with in state cases against the federal government.

The murkiness surrounding the special solicitude doctrine continued in multistate cases against the Trump administration. For example, in *Pennsylvania v. Trump*, the district court relied on special solicitude when it found that Pennsylvania had standing to challenge a federal agency action that that would allow employers to opt out of providing no-cost contraceptive coverage to their employees under the ACA.[220] Relying both on *Massachusetts v. EPA* and *Texas v United States*, the district court found that Pennsylvania was entitled to special solicitude in the standing analysis because it was asserting a procedural right and protecting its quasi-sovereign interests in the health of its women residents.[221] Pennsylvania further argued that it would be injured by employers being exempted from contraceptive coverage because eligible women would instead turn to state-funded services to provide such coverage.[222] The district court issued a nationwide injunction preventing the implementation of the rules that would allow employers an exemption to providing no-cost contraceptives on religious or moral

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217. *See id.* at 162 ("[O]ur determination that Texas has standing is based in part on the 'special solicitude' we afford it under *Massachusetts v. EPA* . . . . To be entitled to that presumption, a state likely must be exercising a procedural right created by Congress and protecting a 'quasi-sovereign' interest . . . . Without 'special solicitude,' it would be difficult for a state to establish standing.").

218. *See id.* at 194–96 (King, J., dissenting) ("Such a theory of standing—based on the indirect economic effects of agency action—could theoretically bestow upon states standing to challenge any number of federal programs . . . . I have serious misgivings about any theory of standing that appears to allow limitless state intrusion into exclusively federal matters—effectively enabling the states, through the courts, to second-guess federal policy decisions.").

219. *See* United States v. Texas, 136 S. Ct. 2271 (2016) (per curiam). While evenly divided court opinions do not typically constitute binding authority, at least one court has argued that the Supreme Court's affirmation of the Fifth Circuit, instead of remanding the case in its per curiam opinion means that "a majority of the Supreme Court decided that Texas had standing to pursue its APA claim." *See* Pennsylvania v. Trump, 281 F. Supp. 3d 553, 566 (E.D. Pa. 2017).

220. *See* 281 F. Supp. 3d at 564–67.

221. *See id.*

222. *See id.*

convictions.[223] On appeal, neither the Third Circuit[224] nor the Supreme Court addressed the issue of whether Pennsylvania had standing under the special solicitude doctrine; however, the Supreme Court remanded the case with instructions to dissolve the nationwide preliminary injunction.[225]

By relying on special solicitude and the lack of clarity surrounding the doctrine, states can craft theories of standing that are unavailable to private litigants.[226] The "one plaintiff rule" requiring that only a single plaintiff establish standing facilitates multistate actions because only one state needs to establish standing for all the states to pursue the litigation together. It also encourages private litigants to combine with states to increase their access to federal courts and consequently, the remedy of the nationwide injunction.

2. Venue Selection

State litigants generally have more flexibility in venue selection than private litigants. This flexibility allows states greater access to a wider choice of federal district courts. Multistate litigants can access venues that they may otherwise not be able to access if they litigated alone by litigating as a group of states.

The venue statute for cases against the federal government provides expanded venue for all litigants against the federal government.[227] It allows litigants to lay venue against the federal government where the federal government resides, where a substantial part of the events giving rise to the claim occur, or importantly, where the *plaintiff* resides.[228] For venue purposes, the residence of federal officers is where the officers perform their

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223. *See id.* at 585.

224. On appeal, the Third Circuit found that Pennsylvania had standing under a traditional standing analysis, without deciding whether it also had standing under the special solicitude doctrine and refused to stay the nationwide injunction. *See* Pennsylvania v. Trump, 930 F.3d 543, n.17 (2d Cir. 2019).

225. *See* Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2373 (2020). The Supreme Court reversed the Third Circuit, holding that the federal agency had the authority to provide exemptions from the regulatory contraceptive requirements for employers with religious and conscientious objections. *See id.* at 2386.

226. *See* Shaub, *supra* note 199, at 676.

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

228. 28 U.S.C.A. § 1391(e)(1) (West). The general venue statute restricts venue to where the defendant resides or where a substantial part of events giving rise to the claim occurred. 28 U.S.C.A. § 1391(b) (West). The venue provision for actions against the United States expands venue to include where a plaintiff resides, provided no real property is involved in the action. 28 U.S.C.A. § 1391(e)(1) (West).

official duties and federal agencies typically reside in Washington, D.C.[229] Prior to the statutory expansion of venue, the federal government and federal officials generally had to be sued in district courts in Washington, D.C.[230] By expanding venue choice to include where plaintiffs reside, the statute expanded access to federal courts to plaintiffs because it allowed plaintiffs to sue in more convenient forums.[231]

A state litigant can lay venue in any district court in the state because the state "resides" in every federal district located in the state. In contrast, an individual private litigant only resides in a single federal district court district.[232] An association may lay venue where it maintains a principal place of business.[233] By virtue of being a state, states automatically have access to every district court in the state without any litigation burden to prove venue is proper.

State litigant venue choices are significantly increased when they join together with other states in multistate actions. Like standing, only one state needs to properly lay venue to access a particular federal district court.[234] Thus, many states may access a desirable forum by virtue of joining with a state that "resides" in the federal district court district. A state that joins a multistate action need not "reside" in the federal district court for venue purposes, and this opens access to many forums that the state could not access if litigating alone.

3. State Resources and Organization

State litigants have resources and are organized in a manner that are distinct advantages for states suing the federal government and seeking nationwide injunctions. Access to resources is particularly important when seeking equitable remedies like nationwide injunctions and when the defendant is the federal government. Furthermore, organizing as a multistate group of litigants creates a greater advantage because it allows states to pool and leverage their resources.

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229. *See* Reuben H. Donnelley Corp. v. F.T.C., 580 F.2d 264, 266 n.3 (7th Cir. 1978). Federal agencies reside in Washington, D.C., notwithstanding the fact that the agency may have regional offices located in other districts.

230. *See* Huddleston, *supra* note 227.

231. *See id.* The venue statute also relieved pressure on DC federal courts from having to hear all cases brought against the federal government or federal government officials.

232. *See* 28 U.S.C.A. § 1391(c)(1) (West). For a natural person, a plaintiff resides in the district where the person is domiciled.

233. 28 U.S.C. § 1391(c)(2).

234. Only one of the plaintiffs need reside in the district for venue to be proper under 28 U.S.C. § 1391(e)(3). Exxon Corp. v. F.T.C., 588 F.2d 895, 899 (3d Cir. 1978).

State litigants can draw upon the public funds to finance litigation against the federal government.[235] In contrast, private litigants must fund their own litigation. Private litigants are often at a resource disadvantage when the remedy being sought is equitable since they cannot rely on money damages to fund litigation. While state budgets are limited, states are significantly better funded than most private individual litigants or non-profit associations. Because states do not rely on money damages to finance litigation, they have greater ability to seek purely equitable relief, such as nationwide injunctions. The ability to tap into public resources, though limited, is an advantage for state litigants.

Resources are particularly important when the defendant is the federal government. The federal government has considerable resources to draw upon in litigation including teams of lawyers dedicated to defending its agencies and officials. Lawsuits seeking nationwide injunctions are resource-intensive endeavors that often involve fast-paced litigation and multiple appellate reviews. Both states and the federal government are repeat players in litigation which enables them to engage in high-stakes litigation that can quickly escalate to the Supreme Court.

Multistate litigants increase the resource advantage that states have in public law litigation. Coalitions of states working together in multistate actions allow many states to pool their public resources.[236] While the federal government's resources dwarf the resources of a single state acting alone, states have begun to level the playing field by joining together and leveraging their combined resources in multistate litigation. Private litigants can access the resources and other advantages of state plaintiffs by joining with them in public-private litigation partnerships.[237] These partnerships have allowed multistate coalitions to increase their collective resources to challenge the federal government.

States can also leverage their resources by playing different roles in the litigation, instead of one state carrying the entire litigation burden alone. This organization allows states to pursue litigation more efficiently. Typically, a single state or small group of states lead multistate actions, and it is the same

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235. *See* Selvyn Seidel, Moderator, Panel 1: Litigation Funding Basics, 12 N.Y.U. J. L. & BUS. 511, 518 (2016).

236. *See id.*, at 524–25 (noting attorneys general have limited budgets and small staffs but can achieve some economies of scale by banding together in multistate actions).

237. *See* Margaret H. Lemos, *Privatizing Public Litigation*, 104 GEO. L.J. 515 (2016) [hereinafter Lemos, *Privatizing Public Litigation*].

states that generally lead multistate actions.[238] Other states participate in multistate actions in varying degrees, with some states essentially free riding on the leadership and resources of other states.[239]

Access to public funds is an advantage for states pursuing public law litigation and seeking nationwide injunctions. Multistate resource pooling and organization increases that advantage and, to some degree, addresses the resource differential between multistate plaintiffs and the federal government. These advantages empower states to bring public law litigation and contribute to their success in obtaining nationwide injunctions.

4. Public Interest Litigant

States have an advantage in public law litigation vis-à-vis private litigants because they are presumed to act in the public interest.[240] This advantage supports a state's assertion that a nationwide injunction is in the public interest, an element a court must consider before issuing an injunction.[241] Furthermore, multistate litigants enhance the legitimacy of states' claims that they are acting in the broad public interest.

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238. *See* Elysa M. Dishman, *Class Action Squared*: *Multistate Actions and Agency Dilemmas*, 96 NOTRE DAME L. REV. 291 (2020) [hereinafter Dishman, *Class Action Squared*]; PAUL NOLETTE, FEDERALISM ON TRIAL (2015). During the Obama presidency, Texas led the most multistate actions against the federal government and during the Trump presidency, New York and California led the bulk of the multistate actions. Texas has been active again leading multistate litigation against the Biden administration. *See Multistate Litigation Database*, *supra* note 19.

239. *See* Elysa M. Dishman, *Enforcement Piggybacking and Multistate Actions*, 2019 BYU L. REV. 421, 435 (2019) [hereinafter Dishman, *Enforcement Piggybacking*]; Prentiss Cox et al., *Strategies of Public UDAP Enforcement*, 55 HARV. J. ON LEGIS. 37 (2018) ("Participants may lend nothing more than a signature to a settlement agreement . . . ."); NOLETTE, *supra* note 238, at 26–27 ("Many states participate in multistate litigation, but only a few states typically take a leading role in these efforts."). An example of the how inexpensive it can be to participate in multistate litigation arose from conflict between Utah's governor and AG regarding the state's participation in a multistate action challenging the election outcome in battleground states in favor of Biden. *See* Dave Boyer, *Utah's Governor Says State Attorney General Blindsided Him with Pro-Trump Lawsuit*, WASH. TIMES (Dec. 10, 2020). When the Utah governor complained about the cost of participating in the litigation, the Utah AG responded that it would only cost the state less than a thousand dollars to participate. *See* Carter Williams, *"Waste of Our Taxpa'er's Money": Herbert, Cox Again Blast Reyes Over Elections Lawsuit Participation*, KSL NEWS (Dec. 10, 2020), https://www.ksl.com/article/50064982/waste-of-our-taxpayers-money-herbert-cox-again-blast-reyes-over-elections-lawsuit-participation [https://perma.cc/4GJH-UNX6].

240. *See* Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L REV. 486, 492 (2012) [hereinafter Lemos, *Aggregate Litigation*].

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

States can instigate litigation on behalf of the interests of their citizenry to protect their health and well-being.[242] In fact, the special solicitude doctrine relies on states protecting their quasi-sovereign interests in the health, safety, and well-being of their residents.[243] In the class action context, courts have found that state parens patriae actions are a superior method of adjudication to a private class action.[244] And states are common amici in the Supreme Court and lower federal courts in part because of their ability to legitimately speak on behalf of the public interest.[245] States increase this advantage when they act together because their combined action supports the claim that they are working for a broader national public interest as opposed to an individual state's interest.[246] States are in a unique position to challenge the federal government and offer a legitimate competing voice of the public interest, especially when many states join in the chorus.

Representing the public interest is an important attribute because the public interest is a factor that courts consider when deciding whether to issue a preliminary injunction. The Supreme Court set a multifactor balancing test to determine whether a court should issue a preliminary injunction.[247] A court needs to examine whether the plaintiff is likely to succeed on the merits, whether the plaintiff is likely to suffer irreparable harm without the injunction, whether the balance of equities and hardships is in the plaintiff's favor, and, importantly, whether an injunction is in the public interest.[248] Because many nationwide injunctions are issued as preliminarily, the ability to legitimately represent the public interest is an advantage for states in public law litigation.[249]

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242. These actions are known as parens patriae actions. States can bring parens patriae actions on behalf of their residents based on a state's sovereign or quasi-sovereign interests. Such quasi-sovereign interests include the health and physical and economic well-being of state residents. *See* Alfred L. Snapp & Sons, Inc. v. Puerto Rico, 458 U.S. 592, 607 (1982). Importantly, states cannot bring parens patriae actions against the federal government because the federal government also acts parens patriae for the benefit of the nations' residents. *See* Massachusetts v. Mellon, 262 U.S. 447, 485–86 (1923). However, the parens patriae doctrine demonstrates the importance of states and their role in vindicating the public interest. *See* Dishman, *Class Action Squared*, *supra* note 238.

243. *See* Massachusetts v. EPA, 549 U.S. 497, 519–20 (2007).

244. *See* Lemos & Young, *supra* note 16.

245. *See* Margaret H. Lemos & Kevin M. Quinn, *Litigating State Interests: Attorneys General as Amici*, 90 N.Y.U. L. REV. 1229, 1236–47 (2015).

246. *See* Lemos & Young, *supra* note 16.

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

248. *Id.*; *see also* M. Devon Moore, Note, *The Preliminary Injunction Standard: Understanding the Public Interest Factor*, 117 MICH. L. REV. 939, 940, 945–52 (2019).

249. *See, e.g.*, Bray, *supra* note 6, at 458–60 (describing a variety of preliminary nationwide injunctions issued during the Trump and Obama administrations).

5. Scope of the Injunction

States have an advantage in justifying nationwide injunctions to courts because their expansive interests and unique characteristics support a broad remedy.[250] This advantage is increased for multistate litigants that can argue only a nationwide injunction can provide relief to all state plaintiffs.[251]

States' broad interests have justified nationwide injunctions to provide them complete relief.[252] In contrast, relief for private plaintiffs may be limited to individuals or geographically smaller areas.[253] States' interests that transcend their state borders have allowed them to successfully argue that nationwide injunctions are necessary to provide them complete relief.[254] For example, in *Texas v. United States*, Texas successfully argued that a nationwide injunction was necessary because DAPA recipients in other states could move to Texas and be eligible for subsidized driver's licenses.[255]

Multistate litigants increase the advantage of supporting a nationwide scope of an injunction, rather than a geographically narrower injunction.[256] When there are multistate litigants, it is harder for courts to narrow injunctions to a single state or even circuit court border.[257] In fact, courts have explicitly relied on the fact that there are multistate plaintiffs to justify ordering nationwide injunctions.[258] For example, in *Pennsylvania v. Trump*, Vermont, New Jersey, and Connecticut joined Pennsylvania's lawsuit.[259] The court found that it was necessary to issue a nationwide injunction based on concerns that multiple states were participating that had employees working outside their state borders who would not be protected by a narrower injunction.[260] Similarly, in *Washington v. DHS*, the district court justified a nationwide injunction when there were multistate plaintiffs.[261] The court reasoned that an injunction limited to the Ninth Circuit would not provide relief to eleven of the fourteen states participating in the action that resided in other circuits.[262]

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250. *See id.* at 465–66; Berger, *supra* note 9, at 1084–85, 1103–04.
251. *See* Bray, *supra* note 6, at 465–66; Berger, *supra* note 9, at 1084–85, 1103–04.
252. *See* Bray, *supra* note 6, at 465–66; Berger, *supra* note 9, at 1084–85, 1103–04.
253. *See* Bray, *supra* note 6, at 465–66; Berger, *supra* note 9, at 1084–85, 1103–04.
254. *See* Bray, *supra* note 6, at 465–66; Berger, *supra* note 9, at 1084–85, 1103–04.
255. *See* Texas v. United States, 86 F. Supp. 3d 591, 673 (S.D. Tex. 2015).
256. *See* Pennsylvania v. Trump, 281 F. Supp. 3d 553, 581–85 (E.D. Pa. 2017).
257. *See id.*
258. *See id.*
259. *Id.*
260. *See id*.
261. *See* Washington v. DHS, 408 F. Supp. 3d 1191, 1223–24 (E.D. Wash. 2019).
262. *See id.*

Multistate participation was also a factor when the district court considered the scope of the injunction with respect to a challenge to the recission of the DAPA and DACA programs.[263] In determining that a nationwide injunction was warranted, the district court noted that "[p]laintiffs include not only several individuals and a nonprofit organization, but also sixteen states and the District of Columbia."[264] The court reasoned that "[t]o protect the State Plaintiffs' interests, the court would presumably need to enjoin [the United States] from rescinding the DACA program with respect to the State Plaintiffs' residents and employees, including the employees of any instrumentalities of the state, such as public hospitals, schools, and universities."[265] The district court found that narrowing the injunction would be "unworkable, partly in light of the simple fact that people move from state to state . . . ."[266] As a result, the district court entered a nationwide preliminary injunction.[267]

Multistate plaintiffs can justify nationwide injunctions due to the number of people they represent and the fact that those people can cross state lines. In contrast, when plaintiffs are individuals or a single nonprofit organization, the court may be able to fashion a narrower injunction that can offer the plaintiff complete relief. Thus, courts may be more inclined to issue national injunctions when there are multistate litigants, providing them an advantage in seeking the remedy.

B. State Litigators

AGs have unique advantages, attributes, and incentives that contribute to their activism in public law litigation.[268] These advantages can be enhanced by participation in multistate actions. AGs have considerable experience suing the federal government and the broad discretion to choose when to sue and what remedy to pursue.[269] AGs also have unique political incentives to sue the federal government and seek nationwide injunctions.[270]

263. *See* Batalla Vidal v. Nielsen, 279 F. Supp. 3d 401, 437–38 (E.D.N.Y. 2018).
264. *Id.*
265. *Id.* at 438.
266. *Id.*
267. *Id.*
268. *See infra* notes 271–282 and accompanying text.
269. *See infra* notes 283–296 and accompanying text.
270. *See infra* notes 297–311 and accompanying text.

6. Litigator Experience

"[S]tate AGs have emerged as a uniquely powerful cadre of lawyers."[271] They have "expertise . . . and depth to oppose formidable federal lawyers."[272] AG offices have grown in sophistication through years of pursuing multistate actions against companies and the federal government.[273] In contrast, counsel for private parties may have limited or no previous experience suing the federal government. This experience provides AGs with an advantage as a litigator in public law litigation.

In addition, AG offices have substantial appellate experience, including in the Supreme Court.[274] States are frequently before the Supreme Court as parties and amici and thus state litigators have become experienced appellate lawyers.[275] Nationwide injunction cases have reached the Supreme Court frequently and expeditiously during the Trump administration, including cases concerning the travel bans, Public Charge immigration rule, repealing the DACA/DAPA programs, and access to contraceptives under the ACA.[276] Since nationwide injunctions are frequently appealed through federal circuit courts and even to the Supreme Court, it is a considerable advantage to have a litigator who is an experienced advocate in public law litigation.[277] This is especially true in the Supreme Court where there is a limited number of experienced Supreme Court practitioners.[278]

AGs have also become adept at litigating as multistate groups.[279] Multistate lawsuits allow AGs to efficiently share expertise and experience.[280] They have established networks, relationships, and working groups so they can swiftly respond to federal actions and coordinate

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271. *See* Lemos & Young, *supra* note 16, at 65.

272. *See* Doug Rendleman, *Preserving the Nationwide National Government Injunction To Stop Illegal Executive Branch Activity*, 91 U. COLO. L. REV. 887, 925 (2020).

273. *See* NOLETTE, *supra* note 238, at 2–3.

274. *See* Lemos & Quinn, *supra* note 245, at 1235–38.

275. *See id.*

276. *See, e.g.*, DHS v. New York, 140 S.Ct. 599 (2020) (granting application for stay of district court's grant of preliminary injunction of enforcement of public-charge rule); DHS v. Regents of the Univ. of Cal., 140 S.Ct. 1891 (2020) (vacating preliminary injunction in DACA case).

277. Many AG offices now also have a state solicitor general who specializes in representing the state before the Supreme Court. *See* Banks Miller, *Describing the State Solicitors General*, 93 JUDICATURE 238, 238 (2010).

278. *See, e.g.*, Kevin T. McGuire, *Lawyers and the U.S. Supreme Court: The Washington Community and Legal Elites*, 37 AM. J. POL. SCI. 365, 366 (1993) (describing the emergence of "an elite group of lawyers . . . centered in Washington and specializing in Supreme Court practice").

279. *See* Lemos & Young, *supra* note 16, at 73–74.

280. *See id.*

multistate actions.[281] These networks and relationships have enabled AGs to organize in multistate actions against the federal government as plaintiffs and defend the federal government's actions.[282] Multistate litigation allows AGs to leverage significant experience for the benefit of the multistate group.

7. Broad Discretion

AGs have broad discretion and little "client" oversight and monitoring.[283] This discretion allows AGs to pick their litigation targets and seek remedies of their choosing.[284] Other state officials and voters have limited ability to oversee or monitor AGs' litigation choices like traditional clients have with their lawyers.[285] Broad discretion combined with political incentives make AGs frequent public law litigators that are incentivized to seek nationwide injunctions.[286]

AGs typically have the authority to bring litigation on behalf of the state independent of any other state elected official.[287] AGs have considerable discretion about how to wield that authority in litigation.[288] Because most AGs are directly elected by state voters, they are not beholden to other state officials for their litigation choices on behalf of the state.[289] Voters also cannot meaningfully oversee an AG's litigation on a case-by-case basis because AGs are usually elected to four-year terms.[290] Voters can only provide accountability in an election cycle based on an overall record, among other issues that influence a voter's decision.[291]

Intrastate conflict has occurred between state officials and AGs over the state's participation in lawsuits against the federal government.[292] In fact, state legislatures have attempted to strip powers from AGs when they have

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281. *Cf. id.* (describing AGs banding together to coordinate multistate actions).

282. *See* Shane A. Gleason, *The Dynamics of Legal Networks: State Attorney General Amicus Brief Coalition Formation*, 39 JUST. SYS. J. 253, 253 (2018).

283. *See* Dishman, *Class Action Squared*, *supra* note 238, at 342–43.

284. EMILY MYERS, STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES 27 (2018).

285. *Cf. id.* at 12 (describing different states' AG selection process and voter ability to choose their state's AG).

286. *See id.* at 27; NOLETTE, *supra* note 238, at 2.

287. *See* Myers, *supra* note 284, at 12.

288. *Cf. id.*

289. *See id.*

290. *See id.* at 18.

291. *See id.*

292. *See* Joseph Kanefield & Blake W. Rebling, *Who Speaks for Arizona: The Respective Roles of the Governor and Attorney General When the State Is Named in a Lawsuit*, 53 ARIZ. L. REV. 689, 694–703 (2011).

disagreed with litigation that AGs brought on behalf of the state.[293] Governors have also joined amicus briefing in multistate actions against the federal government when they disagreed with their AGs' litigation decision.[294] For example, in *Texas v. United States* during the Obama Administration, several governors joined as amicus when their AGs did not join the brief.[295] In *Texas v. Pennsylvania*, several state governors disagreed with their AGs about joining an amicus brief urging the Supreme Court to overturn election results in favor of President Biden in battleground states.[296] This conflict contributes to intrastate partisan conflict that can occur due to AGs' broad discretion to bring litigation on behalf of the state.

8. Political Incentives

AGs have unique political incentives to sue the federal government and seek nationwide injunctions. AGs have a reputation for having ambitions to run for higher political office such as governor or US senator.[297] In fact, some have quipped that the acronym "AG" stands for "aspiring governor."[298] Empirically, it has been shown that a majority of AGs run for higher office.[299] And the AGs most likely to run for future political office are those that lead multistate actions.[300] As AGs have risen in prominence, the office has been recognized as an influential political office in its own right.[301] An upwardly mobile AG "wishing to bolster his or her credentials for future political office

293. *See* Sarah Martin, *New Bill Would Limit Utah Attorney General Power Over Election Lawsuits*, ABC4.COM (Jan. 23, 2021), https://www.abc4.com/news/new-bill-would-limit-utah-attorney-general-power/ [https://perma.cc/A26P-HEUB].

294. *See, e.g.*, Amici Curiae Brief for the Governors of Texas, Louisiana, New Jersey, and South Dakota in Support of Plaintiffs-Appellees and Affirmance, Texas v. United States, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (No. 15-40238), 2015 WL 2237631.

295. *See id.*

296. For example, the Utah AG's decision to join the brief was criticized by the state governor while the Idaho governor issued a statement in support of the lawsuit when the Idaho AG refused to join the amicus brief. *See* Boyer, *supra* note 239; Keith Ridler, *Idaho Attorney General Won't Join Texas Election Lawsuit*, KTVB7 (Dec. 10, 2020), https://www.ktvb.com/article/news/politics/national-politi396rookaho-attorney-general-wont-join-texas-election-lawsuit/277-869896d7-351c-4e09-a30e-1f8416334119 [https://perma.cc/UQ4H-BTG8].

297. *See* Colin Provost, *When Is AG Short for Aspiring Governor? Ambition and Policy Making Dynamics in the Office of State Attorney General*, 40 PUBLIUS 597, 597 (2010) [hereinafter Provost, *Aspiring Governor*].

298. *See id.*

299. *See id.* at 612–13.

300. *See id.* at 612.

301. *See* NOLETTE, *supra* note 238, at 2.

can do nothing better than sue a President from the opposite party to oppose a policy or regulatory decision."[302]

AG lawsuits against the federal government are highly partisan. The issues in the litigation are often controversial and divisive such as immigration, contraceptives, and environmental protections.[303] For AGs, lawsuits against the federal government make good campaign rallying cries.[304] Given the political incentives, it is unsurprising that multistate actions have evolved from being bipartisan efforts of "states against the federal government"[305] to partisan ideological conflicts between the states and federal government.[306]

Political incentives contribute to AGs preferring nationwide injunctions over other remedies.[307] The ability to stall presidential priorities is a powerful political weapon.[308] Nationwide injunctions elevate AGs to national policymakers and allow them to impose their ideological preferences outside their states' borders.[309] AGs also gain notoriety when they litigate cases in the Supreme Court, as has often occurred in high-profile nationwide injunction cases.[310] Given heightened levels of polarization in the country, AGs have more political incentive than ever to file suits against the federal government and seek nationwide injunctions.[311]

AGs are a unique type of litigator who represent a distinct state litigant. States and AGs have attributes, advantages, and incentives that allow them to frequently sue the federal government and successfully secure nationwide injunctions.

III. CRITICISMS OF THE NATIONWIDE INJUNCTION

Critics of nationwide injunctions often overlook that common criticisms of nationwide injunctions are shaped by the state litigants and litigators who frequently seek and successfully obtain them. Instead, criticism of the nationwide injunction is generally court-centric with little acknowledgment of the role played by states and AGs. Common criticisms of nationwide

302. Shaub, *supra* note 199, at 686.

303. *See, e.g.*, DHS v. Regents of the Univ. of Cal., 140 S.Ct. 1891 (2020) (immigration); Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S.Ct. 2367, 2373 (2020) (contraceptives).

304. *See* Lemos & Young, *supra* note 16, at 85–95.

305. Shaub, *supra* note 199, at 654.

306. *See* Lemos & Young, *supra* note 16, at 85.

307. *See* Nash, *supra* note 38, at 1992.

308. *See id.*

309. *See id.*; Lemos & Young, *supra* note 16, at 85.

310. *See* Nash, *supra* note 38, at 1992.

311. *See id.*

injunctions include that they encourage forum shopping, risk conflicting injunctions, reduce beneficial percolation through courts, and increase politicization of the judiciary and deepen political polarization. States and AGs contribute to these criticisms and the presence of multistate litigants exacerbates them.

A. Forum Shopping

A common criticism of nationwide injunctions is that they encourage forum shopping.[312] However, forum selection is a decision made by litigators and the forum choices available are determined by jurisdiction and venue rules.[313] This criticism of nationwide injunctions is more about litigant choices and abilities, rather than the availability of a particular remedy.[314] State litigants, and in particular multistate litigants, have wide flexibility in forum options and they are well-resourced to make those choices a reality.[315]

Forum shopping is common among plaintiffs in civil litigation.[316] Because jurisdiction and venue requirements are often easily satisfied, plaintiffs can choose among several forums.[317] "[C]hoice of forum is often one of the plaintiff's most important tactical decisions in a lawsuit."[318] Forum shopping is a long-standing litigation practice and whether it is a feature, or a bug, of our adversarial justice system has been the topic of an ongoing debate.[319]

AGs suing the federal government are often highly selective in their forum choice.[320] They will choose the forum where they perceive a judge will be the most sympathetic to their claims and most disposed to issue a nationwide injunction.[321] Nationwide injunctions make a district court's decision highly influential which incentivizes litigants to strategically forum shop.[322] An important part of the forum shopping calculation is not only a "home court"

312. *See* Bray, *supra* note 6, at 457–61. Forum shopping occurs when a plaintiff strategically chooses the court in which to file a lawsuit in hopes that the selected court will treat its case more favorably than another court. Rendleman, *supra* note 272, at 937.

313. *See* Rendleman, *supra* note 272, at 937–39.

314. *Cf. id.*

315. *See id.* at 938–39.

316. *See id.* at 938.

317. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 250 (1981).

318. Rendleman, *supra* note 272, at 938; *see* Pamela K. Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 NOTRE DAME L. REV. 579, 583 (2016).

319. Rendleman, *supra* note 272, at 937–38; Bookman, *supra* note 318, 582–83.

320. *See* Trammel, *supra* note 5, at 106–07.

321. *See id.*

322. *See id.*

advantage, but also a judge who may have political leanings that influence her decision to issue a nationwide injunction.[323]

States are particularly adept at forum shopping. States forum shop for both a favorable district court and court of appeal.[324] It is no surprise that Democratic AGs seeking nationwide injunctions against the Trump administration filed in district courts in "blue states" like California, New York, Pennsylvania, Washington, and Massachusetts, within the Second and Ninth Circuit Courts of Appeals.[325] In contrast, Republican AGs filed lawsuits against the Obama administration in a "red state" like Texas in the more conservative leaning Fifth Circuit Court of Appeals.[326]

States seeking an ideologically aligned judge inclined to order a nationwide injunction means controversial decisions that affect the entire nation may be made by judicial ideological outliers instead of "a more representative cross section of the federal judiciary."[327] Nationwide injunctions "allow these judicial outliers to impose their potentially idiosyncratic views throughout the nation, even if only temporarily."[328]

Forum shopping to increase the chances of being assigned a particular judge has occurred repeatedly in multistate challenges of the DACA program.[329] When Texas challenged the Obama administration's deferred immigration initiatives, Texas filed in the Brownsville division of the Southern District of Texas.[330] There are only two active federal district judges in that division, including Judge Andrew Hanen, who was known to be conservative and had previously publicly criticized Obama administration immigration policies.[331] Judge Hanen was assigned to the case and ordered a nationwide injunction.[332] The Fifth Circuit reviewed the case and affirmed the issuance of the injunction.[333] It is no coincidence that when Texas again

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323. *See id.*

324. *See* Bray, *supra* note 6, at 459–60.

325. *See Multistate Litigation Database*, *supra* note 19.

326. *See id.*

327. Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 ALA. L. REV. 1, 32 (2019).

328. *Id.*

329. *See, e.g.*, Texas v. United States, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (Texas's challenge of DACA in ostensibly favorable federal district court for the Southern District of Texas).

330. *See id.*

331. *See* Andrew Kent, *Nationwide Injunctions and the Lower Federal Courts*, LAWFARE (Feb. 3, 2017), www.lawfareblog.com/nationwide-injunctions-and-lower-federal-courts [https://perma.cc/3G47-GY8V]; Frost, *supra* note 7, at 1104–05. Also, the challenge to transgender bathroom regulations during the Obama administration was filed in Texas; forum shopped to one active judge who was critical of LGBTQ rights who ultimately issued a nationwide injunction. *See* Berger, *supra* note 9, at 1092–93.

332. *See Texas*, 86 F. Supp. 3d at 604.

333. *See* Texas v. United States, 809 F.3d 134, 187–88 (5th Cir. 2015).

challenged the DACA program during the Trump and Biden administrations that Texas filed in the Brownsville division in the Southern District of Texas and drew Judge Hanen.[334] And it was Judge Hanen that most recently enjoined the DACA program.[335]

The criticism that nationwide injunctions encourage forum shopping is exacerbated by multistate litigants that can access many more forums by litigating together.[336] If a state wants to access a particular forum to challenge the federal government, they need only to join with a like-minded AG with access to the forum.[337] Since only one plaintiff needs to establish standing and venue, partnering with only one state that can meet those requirements will be enough for the entire multistate coalition to litigate their case in a chosen forum and seek a nationwide injunction.[338] It is typically the leading state in a multistate action that will file suit in its "home state" federal district court.[339] By joining with another state, the "outsider" state can get the "home court" advantage of the leading state and the benefit of accessing a court perceived to have favorable ideological leanings.[340] For example, in *Texas v. United States*, twenty-six states joined Texas in challenging the Obama administration.[341] As a result, all the participating states could have the benefit of the forum selection in the Brownsville Division of the Southern

334. *See* Texas v. United States, 328 F. Supp. 3d 662, 671 (S.D. Tex. 2018). However, in this case, Judge Hanen refused to issue the requested nationwide injunction due to other injunctions that had been ordered by other district courts in other cases. *See id.* at 741–43.

335. *See* Texas v. United States, No. 1:18-cv-00068, 2021 WL 3025857, at *41–42 (S.D. Tex. July 16, 2021). The United States has appealed the permanent injunction to the Fifth Circuit where the case is currently pending. *See* Texas v. United States, No. 21-40680 (5th Cir. Sept. 16, 2021).

336. *See* Rendleman, *supra* note 272, at 939 ("A wide selection of states, and perhaps judges, is possible if several state attorneys general band together as plaintiffs.").

337. *See* Massachusetts v. EPA, 549 U.S. 497, 526 (2007) (holding that petitioners had standing to challenge the 'PA's denial of their rulemaking petition because "the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts").

338. *See id.*

339. For example, during the Obama administration, Texas often led multistate actions and filed them in district courts in Texas. *See, e.g.*, Texas v. United States, 86 F. Supp. 3d 591 (S.D. Tex. 2015). During the Trump administration, California, New York, Massachusetts, and Washington led multistate actions and filed cases in district courts in those states. *See, e.g.*, California v. DHS, 476 F. Supp. 3d 994 (N.D. Cal. 2020); Washington v. DHS, 408 F. Supp. 3d 1191 (E.D. Wash. 2019).

340. *See* Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEO. MASON L. REV. 29, 42–51 (2019) ("Although plaintiffs still must have sufficient contacts in whatever locale they file suit in to satisfy jurisdictional requisites, those interested in a matter of broad public interest generally can find one person or entity that can meet that test for a desirable venue."); *see also* Rendleman, *supra* note 272, at 937–39; Trammel, *supra* note 5, at 106–07.

341. *See* Texas v. United States, 86 F. Supp. 3d at 604.

District of Texas because Texas could access that forum.[342] The "outsider" states could piggyback on Texas's "home court" advantage and the likelihood that a judge with favorable political preferences would decide the case.[343]

Multistate litigants can engage in a concerted forum shopping spree, in essence "[s]hop[ping] 'til the statute drops."[344] Coalitions of ideologically aligned multistate groups can strategically file in multiple forum-shopped jurisdictions to increase their chances of obtaining a nationwide injunction.[345] For example, in *DHS v. Regents of the University of California*, the Supreme Court consolidated multiple cases that challenged the Trump administration's recission of the DACA and DAPA programs.[346] Two of those consolidated cases were multistate actions, including one multistate action filed in the Northern District of California[347] and another in the Eastern District of New York.[348] The district courts in both California and New York entered preliminary nationwide injunctions.[349] The *Regents* case is an example of how multistate actions can be filed in multiple forum-shopped jurisdictions to increase the odds that a district court will issue a nationwide injunction. A network of AGs uniquely enables states to have an overall litigation strategy that involves multiple hand-picked forums.

Multistate litigants exacerbate the criticism that nationwide injunctions encourage forum shopping. States have established networks that allow multistate groups to coordinate forum shopping sprees as part of an overall litigation strategy to obtain a nationwide injunction. However, increasing the odds of winning a nationwide injunction is a strategy that also increases the risk that courts will issue conflicting injunctions.

B. Conflicting Injunctions

State litigants contribute to the risk that courts will order conflicting injunctions. Multistate litigants heighten the risk because they can file lawsuits in multiple forums as part of an overall strategy to secure a nationwide injunction. On the other hand, multistate litigation can

342. *See id.*; *see also* Massachusetts v. EPA, 549 U.S at 505.

343. *See* Cass, *supra* note 340, at 44–45; Rendleman, *supra* note 272, at 937–39; Trammel, *supra* note 5, at 106–07.

344. Bray, *supra* note 6, at 460.

345. *See id.* at 459 (describing efforts by states opposed to the Trump administration's immigration policies to obtain nationwide injunctions in several different jurisdictions).

346. *See* DHS v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1905 (2020).

347. *See* Regents of the Univ. of Cal. v. DHS, 279 F. Supp. 3d 1011 (N.D. Cal. 2018).

348. *See* Batalla Vidal v. Duke, 295 F. Supp. 3d 127 (E.D.N.Y. 2017).

349. *See Regents of the Univ. of Cal.*, 279 F. Supp. 3d at 1048–50; *Batalla Vidal*, 295 F. Supp. 3d at 163–64.

consolidate and coordinate actions, reducing the overall number of lawsuits filed by states and decreasing the risk of conflicting injunctions.

Critics of nationwide injunctions have pointed out many negative consequences of conflicting injunctions. Justice Gorsuch wrote that nationwide injunctions "sow[] chaos for litigants, the government, courts, and all those affected by these conflicting decisions."[350] The federal government could be "whipsawed" by conflicting nationwide injunctions as groups with opposing interests seek to enforce both of them.[351] The federal government could also refuse to comply with an injunction by citing a conflicting injunction issued by a different court.[352]

Nationwide injunctions have presented conflicts and confusion as courts have navigated the complexity of ordering remedies when litigation is ongoing in several jurisdictions. This risk was posed when two lawsuits were filed in response to the nationwide injunction issued in *Texas v. United States* that halted the extended DACA and DAPA programs during the Obama administration. These lawsuits, one filed in the Eastern District of New York[353] and one in the Northern District of Illinois,[354] sought declaratory judgments that the Texas injunction did not apply in New York and Illinois, respectively. The individual private plaintiffs also sought injunctions requiring the federal government to ignore the Texas injunction in their own cases. In the New York case, the judge signaled his willingness to accept the plaintiff's argument, hinting that he might order the federal defendants to disregard the injunction from the district court in Texas.[355] However, neither

350. DHS v. New York, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring).

351. Nash, *supra* note 38, at 1993.

352. *See id.*

353. Complaint, Batalla Vidal v. Baran, No. 1:16-cv-04756 (E.D.N.Y. Aug. 25, 2016).

354. Complaint, Lopez v. Richardson, No. 1:16-cv-09670 (N.D. Ill. Oct. 12, 2016). Illinois joined the multistate challenge to the Trump administration's recission of the DAPA and DACA programs. *See* Complaint, New York v. Trump, No. 1:17-cv-05228 (E.D.N.Y. Sept. 6, 2017).

355. In a pre-motion conference in late September, the district court judge announced that he had "absolutely no intention of simply marching behind in the parade t'at's going on out there in Texas, if this person has rights here." Alan Feuer, *Brooklyn Lawsuit Could Affect the Fate of Millions of Immigrants Nationwide*, N.Y. TIMES (Oct. 9, 2016), https://www.nytimes.com/2016/10/10/nyregi402rooklynlyn-lawsuit-could-affect-the-fate-of-millions-of-immigrants-nationwide.html [https://perma.cc/R2AT-MYX6]. "'I sympathize with your problem,' he told the government, 'but I do not sympathize with the idea that I am hamstrung in dealing with an issue involving individual rights and including the right to go make a living and have a life as an immigrant in the United States.'" Daniel Denvir, *New Hope for Undocumented Immigrants: DAPA Might Not Be Dead—A Bold Legal Strategy Could Protect Millions from Deportation*, SALON (Oct. 13, 2016), http://www.salon.com/2016/10/13/new-hope-for-undocumented-immigrants-dapa-might-not-be-dead-a-bold-legal-strategy-could-protect-millions-from-deportation/ [https://perma.cc/5E47-5GY5]. "How, he asked, could a judge in one jurisdiction 'issue a nationwide injunction if someone comes to him with a claim that affects the rights of people in' another jurisdiction 'who have not been before the court?'" *Id.*

court ended up issuing a conflicting national injunction. President Trump was elected months after these cases were filed and the litigation pivoted to challenging the Trump Administration's repeal of the DAPA and DACA programs.[356]

Despite the risk, courts have navigated the potential conflicts by relying on principles of comity, judicial restraint, and appellate review. Courts are aware of the danger posed by the potential for conflicting nationwide injunctions. They avoid conflict by refusing to issue a conflicting injunction or narrowing or staying an injunction so that it will not conflict with a previously ordered nationwide injunction.[357] Courts stay abreast of developments in cases challenging federal government policies in other jurisdictions to prevent conflict.[358] And they also issue injunctions limited in geography or time to avoid conflict with other courts.[359] In the rare situation in which a district court refuses to stand down, appellate review is available to address the conflict.[360] Cases can be consolidated on appeal to manage multiple cases that could conflict at an appellate level. And the Supreme Court has stepped in multiple times to stay injunctions, which also reduces the risk that there will be conflicting injunctions. Some Supreme Court justices have openly criticized nationwide injunctions.[361] As a result, district courts may be exercising restraint in order to maintain the power for the courts in the future. Thus, the risk of a lasting conflicting injunction is low and, after years of being faced with public law litigation, courts have adapted to manage the risk.[362]

While multistate actions can increase the risk for conflicting injunctions, they can also increase plaintiff coordination and bring uniformity in public law litigation.[363] Because states have been successful in joining together in

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356. After President Trump took office and repealed DACA and DAPA, a multistate group filed a lawsuit against Trump in the Eastern District of New York. *See* Complaint, New York v. Trump, No. 1:17-cv-05228 (E.D.N.Y. Sept. 6, 2017). The *Batalla Vidal* case and New York multistate case were ultimately consolidated in the Supreme Court in *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020).

357. *See* Bray, *supra* note 6, at 463; Frost, *supra* note 7, at 1106.

358. *See, e.g.*, Texas v. United States, 328 F. Supp. 3d 662, 678–87 (S.D. Tex. 2018) (discussing recent DACA decisions of other courts).

359. *See* Frost, *supra* note 7, at 1106–07.

360. *See id.*

361. *See* Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2089 (2017) (Thomas, J., concurring in part and dissenting in part); DHS v. New York, 140 S. Ct. 599, 599 (2020) (Gorsuch, J., concurring).

362. *See* Bert I. Huang, *Coordinating Injunctions*, 98 TEX. L. REV. 1331, 1343 (2020); Frost, *supra* note 7, at 1107 ("In short, abolishing nationwide injunctions out of fear of conflicting injunctions is a bit like using a steak knife to remove a splinter.").

363. *See* Rendleman, *supra* note 272, at 940 ("State attorneys general joining together in one lawsuit brings a measure of cooperation and uniformity to numerous lawsuits.").

the same lawsuits, they could use multistate organization to consolidate similar claims. If states consolidate around one case, rather than proliferate many cases, then the likelihood of conflicting nationwide injunctions would decrease. While the potential for conflicting injunctions is a concern, courts have navigated the nationwide injunction landscape to largely avoid conflict.[364] However, efforts to avoid conflicting injunctions may stymy percolation and interfere with good judicial decision making.

C. Percolation and Judicial Decision Making

Another common criticism of nationwide injunctions is that they prevent percolation of issues in lower courts and interferes with good judicial decision making.[365] Viewing the critique through a litigant lens, however, reveals that both state plaintiffs and federal defendants undermine percolation when nationwide injunctions are at stake. Furthermore, courts also prevent percolation in favor of quick resolution, uniformity, and judicial economy. Multistate litigants may act as proxies for the benefits of percolation by incorporating multiple viewpoints in public law litigation.

"Percolation" expresses the idea that it is helpful for the Supreme Court to have well-developed arguments about issues they hear, and their decision making is improved by having opinions from multiple district courts and courts of appeals.[366] Whether the lower courts agree or not, the appellate court benefits from lower courts engaging in the issue and debating the outcome. Critics argue that nationwide injunctions "freeze" issues, depriving other courts from deciding cases to the contrary and issuing conflicting injunctions.[367] But if lower courts disagree and issue conflicting injunctions, the situation raises such important stakes that percolation may not be a practical option.[368]

Moreover, in the case of preliminary nationwide injunctions, appellate review is "accelerated and relatively fact-free," without the benefit of a record.[369] "[I]n deciding a motion to stay a preliminary injunction," the appellate courts are not deciding on the merits of the case, but "only whether the plaintiff is *likely* to prevail on the merits."[370] The Supreme Court is put in the position of "decid[ing] major constitutional questions not in order to

364. *See* Amdur & Hausman, *supra* note 15, at 52; Trammel, *supra* note 5, at 81–82.
365. Bray, *supra* note 6, at 461; *see also* Nash, *supra* note 38, at 1993.
366. *See* Rendleman, *supra* note 272, at 946–48.
367. Berger, *supra* note 9, at 1071; *see also* Bray, *supra* note 6, at 461–62.
368. *See* Rendleman, *supra* note 272, at 946–47.
369. Bray, *supra* note 6, at 461.
370. *Id.* at 462.

resolve circuit splits but instead to address stays of district court preliminary injunctions."[371] Nationwide injunctions create a pattern of the Supreme Court "decid[ing] important questions more quickly, with fewer facts, and without the benefit of contrary opinions by lower courts."[372]

States and AGs contribute to the criticism that nationwide injunctions undermine percolation. They are well situated to engage in appellate litigation that can quickly escalate to the Supreme Court.[373] States request the remedy of the nationwide injunction knowing that, if successful, they will be required to defend the action through courts of appeals and even to the Supreme Court.[374] AGs likely prefer to obtain a quick resolution with a preliminary nationwide injunction and to later defend the injunction in a court of appeals, rather than investing considerable time and resources litigating the merits of the dispute in district court litigation prior to obtaining an injunction. AGs seeking publicity by suing the federal government can generate quick headlines by winning preliminary nationwide injunctions shortly after filing suit and can then continue to generate more notoriety by litigating through the appellate system. AGs have incentives to litigate against the federal government in a way that maximizes the publicity of the lawsuit and nationwide injunctions pave the way to high-profile litigation all the way to the Supreme Court.

Federal defendants also play an important role in undermining percolation by appealing nationwide injunctions. For example, federal defendants undermine percolation when they seek emergency stays of nationwide injunctions from the Supreme Court through the U.S. Solicitor General prior to the cases being heard by federal courts of appeal.[375] During the Trump administration, the Solicitor General sought emergency stays and certiorari prior to judgment an unprecedented number of times.[376] Instead of allowing cases to reach judgment in courts of appeal or reaching the merits in the cases of preliminary injunctions, the federal government defendant has been quick to seek emergency stays in the Supreme Court.[377] A litigant focus reveals that

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371. *Id.*

372. *Id.*

373. *See* Bray, *supra* note 6, at 422 (describing instances where "major constitutional question[s]" were nearly decided on hasty motions for stays because AGs quickly appealed national injunctions to the Supreme Court).

374. *See id.* at 460 (explaining that forum selection at the lower court level is often also a strategy for getting the case into an appellate court in a specific circuit).

375. *See* Vladeck, *supra* note 107, at 134.

376. *See id.* ("By volume, the most common ground the Trump Administration has invoked for needing emergency or extraordinary relief has been as a response to nationwide injunctions issued by district courts against executive branch policies.").

377. *See id.* at 134–44.

many criticisms of the nationwide injunction are related to litigant behavior, rather than the attributes of the remedy.

Courts can also undermine percolation in cases involving nationwide injunctions in pursuit of other values such as uniformity, quick resolution of important questions, and judicial economy. The Supreme Court has consolidated and considered cases before they were even heard by courts of appeals, which would have increased percolation of the issue. For example, in *Regents of the University of California v. Trump*, involving the recission of the extended DACA and DAPA programs, the Supreme Court consolidated other cases pending in the courts of appeals and delivered a decision prior to the appellate courts issuing opinions.[378] The Supreme Court has agreed to hear many emergency applications for stays, rather than allow cases to percolate in the lower courts. For example, the Supreme Court granted an emergency stay in *Wolf v. Cook County*, a case that involved an injunction in a single state, a week before oral arguments were to be heard in the Seventh Circuit.[379] Justice Sotomayor wrote in dissent, "It is hard to say what is more troubling: that the Government would seek this extraordinary relief seemingly as a matter of course, or that the Court would grant it."[380]

Concerns about percolation may be overstated because nationwide injunction cases are being heard in multiple district courts and appellate courts before reaching the Supreme Court.[381] For example, travel ban litigation occurred in multiple districts and appellate courts before reaching the Supreme Court.[382] The Public Charge Rule also resulted in cases being filed in multiple jurisdictions by a variety of litigants, including multistate groups.[383] By the time the Supreme Court addressed the issue, opinions had been rendered in district courts in New York,[384] California,[385] and Washington,[386] and by the Second and Ninth Circuits.[387]

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378. *See* DHS v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1905 (2020).

379. *See* Wolf v. Cook County, 140 S. Ct. 681 (2020).

380. *Id.* at 681 (Sotomayor, J., dissenting).

381. *See* Frost, *supra* note 7, at 1108 (explaining that "a nationwide injunction issued by one court need not always stop other courts from weighing in on the matter").

382. *Id.* at 1072–73.

383. *See* Camilo Montoya-Galvez, *Courts Block Trump Rule To Deny Green Cards and Visas to Low-Income Immigrants*, CBS NEWS (Oct. 15, 2019), https://www.cbsnews.com/news/public-charge-rule-judge-blocks-attempt-to-deny-green-cards-and-visas-to-low-income-immigrants/ [https://perma.cc/89BS-EU6D].

384. New Jersey v. Wheeler, 475 F. Supp. 3d 308 (S.D.N.Y. 2020).

385. California v. DHS, 476 F. Supp. 3d 994 (N.D. Cal. 2020).

386. Washington v. DHS, 408 F. Supp. 3d 1191 (E.D. Wash. 2019).

387. *See* New York v. DHS, No. 19-3591, 2020 WL 95815 (2nd Cir. Jan. 8, 2020); City & Cnty. of San Francisco v. U.S. Citizenship & Immigr. Servs., 981 F.3d 742 (9th Cir. 2020).

Furthermore, concerns about percolation may be mitigated by the presence of multistate litigants that offer competing interpretations and policy arguments. Not only will the court have the benefit of the position of state plaintiffs, but also of states that file briefs in favor of the federal government's position or intervene as defendants.[388] Nationwide injunction litigation also attracts the attention of interested intervenors and amici curiae.[389] The many perspectives that arise in these cases can act as a proxy for multiple lower courts to examine the issues.[390] Admittedly, states, intervenors, and amici are not perfect substitutes for percolation in courts because they are advocates that "may run out of novel arguments" or "simply wind up echoing one another."[391] However, multiple perspectives, when combined with opinions from district courts and circuit courts of appeal, may make these cases more preferable for offering diverse views than another case that lacks the attention of many litigants and amici.

D. Politicization of the Judiciary and Polarization

States and AGs uniquely contribute to the criticisms that nationwide injunctions politicize the judiciary and deepen political polarization.[392] AGs are currently "playing a pivotal role in some of the most important national political debates of the day" by instigating litigation and securing nationwide injunctions.[393] This activism politicizes the judiciary and fuels deepening political polarization.[394]

States are political actors and AGs are elected public officials with partisan affiliations. These unique attributes exacerbate the criticism that nationwide injunctions increase judicial politicization.[395] The nationwide injunction turns a harsh spotlight on the judiciary and its desired impartial and non-partisan reputation.[396] "[T]he critical exacerbating factor for disputes about

388. *See* Frost, *supra* note 7, at 1078–80 (discussing examples of multistate litigation in cases involving nationwide injunctions).

389. *See* Clopton, *supra* note 6, at 38–39.

390. *See id.* at 39.

391. Nash, *supra* note 38, at 2003.

392. *See* Lemos & Young, *supra* note 16, at 122–23.

393. *Id.* at 46.

394. *See id.* at 46–47 ("State public-law litigation, especially in its most recent manifestations, seems at first glance to be a symptom of the broader polarization in national politics . . . In many instances, state public-law litigation is a vehicle for expressing the same divisions that convulse American politics generally.").

395. *See* Rendleman, *supra* note 272, at 943–46; Cass, *supra* note 340, at 51–55.

396. *See* CASA de Maryland, Inc. v. Trump, 971 F.3d 220, 261 (4th Cir. 2020) ("Perhaps most importantly, the growth of the nationwide injunction also risks the perception of the federal courts as an apolitical branch.").

nationwide injunctions plainly is the underlying cases' connection to *political* issues."[397] The judiciary's reputation suffers when the public observes judges in red states halt Obama and Biden policies and judges in blue states enjoin Trump policies.[398] "Inserting the judiciary into quintessentially political fights, even when there is a substantial legal issue to be decided on recognizably legal grounds, plainly risks the perception that judges base decisions on political preferences, or at least are affected by those preferences."[399] That perception is reinforced by the fact that "the judicial decision-makers are selected by one side of a political contest precisely because of their expected prejudices."[400]

Eroding the apolitical reputation of the federal judiciary increases political contention of judicial appointments and ultimately undermines the ability of the judiciary to check executive overreach. Appointments to federal district courts have been "relatively insulated from boldly politicized debates."[401] However, if district court judges are perceived to be "soldiers in proxy fights over political platforms," district court appointments will become a focal point for partisan contention, ratcheting up the politicization of the judiciary.[402] If district judges can halt federal government policies that are important political priorities, politicians from both sides of the aisle will increase their efforts to appoint judges with more partisan political views or vigorously oppose them.[403] The more courts are viewed as political apparatuses, the less institutional legitimacy courts will have to issue orders to check executive overreach, ironically including nationwide injunctions.

Relatedly, nationwide injunctions deepen political polarization.[404] "A lawsuit brought by an elected state official against the President to void an executive order strikes the rawest political and partisan nerves."[405] Americans are more deeply divided "along partisan and ideological lines" than they have been in recent history.[406] Polarization contributes to congressional gridlock,

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397. Cass, *supra* note 340, at 52.

398. *See* Rendleman, *supra* note 272, at 901.

399. Cass, *supra* note 340, at 53–54.

400. *Id.* at 54.

401. *Id.* at 56.

402. *Id.*

403. *Id.* at 56–57.

404. While some argue that polarization is not inherently concerning because it gives voters more distinctive choices, my argument "largely presuppose[s], rather than defend[s], the proposition that polarization is worrisome and in need of mitigation." Lemos & Young, *supra* note 16, at 55 (making the same presumption with respect to polarization and state public law litigation).

405. Rendleman, *supra* note 272, at 944.

406. *See* Lemos & Young, *supra* note 16, at 46.

impeding efforts to compromise on issues of national significance and hobbling Congress's executive oversight.[407]

State public law litigation is a reaction to legislative gridlock, but it also deepens already high levels of polarization that entrench gridlock. Congressional gridlock prompts presidential administrations to rely on executive orders or agency regulations.[408] In response, AGs have pursued litigation to challenge executive actions. For example, the Travel Ban orders in the Trump administration, the DAPA and DACA programs in the Obama administration, and the immigration deportation moratorium by the Biden administration were all executive actions met with state resistance at the courthouse.[409] States have used nationwide injunctions to effectively stall the implementation of federal policies until election cycles in hopes that another president may repeal the prior administration's challenged policies.[410]

However, national policy gridlock is entrenched when multistate litigation prevents an administration from reversing the previous administration's policies. For example, efforts of both the Obama and Trump administrations to change their predecessor's policies resulted in litigation. The Trump administration's efforts to repeal the DACA and DAPA programs were met with swift and stiff resistance throughout the country by Democratic AGs opposed to repealing the policies.[411] However, the Trump administration was also threatened with litigation by Republican AGs if the administration did not reverse the Obama-era immigration policies.[412] Whichever policy route a presidential administration pursues can wind up in litigation, with each side seeking a nationwide injunction to enact their chosen policy outcome. By preventing administrations from changing policies, multistate actions contribute to entrenching national policy gridlock.

State litigants are more politically polarizing than other litigants engaged in public law litigation. Private organizations such as non-profit advocacy groups routinely challenge executive actions, including in parallel or joint

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407. *See* Copeland, *supra* note 16, at 796, 809–14.

408. *See* Lemos & Young, *supra* note 16, at 62; Copeland, *supra* note 16, at 796 ("The nationwide injunction is an adaptive response by the judiciary to a system under pressure by the imbalances created by an increasingly powerful presidency set further free from effective congressional oversight because of gridlock.").

409. *See supra* sections I.A.1, I.B.1, I.C.1.

410. *Cf.* Nolette, *supra* note 20, at 360 (discussing the strategy of a coalition of AGs to delay the Obama administration's Clean Power Plan until the subsequent administration by seeking a stay from the Supreme Court).

411. *See, e.g.*, DHS v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1903 (2020).

412. *See* Letter from Eleven State Att'y Gens. to Att'y Gen. Jeff Sessions (June 29, 2017), https://www.texasattorneygeneral.gov/sites/default/files/files/epress/DACA_letter_6_29_2017.pdf [https://perma.cc/5QSG-ZCWP].

suits brought by states.[413] However, a state suing the federal government politicizes the litigation in ways that private litigants do not. It is generally presumed that states represent the public interest of their citizenry.[414] But a state's position in litigation will never reflect the policy preferences of all its citizens.[415] Unlike other aggregate litigation, such as class action litigation, state citizens don't have the opportunity to "opt out."[416] Nevertheless, citizens are compelled to fund state litigation in the form of taxes without meaningful opportunities to oversee litigation or have their opposing voice represented in litigation.[417] These attributes make state litigants more polarizing to the state electorate than private litigants.[418]

AG litigators in public law litigation are uniquely polarizing.[419] Coalitions of AGs that bring lawsuits are almost always from the same political party, which is also the opposing party to the president.[420] The partisan pendulum of AG litigation swings with presidential election outcomes. Republican AGs sued the Obama administration, Democratic AGs sued the Trump administration, and Republican AGs are currently suing the Biden administration.[421] Countercoalitions of AGs from the president's party file amici briefs and intervene in lawsuits defending the actions of the federal government. The highly partisan nature of the litigation makes it appear that states are engaged in politically motivated policymaking endeavors, which creates a polarizing effect among politicians and the electorate.

Polarizing rhetoric has also surrounded AG litigation involving nationwide injunctions. AGs have widely publicized nationwide injunctions as political victories in press releases and on social media.[422] President Trump also engaged in polarizing rhetoric with respect to the nationwide injunction

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413. *See, e.g.*, La Clinica De La Raza v. Trump, 477 F. Supp. 3d 951 (N.D. Cal. 2020) (challenging the Public Charge Rule).

414. *See What Attorneys General Do*, Nat'l Ass'n of Att'ys Gen., https://www.naag.org/attorneys-general/what-attorneys-general-do/#:~:text=As%20chief%20legal%20officers%20of,representative%20of%20the%20public%20interest [https://perma.cc/UE7V-4AAA] (last visited Mar. 7, 2022).

415. *Cf.* Lemos & Young, *supra* note 16, at 91–95 (discussing the partisan nature of Attorneys' General positions in state litigation).

416. *See* Dishman, *Class Action Squared*, *supra* note 238, at 316.

417. *See id.* at 317.

418. *See id.* at 346.

419. *See generally* Lemos & Young, *supra* note 16, at 86–95 (discussing partisanship in Attorneys' General positions in litigation and the accompanying polarizing effects).

420. *Cf.* Nolette & Provost, *supra* note 17, at 474–76 (explaining that amicus briefs from AGs come mostly from partisan coalitions, and that Democratic coalitions brought many suits against the Trump administration).

421. *See id.*

422. *See* Miroff, *supra* note 4.

issued by a district court judge in an asylum case[423] by referring to the judge as "an Obama judge," a statement challenged directly by Chief Justice Roberts.[424]

AGs are distinct litigators that have political incentives to engage in polarizing behavior with respect to litigation against the federal government.[425] AGs are a polarized group of partisan litigators.[426] Political organizations have formed for both Republican[427] and Democratic[428] AGs to support partisan litigation against presidential administrations. Electoral pressures and opportunities also contribute to the polarizing of AGs and their litigation tactics. AGs often use litigation to portray themselves as the "resistance" to presidential administrations they oppose. AGs also contribute to the polarizing effects of litigation by targeting politically divisive issues such as immigration, climate control, and contraceptive insurance coverage. As the electorate becomes more polarized, AGs may respond by more aggressively bringing public law litigation to rally their partisan base of support.[429]

Nationwide injunctions remove decisions about salient issues from the political process. The decision whether to halt or continue a particular policy is made not by a democratically accountable branch of government, but by a single unelected district court judge in a handpicked legal forum by the state seeking a nationwide injunction. Nationwide injunctions foster the sentiment that the purpose of the litigation is to impose a certain state's policy preference on the entire nation, overriding and frustrating the democratic decisions of voters who elected the president. Of all the potential remedies, a nationwide injunction is likely to be the most politically polarizing. Nationwide injunctions also contribute to the cycle of polarization and

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423. *See* Order Granting Temporary Restraining Order, 349 F. Supp. 3d 838, 868 (N.D. Cal. 2018).

424. *See* Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge'*, N.Y. TIMES (Nov. 21, 2018), https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html [https://perma.cc/CBE9-ZYNH].

425. *See* Lemos & Young, *supra* note 16, at 86–95.

426. *See id.* at 90 (citing to a study that found AGs are more ideologically extreme than the "mean state legislator from their respective party" with the divergence being similar to ideological divides among members of Congress).

427. The Republican Attorneys General Association (RAGA) is an association dedicated to electing and re-electing Republican attorneys general. *See About RAGA*, REPUBLICAN ATTORNEYS GENERAl, https://republicanags.com/about/ [https://perma.cc/8E5V-6PLQ].

428. The Democratic Attorneys General Association (DAGA) is the only committee solely dedicated to electing and supporting Democratic state Attorneys General. *See About DAGA*, DEMOCRATIC ATTORNEYS GENERAL ASSOCIATIOn, https://dems.ag/about/ [https://perma.cc/8SQ7-8VDE].

429. *See* Nash, *supra* note 38, at 1992.

gridlock because there is little incentive to compromise if going to a courthouse to get a nationwide injunction is an option.

Public law litigation and nationwide injunctions can also increase polarization and political contention within states. Increased polarization at the state level is problematic because federalism can help relieve polarization pressures at the national level.[430] State politics are generally less polarized than national politics.[431] Politically divisive issues can be decided at the state level to mitigate national polarization and allow a diversity of policy preferences among the states. When states litigate against the federal government to protect their interests qua states, they preserve state autonomy to engage in policymaking.[432] However, when states engage in litigation aiming to force a certain policy outcome on their sister states,[433] they increase polarization at both the national and state level. Nationwide injunctions are often used to force a policy outcome on all states, which can "undermin[e] our federal system's ability to manage polarization."[434]

Politicization of the judiciary and polarization are significant consequences of states seeking nationwide injunctions against the federal government. States and AGs uniquely contribute to these criticisms, and thus, they should be considered in efforts to reform the nationwide injunction.

IV. REFORMS TO THE NATIONWIDE INJUNCTION

Because states and AGs uniquely contribute to criticisms of the nationwide injunction, reforms to the nationwide injunction should consider this special class of litigants and litigators. Reforms proposed by scholars and policymakers focus primarily on courts rather than on litigants and litigators. Expanding consideration of litigant and litigator focused reforms is an important part of the conversation about the future of the nationwide injunction.

A. State Litigant Reforms

States have been overlooked as a source of reforms for the nationwide injunction despite their prominence in public law litigation. "The advantages that states currently enjoy in the litigation field are not set in stone, and they

430. *See* Lemos & Young, *supra* note 16, at 50–51.

431. *See id.* at 55–56.

432. Professors Lemos and Young refer to this as vertical federalism. *See id.* at 97.

433. Professors Lemos and Young refer to this as horizontal federalism, although they acknowledge difficulty in distinguishing them in certain instances. *See id.* at 97–99.

434. *See id.* at 98–99.

could be trimmed back—by courts, by state legislators, or even by federal law."[435] State litigant focused reforms can mitigate concerns about nationwide injunctions relating to forum shopping, conflicting injunctions, percolation, and polarization.

State litigant reforms can address advantages states have in forum selection that create incentives to forum shop. First, states should have the same standing requirements as private plaintiffs instead of relying on special solicitude to gain access to federal courts.[436] States should not enjoy greater access to nationwide injunctions because they can more easily establish standing in federal courts.[437] Furthermore, states are advantaged as plaintiffs by the "one good plaintiff rule" which makes a state an attractive partner in litigation for other states and private litigants to join in multistate litigation.[438] If courts rejected the "one good plaintiff rule," then each plaintiff would be required to establish standing, making it more challenging for states to join together and justify the imposition of a nationwide injunction.[439] This change could mitigate concerns about multistate forum shopping because states would be limited to joining multistate actions in cases where they could establish standing. If states are required to meet traditional standing requirements, courts will be required to scrutinize state lawsuits more closely before considering the question of whether to issue a nationwide injunction. Robust standing requirements can ensure that states are not a preferred litigant with greater ability to seek nationwide injunctions.

Incentives to forum shop could also be reduced if states were subject to a wider pool of federal district judges, particularly in multistate actions. States can establish jurisdiction and venue in any federal district court located in the state. State litigants have used this wide forum selection ability to sue in federal district court divisions with few active federal judges in order to increase the odds that a favorable judge will be drawn for the case.[440] However, if state litigants were subject to a lottery of all active sitting district court judges in the state, regardless of the division where they file suit, there

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435. *Id.* at 121.

436. *See* Nash, *supra* note 38, at 2013; Tara Leigh Grove, *When Can a State Sue the United States*, 101 CORNELL L. REV. 851, 854–55 (2016).

437. *See generally* Nash, *supra* note 38, at 2006–07 (discussing standing of states in federal court).

438. Chris Conrad, Note, *Judicial Power in the Laboratory: State Court Treatment of the One Good Plaintiff Rule*, 108 GEO. L.J. 767, 767 (2020) (explaining that t"e "One Good Plaintiff R"le" enabl"s "parties without proper Article III standing [to] remain in federal lawsuits as long as they seek the same form of relief as other plaintiffs in the action that do have proper stand"ng").

439. *Cf.* Morley, *supra* note 6, at 490 (explaining that a "Defendant-Oriented Injunction . . . allows a single judge to completely enjoin enforcement of a . . . federal legal provision throughout the . . . nation").

440. *See* Frost, *supra* note 7, at 1105.

would be less incentive to forum shop within the state.[441] A state would still have the "home court" advantage of filing in their preferred district and division in their own state but would not have the benefit of playing the odds to find a judge who is ideologically inclined to rule in the state's favor. In the case of multistate plaintiffs, the lottery could include district court judges in any federal district court in any participating state. This would preserve a home state advantage for the plaintiffs but at the same time would drastically increase the pool of district court judges. State litigants would be much more selective about a multistate litigation strategy if the judge pool were increased to every participating state. To the extent that courts that issue nationwide injunctions are outliers among the judiciary, a wider pool of judges chosen by lottery increases the chances that decisions about nationwide injunctions are not made on the margins. By reducing the ability of states to engage in highly strategic forum shopping, it also reduces the politicization and polarization effects of nationwide injunctions because the selection process is less tainted by the decisions of politically motivated actors.

Other procedural reforms to the nationwide injunction would reduce the risk of conflicting injunctions and increase the likelihood that the issues could percolate through the court system. Such reforms could include, for example, that if a district court issues a nationwide injunction, the federal government defendant can elect to get an automatic stay of the injunction pending an expedited appeal to a circuit court of appeals. But if the district court issues a more geographically limited injunction, a stay pending appeal remains in the discretion of the district court. State litigants and courts will have greater incentive to seek more limited injunctions if they cannot get immediate relief with a nationwide injunction. More geographically limited injunctions are less politically polarizing because they do not shape controversial policies for states not party to the litigation.

Furthermore, automatic stays will reduce the chances that the federal government could be subject to conflicting injunctions since nationwide injunctions will be stayed in the first instance until more decision-makers can address the issue. This reform increases the likelihood that issues will percolate in multiple district courts because a nationwide injunction issued by one court will not prevent another court from considering the issue and even making a contrary decision since any nationwide injunction would be stayed pending appeal. This reform expands the number of decision-makers on the nationwide injunction before it goes into effect while at the same time contracting the number of courts that can put the injunction into effect by

441. *Id.* at 1105–06*; see also* Dishman, *Calling the Shots*, *supra* note 29 (discussing judicial lottery system in OSHA vaccine mandate challenges).

moving the decision from every federal district court to only federal appellate courts. Courts of appeal are more likely to be aware of what their sister circuits are considering and would be very hesitant to order conflicting nationwide injunctions. However, even if they did, the case would be teed up for Supreme Court review.

Courts can also take judicial notice of states as litigants in their decision-making with respect to nationwide injunctions. Courts can take notice of the parties filing the lawsuit including whether there is a bipartisan group of states involved or whether there is evidence of intra-state conflict in participating in the multistate actions. Courts can also take notice of whether there is litigation pending in multiple states when making decisions about nationwide injunctions and refuse to grant an injunction or narrow the injunction. If states have filed multiple suits and have not been awarded an injunction, the court could consider that factor when considering the likelihood of success on the merits, a prerequisite to ordering an injunction.[442]

State-litigant-focused reforms are an underexplored avenue to address concerns about nationwide injunctions despite the prominence of states in the public law litigation landscape. Another avenue is to consider the unique litigators, AGs, that have unique incentives and abilities to seek nationwide injunctions on behalf of their state clients.

B. State Litigator Reforms

Proposed reforms to the nationwide injunction also largely ignore that there are unique litigators, AGs, who frequently seek and are often successful in securing national injunctions on behalf of their states. AG-related reforms focus on state government and democratic accountability, rather than on courts. Such reforms increase transparency and accountability and encourage restraint in decisions to sue the federal government.

Increased transparency about an AG's participation in lawsuits and his or her decision to seek a nationwide injunction facilitates greater accountability. For example, AG offices could provide information about the amount of time and money expended on litigation against the federal government and how its public law litigation portfolio compares to the rest of the office's litigation resource expenditures. While multistate litigation against corporations can bring money to the public fisc, litigation against the federal government does not result in financial settlements for the state.[443] Instead, it requires an investment of public funds for policy outcomes that may not be supported by

442. *See* Frost, *supra* note 7, at 1116–17.

443. *See* Dishman, *Class Action Squared*, *supra* note 238, at 345.

a significant part of the electorate. AG offices could also increase transparency about who they partner with in litigation and how litigation costs are shared among participants. Such transparency would allow voters and state legislatures to better monitor AGs and provide greater accountability.

Increased transparency allows voters to incrementally monitor their AGs between elections. If voters have better information, they can contact their AGs' offices and voice their opinions. Even if voters' opinions could not undo a particular lawsuit, AGs could adjust their behavior in the future based on voter feedback and AGs would be able to get an indication prior to elections of voters' reactions to their participation in multistate actions.

There could be greater monitoring of AGs' decisions to engage in litigation against the federal government and to seek a nationwide injunction. AGs have tremendous discretion in determining whether to bring litigation on behalf of their states. Outside of periodic elections, there are virtually no checks in the state government on the decisions of the AG with respect to litigation brought on behalf of the state or the choice of remedies. Because most AGs are elected independently from the governor, there can be a split in the state executive branch about whether the state should engage in litigation.

This lack of monitoring problem is compounded by the fact that the AG both advocates for the state and independently determines what is in the state's best interest.[444] This dual attorney-client role can be problematic when AGs have political incentives that influence their decisions about what is in the best interests of the state. AGs who are politically motivated to win re-election or election to other offices may engage in politically charged litigation against the federal government and seek nationwide injunctions to fuel campaign rallying cries.

Voters hold AGs accountable primarily through periodic elections. However, elections do not provide meaningful monitoring on a case-by-case basis because by the time voters go to the ballot box, the lawsuit may be resolved.[445] While AGs use their record of suing the federal government in campaigns, voters cannot meaningfully monitor behavior in individual actions through a single up or down vote in the ballot box. However, given the high-profile nature of AG-initiated litigation, there are opportunities for state residents to voice their opinions about individual actions, and AGs may be responsive to this type of voter monitoring in between election cycles.

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444. *See id.* at 298; Lemos, *Aggregate Litigation Goes Public*, *supra* note 240, at 512–513.

445. *See* Dishman, *Class Action Squared*, *supra* note 238, at 317 ("[B]y the time the next election cycle rolls around, the action will likely be settled, making it difficult to hold the AG accountable for a specific settlement.").

The AG's sole discretion in bringing litigation on behalf of the state can create intra-state conflict when other state government officials disagree with the AG's decision to sue the federal government. In fact, governors have signed onto amicus briefs in actions against the federal government when AGs have not joined.[446] Governors and members of state legislatures have also criticized AGs for their participation in multistate lawsuits and have even attempted to strip AGs of their powers through legislation.[447]

There could be reforms that allow other state officials to speak for the state-client in public law litigation. This wider participation in decision-making could be a form of client monitoring to ensure that the state has a greater voice in litigation brought on its behalf. State legislators, the governor, or government attorneys outside of the AG's office may be given authority to authorize or have control over public law litigation.[448] There could also be a commission of state elected officials that could oversee litigation on behalf of the state and could provide oversight and monitoring of the AG. Such a commission could be consulted about whether the state should be seeking a nationwide injunction or a narrower remedy.

The state legislature can play a greater role in monitoring AG behavior in multistate actions through its oversight abilities. Increasing legislative oversight would better ensure that the state's interests were being served in multistate actions. Since state legislators are also elected, legislative oversight provides another avenue of democratic accountability. Legislatures have powers to make state law and allocate state budgets. Legislatures also have committees that are structured to provide oversight functions. In many instances, the AG may already be accustomed to appearing before legislative committees to report on issues or lobby the legislature for more funds. While individual voters may not have the time or resources to monitor the AG, the legislature has greater institutional capacity to monitor the AG.

Another potential reform for AGs is to have guidance about when to bring suit against the federal government seeking a nationwide injunction. Just as courts are encouraged to use restraint in ordering nationwide injunctions, AGs should also be encouraged to exercise restraint when suing the federal government and seeking nationwide injunctions. AGs could seek more narrowly tailored remedies or, in some instances, be more selective about which lawsuits to bring against the federal government. Currently, AGs don't

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446. *See* Boyer, *supra* note 239.

447. *See* Dennis Romboy, *Utah Lawmaker Proposes Restricting Attorney General's Power to Involve State in Lawsuits*, KSL.COM (Feb. 16, 2021, 8:26 PM), https://www.ksl.com/article/50108714/utah-lawmaker-proposes-restricting-attorney-generals-power-to-involve-state-in-lawsuits [https://perma.cc/76KM-FEDG].

448. *See* Lemos & Young, *supra* note 16, at 121–22.

have uniform guidance and generally only rely on their discretion to decide whether to bring suit or seek nationwide injunctions. Guidance could include consulting with other state elected officials, encouraging bipartisan participation in lawsuits, and considering issues that affect the interests of states qua states in seeking nationwide injunctions. AGs also could employ tests that scholars have recommended to courts to exercise restraint in seeking nationwide injunctions. For example, AGs could apply a cost-benefit analysis test or consider whether the remedy they are seeking is narrowly tailored to provide the greatest relief to the most state residents.[449] Combined with increased monitoring, AGs could be required to justify their actions to voters or state officials based on guidance or tests prior to taking action. This accountability would support the exercise of restraint by AGs in public law litigation.

Considering the unique attributes and incentives of AGs is another avenue to address criticisms of the nationwide injunction. Reforms targeted at AGs include increased transparency, accountability, and restraint in engaging in public law litigation and seeking nationwide injunctions.

CONCLUSION

State litigants and litigators are an important, yet largely ignored, part of the debate surrounding nationwide injunctions. States and AGs have attributes, advantages, and incentives in public law litigation that contribute to their success in securing nationwide injunctions. These advantages are increased by states suing the federal government together in multistate actions. States and AGs shape common criticisms of the nationwide injunction; however, these criticisms can be addressed by reforms targeted at state litigants and litigators. States and AGs are an important part of the conversation among scholars, jurists, and policymakers about the future of nationwide injunctions.

449. *See generally* Frost, *supra* note 7.