ARTICLE

PRESERVING PRELIMINARY RELIEF

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ABSTRACT

In June 2025, the Supreme Court's decision in Trump v. CASA *fundamentally altered the landscape of federal litigation by eliminating district courts' authority to issue "universal injunctions" that protect anyone beyond named plaintiffs. While this ruling addressed legitimate concerns about forum shopping and single-judge control over national policy, it may have overcorrected—potentially leaving constitutional violations to continue unabated while affected parties scramble to organize class actions or coordinate individual suits. The Court's reliance on statutory interpretation of the Judiciary Act, rather than constitutional limitations, means Congress retains authority to restore broader injunctive relief through new legislation. This Article examines the case for such legislative action and proposes institutional reforms that would preserve meaningful judicial protection against government overreach while addressing the legitimacy concerns that made universal injunctions controversial. The Article evaluates universal injunctions' evolution from extraordinary remedies into routine instruments of political contestation, analyzes the Supreme Court's restriction of this authority, and proposes a modernized three-judge court system—structured with targeted jurisdiction, circuit court appellate review, and technological enhancements—as a promising institutional solution that addresses judge-shopping concerns without impeding access to justice. The Article further demonstrates why increasing security bond requirements would create unacceptable financial barriers to judicial review for vulnerable plaintiffs and argues that any legislative framework should preserve existing judicial discretion over bond determinations rather than mandate specific requirements. Drawing on historical experience and contemporary needs, this Article proposes a balanced legislative approach that would restore the essential function of preliminary injunctions as a check on government overreach while enhancing their deliberative legitimacy and reducing their most partisan applications.*

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I. Introduction

When the Trump administration announced in January 2025 that babies born on American soil to undocumented mothers would no longer receive U.S. citizenship documents,[1] the response was swift. Within weeks, four federal district judges across the country had issued preliminary injunctions blocking the policy (three of them applying nationwide, or universally), each judge ruling that the executive order appeared to violate the Constitution's guarantee of birthright citizenship.[2] But in June 2025, the Supreme Court fundamentally altered the landscape for such challenges, ruling 6-3 in *Trump v. CASA* that federal courts lack authority under the Judiciary Act of 1789 to issue "universal injunctions" that protect anyone beyond the named plaintiffs.[3]

The Court's decision represents a seismic shift in federal litigation practice. For decades, preliminary injunctions had evolved from extraordinary equitable remedies into routine instruments of political contestation, with both Republican and Democratic administrations finding their initiatives

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[1] Exec. Order No. 14,160, Protecting the Meaning and Value of American Citizenship, 90 Fed. Reg. 8449 (Jan. 20, 2025).

[2] Melissa Quinn, *4th Federal Judge Blocks Trump's Birthright Citizenship Executive Order*, CBS News (Feb. 13, 2025), https://www.cbsnews.com/news/trump-birthright-citizenship-order-judge-blocks/ [https://perma.cc/LMV3-ABHY]; New Jersey v. Trump, 131 F.4th 27, 35 (1st Cir. 2025) (pointing out that the government did not even contest the fact that "for more than a century, persons in the two categories that the Executive Order seeks to prevent from being recognized as United States citizens have been so recognized"); CASA, Inc. v. Trump, No. 25-1153, 2025 WL 654902, at *2 (4th Cir. Feb. 28, 2025) ("For well over a century, the federal government has recognized the birthright citizenship of children born in this country to undocumented or non-permanent immigrants, a practice that was unchallenged until last month."); *id.* at *3 (Niemeyer, J., dissenting) (noting four district courts granting preliminary injunctions against the executive order).

[3] Trump v. CASA, Inc., 606 U.S. 831, 847 (2025).

halted by nationwide judicial orders.[4] For example, the Biden administration's earlier attempt to protect transgender youth through federal funding conditions met a similar fate—enjoined nationwide by judges in Texas and other conservative jurisdictions.[5] These judicial interventions, cutting in opposite political directions but employing identical procedural mechanisms, raised troubling questions about whether a single district court judge should wield such extraordinary power over national policy.

CASA answered that question with a resounding "no." Writing for the majority, Justice Barrett held that universal injunctions "likely exceed the equitable authority that Congress has granted to federal courts" in the Judiciary Act of 1789, relying on historical analysis showing that such broad remedies lacked precedent in 18th-century English equity practice.[6] The Court's formalistic approach required that modern equitable remedies be sufficiently analogous to those "traditionally accorded by courts of equity" at the founding—a standard that universal injunctions could not meet.[7]

Yet the Court's solution creates new problems. By limiting preliminary injunctions to named plaintiffs only, *CASA* may have overcorrected, potentially leaving constitutional violations to continue unabated while affected parties scramble to organize class actions or coordinate individual suits.[8] The decision's reliance on statutory interpretation of the Judiciary Act of 1789, rather than constitutional limitations, means that Congress retains authority to restore broader injunctive relief through new legislation—but any such legislative effort must deliberately address the institutional concerns that made universal injunctions so controversial.[9]

This transformation reveals the deeper tensions that *CASA* leaves unresolved. Congressional gridlock continues to drive presidents toward assertive executive policies that often rest on legally uncertain ground.[10]

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[4] *See* Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum-Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 Geo. Mason L. Rev. 29, 53 (2019) ("[T]he pattern that emerges is the routine use of suits seeking nationwide injunctions in highly politically salient cases with relatively consistent blocs of public officials and interest groups, from relatively consistent parts of the nation, lining up in opposition.").

[5] Reuters, *Biden's Title IX Protections for LGBTQ Students Struck Down by Texas Court*, NBC News (June 12, 2024), https://www.nbcnews.com/nbc-out/out-news/bidens-title-ix-protections-lgbtq-students-struck-texas-court-rcna156784 [https://perma.cc/ST2M-WV28] (noting that courts in Texas and Tennessee had struck down the Title IX protections).

[6] *CASA*, 606 U.S. at 837, 841–46.

[7] *Id.* at 841 (citing Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 528 U.S. 308, 319 (1999)).

[8] *See id.* at 867–68 (Alito, J., concurring).

[9] *See* Adam Liptak, *Trump's Birthright Citizenship Ban Faces New Peril: Class Actions*, N.Y. Times (July 12, 2025), https://www.nytimes.com/2025/07/12/us/politics/birthright-citizenship-class-action.html [https://perma.cc/3TM3-AK6T] (explaining that Judge Joseph N. Laplante, a federal district court judge for the District of New Hampshire, provisionally certified a nationwide class of children born to parents who would be subject to the new executive order, either because they lack immigration authorization or because they are in the United States on temporary visas and that he subsequently granted a preliminary injunction).

[10] *See infra* Part II.C.

Political polarization means that virtually every major presidential initiative faces immediate judicial challenge—a point that the Court made explicit in *CASA*, but a problem that will not likely go away simply because the Court has limited preliminary injunctions.[11]

The transformative power of nationwide injunctions created a genuine tension between competing institutional values.[12] On the one hand, preliminary injunctions served as a crucial check against potentially unconstitutional government overreach, protecting fundamental rights from immediate irreparable harm.[13] On the other hand, the pre-*CASA* practice—where forum shopping allows plaintiffs to effectively select sympathetic judges—threatened judicial legitimacy and created unpredictable governance.[14] This tension doesn't go away with the Court's restriction of universal injunctions. Instead, the *CASA* decision raises continuing questions about the proper allocation of power between judges and the political branches, and about whether our court system is equipped to serve as the primary arbiter of major policy disputes.[15]

This Article explores the risks and benefits of legislation to restore universal preliminary injunctions in suits against the government. Part I explains how preliminary injunctions allowed litigation to become a counterweight against executive action, used by the out-of-power political party to slow down challenged policy choices. It analyzes the Supreme Court's restriction of universal preliminary injunctions after *Trump v. CASA*, and it evaluates the pros and cons of restoring district courts' ability to grant universal preliminary relief.

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[11] *See* William Baude & Samuel L. Bray, *Proper Parties, Proper Relief*, 137 Harv. L. Rev. 153, 174 (2023) ("[S]o we have arrived, for the first time in our national history, at a state of affairs where almost every major presidential act is immediately frozen by a federal district court."); *CASA*, 606 U.S. at 840 (quoting Baude & Bray, and noting that "[t]he trend has continued: During the first 100 days of the second Trump administration, district courts issued approximately 25 universal injunctions").

[12] *See* Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 Harv. L. Rev. 920, 1007 (2020) ("[T]he authority to provide a meaningful remedy is important, both functionally and symbolically, for the federal courts' ability to pronounce robust constitutional or legal norms, to ensure adequate checks on government at both the state and federal level, and thus to secure the rule of law in a constitutional democracy."); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1787 n.304 (1991) ("The provision of constitutional remedies also promotes respect for the values underlying constitutional norms by demonstrating society's seriousness about their enforcement.").

[13] *See* Kevin J. Lynch, *The Lock-in Effect of Preliminary Injunctions*, 66 Fla. L. Rev. 779, 821 (2014) ("[S]erious questions should be sufficient for the issuance of a preliminary injunction. . . . This approach will preserve the functions of a preliminary injunction—to allow for considered decision-making, to avoid 'justice on the fly,' and to preserve the status quo until legal claims can be resolved.").

[14] *See* Jack Thorlin, *Constitutional Hardball and Nationwide Preliminary Injunctions*, 18 Duke J. Const. L. & Pub. Pol'y 1, 3 (2023) ("If there is always a judge willing to issue an injunction for every politically sensitive executive action, nationwide preliminary injunctions can hobble the executive branch.").

[15] *See* Jill Wieber Lens, *Stays of Injunctive Relief Pending Appeal: Why the Merits Should Not Matter*, 43 Fla. St. U. L. Rev. 1319, 1338 (2016) ("Individuals value the process of meaningful review itself.").

Part II proposes that Congress restore universal injunctive authority through requiring three-judge district courts to rule on preliminary injunctions challenging federal government action. Such courts have been used in the past for politically charged litigation, most particularly during the Civil Rights Era of the 1950s and 1960s when civil rights litigators sought to challenge discriminatory laws and practices.[16] Reviving three-judge courts offers a bipartisan solution that would restore necessary constitutional oversight while addressing the legitimacy concerns that led to *CASA*'s restrictions. Both major political parties have experienced the consequences of inadequate judicial protection against executive overreach, creating a shared institutional interest in developing a legislative framework that preserves constitutional safeguards without recreating the problems of judge shopping and single-judge control over national policy.

Part III analyzes security bonds in the context of restored injunctive authority. While the Trump administration and others have proposed increasing the use of security bonds for preliminary injunctions, this Part argues that although courts have not been analytically consistent in their approach to considering such bonds, courts have nevertheless correctly denied such bonds in most cases against the government. It concludes that existing judicial discretion under Federal Rule of Civil Procedure 65(c) provides an adequate framework for addressing security bonds in constitutional litigation, making statutory specification of bond requirements unnecessary if Congress adopts the three-judge court framework proposed in Part II. Should Congress nevertheless choose to address security bonds in legislation authorizing three-judge district courts, however, any such provision should preserve judicial discretion rather than mandate specific bond amounts that could create financial barriers to constitutional oversight.

II. Universal Injunctions Against Government Action

Preliminary injunctions are an equitable remedy developed to protect the status quo until the merits of a lawsuit can be determined through the fact-finding process. Thus, for example, an injunction might be used "to protect a wildlife preserve from getting bulldozed to construct a theme park," while the parties litigate the legal status of the land, or to prevent the sale of alleged counterfeit goods while the parties litigate a trademark claim.[17] In private litigation, the injunction may have some impact on outsiders, but its predominant

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[16] *See* Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. Mich. J. L. Reform 79, 126 (1996) (noting that three-judge courts were ultimately restricted to two types of highly politically-charged cases (reapportionment and related Voting Rights Act cases), in part because multi-member courts benefitted from "the symbolic power of the apparent greater fairness of such courts in civil rights cases").

[17] *See* Trembly Law, *6 Common Examples of Injunctive Relief* (Apr. 24, 2024), https://tremblylaw.com/blog/4-common-examples-injunctive-relief-2/ [https://perma.cc/EV83-PJYG].

effect is on the parties litigating the case. But in litigation challenging the constitutionality of government action, injunctions typically bind the government against all parties—not just those who were able to sue.[18] Of course, when electoral change leads to a change in government policy, then different parties will be motivated to bring suit. This, in turn, leads to a type of "injunction whiplash" when plaintiffs challenge government action.[19]

A. Injunction Whiplash: the DACA Litigation

In 2012, President Obama created the Deferred Action for Childhood Arrivals (DACA) program, protecting from deportation eligible individuals who had entered the United States as children.[20] Two years later, Obama announced plans to expand DACA and to create a related Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program—actions that together would have "deferred action from immigration enforcement for up to 4.4 million children and parents in the United States, thus effectively allowing them to remain in the U.S. for the time being."[21] The state of Texas sued the government, alleging that the program expansion violated the United States Constitution's "Take Care" clause and that the program would cost the state additional money by increasing the pool of individuals eligible for state-subsidized driver's licenses and for unemployment assistance.[22] In February 2015, a federal district court judge entered a preliminary injunction against the action.[23] On appeal, an evenly divided Supreme Court (with one vacancy on the Court) left the preliminary injunction in place.[24] Later that year, President Trump was elected for the first time, thus bringing the Obama initiative to an end.[25]

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[18] *See* Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. Rev. 1065, 1071 (2018) (explaining that the term "nationwide injunction" is commonly used "to refer 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," and noting that the "term is somewhat misleading . . . 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," and that instead "the dispute is about who can be included in the scope of the injunction, not where the injunction applies or is enforced") (emphasis omitted).

[19] *See infra* Part II.A.

[20] *See* Juliet P. Stumpf & Stephen Manning, *Liminal Immigration Law*, 108 Iowa L. Rev. 1531, 1548 (2023) (noting that "[i]n 2012, the Administration unveiled DACA, providing a form of prosecutorial discretion called 'deferred action' that bestowed temporary protection from deportation," and explaining that although "[d]eferred status bestowed no legal status," it still "offered a renewable two years of protection from removal and permitted temporary work authorization").

[21] Cassandra Robertson, *Nationwide Injunctions, Immigration, and Civil Rights Litigation*, 5 C.R. Litig. 20, 20 (Spring 2017).

[22] Texas v. United States, 809 F.3d 134, 149 (5th Cir. 2015).

[23] Texas v. United States, 86 F. Supp. 3d 591 (S.D. Tex. 2015), *aff'd* 809 F.3d 134 (5th Cir. 2015).

[24] United States v. Texas, 579 U.S. 547, 548 (2016).

[25] *See* Casa De Maryland v. Dep't of Homeland Sec., 924 F.3d 684, 693 (4th Cir. 2019) (noting that "[i]n June 2017 (approximately five months after the Trump administration

It was not enough for Trump to end the expansion of the DACA program, however—instead, the administration sought to end it altogether, closing down the program to new applicants and winding down renewals for previously granted applications.[26] This time, immigrants, advocacy groups, and other plaintiffs sued to enjoin the order, arguing that the Trump administration's attempt to terminate the program violated the Administrative Procedure Act and the Fifth Amendment's Due Process Clause.[27] Plaintiffs filed suit in California, New York, and the District of Columbia.[28] Federal district courts in California and New York "entered coextensive nationwide preliminary injunctions, based on the conclusion that the plaintiffs were likely to succeed on the merits of their claims that the rescission was arbitrary and capricious."[29] The federal district court for the District of Columbia, on the other hand, "deferred ruling on the equal protection challenge but granted partial summary judgment to the plaintiffs on their APA claim, finding that the rescission was inadequately explained," but "stayed its order for 90 days to permit DHS to reissue a memorandum rescinding DACA, this time with a fuller explanation of the conclusion that DACA was unlawful."[30]

The Ninth Circuit was the first to affirm the nationwide injunction, at which point the Supreme Court granted certiorari in all three cases.[31] In June 2020, by a vote of 5-4, the Court affirmed the judgment from the federal district court for the District of Columbia.[32] Once again, however, elections later that year saw party control of the executive branch flip. When President Biden took office, he immediately filed an executive order reinstating DACA.[33]

Of course, the change in administration did not end the litigation—further lawsuits and further injunctions ensued throughout the Biden years and continued into the second Trump administration.[34] Most recently, in January 2025, the Fifth Circuit ruled the DACA program unlawful but nevertheless

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took office)," the administration "rescinded DAPA but left in place DACA and the deferred action relief and employment authorizations granted between the issuance of the DAPA Memo and the district court's decision in the *Texas* litigation").

[26] *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 13 (2020) (describing how the program would be wound down).

[27] *See id.* ("Within days of Acting Secretary Duke's rescission announcement, multiple groups of plaintiffs ranging from individual DACA recipients and States to the Regents of the University of California and the National Association for the Advancement of Colored People challenged her decision.").

[28] *See id.*

[29] *Id.* at 14.

[30] *Id.* at 2.

[31] *Id.* at 15–16.

[32] *Id.* at 36.

[33] *See* Ctr. for Migration Stud., *President Biden's Executive Actions on Immigration*, (Feb. 2, 2021), https://cmsny.org/biden-harris-immigration-executive-actions/#3 [https://perma.cc/D9MP-4FYJ].

[34] *See* Nat'l Immigr. L. Ctr., *DACA Litigation Over the Years* (Jan. 17, 2025), https://www.nilc.org/resources/timeline-daca-in-the-courts/ [https://perma.cc/K63K-M9JB] (providing a timeline of DACA litigation from 2012 to 2025).

left the program in place for current recipients.[35] The ruling means that for the time being, "current beneficiaries can still renew their status, but the program is closed to new applicants, as has been the case for several years."[36] The Fifth Circuit also narrowed the scope of the injunction, holding that Texas was the only state that had demonstrated financial harm from the program.[37] In this case, however, the narrower geographic scope of the injunction is unlikely to make a difference, as there is no reason to believe that President Trump has moved away from his earlier opposition to DACA.

The shifting legal status of DACA reveals the human consequences of political and judicial uncertainty. For approximately half a million recipients, this has meant living with uncertainty that extends far beyond simple legal status. Each judicial decision has transformed their lives into a high-stakes waiting game, where career choices, educational pursuits, and family planning hang in the balance, as recipients face an ever-changing landscape of potential deportation and temporary reprieve.[38] As the Fifth Circuit acknowledged, these individuals have developed significant reliance interests in the program, having built their lives around a promise of temporary security that has been repeatedly challenged.[39] The result is a deeply personal legal confrontation that leaves these young people—brought to the United States as children and now integral parts of American communities—uncertain about their place in the only home they have ever known.[40] What began as an executive policy has become a microcosm of broader political battles, with DACA recipients

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[35] Texas v. United States, 126 F.4th 392, 422 (5th Cir. 2025) ("Though Texas has succeeded on the merits, our previous decision to maintain the stay–not to mention the immense reliance interests that DACA has created–guide us to preserve the stay as to the existing applicants.").

[36] Christina Van Waasbergen, *Fifth Circuit Declares DACA Illegal But Leaves Program In Place For Current Recipients*, Courthouse News Serv. (Jan. 17, 2025), https://www.courthousenews.com/fifth-circuit-declares-daca-illegal-but-leaves-program-in-place-for-current-recipients/ [https://perma.cc/V8U7-7USK].

[37] *See* Texas v. United States, 126 F.4th 392, 421 (5th Cir. 2025) ("Because Texas is the only plaintiff that has demonstrated or even attempted to demonstrate an actual injury, and because that injury is fully redressable by a geographically limited injunction, we narrow the scope of injunction to Texas.").

[38] *See* Nicole Acevedo, *DACA Recipients Worry About Being Ensnared in Trump's Immigration Crackdown*, NBC News (Feb. 12, 2025), https://www.nbcnews.com/news/latino/daca-recipients-trump-deportation-crackdown-dreamers-immigration-rcna191667 [https://perma.cc/4AKQ-TTGU] (noting that fears increased after a middle-school teacher was deported to Honduras; the teacher, at least at one time, had DACA status).

[39] *See* Texas v. United States, 126 F.4th 392, 422 (5th Cir. 2025) (acknowledging "the immense reliance interests that DACA has created" as well as "'[t]he uncertainty of final disposition and the inevitable disruption that would arise from a lack of continuity and stability'") (quoting Texas v. United States, 50 F.4th 498, 531 (5th Cir. 2022)).

[40] *See generally* Acevedo, *supra* note 38; *see also* Rachel F. Moran, *Dreamers Interrupted: The Case of the Rescission of the Program of Deferred Action for Childhood Arrivals*, 53 U. C. Davis L. Rev. 1905, 1946 (2020) (explaining that "[t]hemes of human dignity and liberty are central to the narratives that inspired DACA and were rebuffed by its rescission," and that "[t]hose stories may not have a formal place in the Court's current equal protection jurisprudence, but they have figured prominently in the rhetorical framing of legal challenges to the Trump administration's action").

caught in the crossfire of administrative actions, judicial interventions, and shifting political winds.

B. The Supreme Court's Restriction of Universal Injunctions

In June 2025, the Supreme Court fundamentally changed the landscape for such challenges, ruling 6-3 in *Trump v. CASA* that federal courts lack authority under the Judiciary Act of 1789 to issue "universal injunctions" that protect anyone beyond the named plaintiffs.[41]

Writing for the majority, Justice Barrett held that universal injunctions—those that prohibit government enforcement against anyone, anywhere—"likely exceed the equitable authority that Congress has granted to federal courts."[42] The Court granted partial stays of the nationwide injunctions, limiting their scope to provide relief only to the actual plaintiffs in each case.

Justice Barrett's majority opinion relied heavily on historical analysis, concluding that universal injunctions lack sufficient precedent in 18th-century English equity practice to justify their use under the Judiciary Act of 1789. The Court's approach was notably formalistic, requiring that modern equitable remedies be "sufficiently analogous" to those "traditionally accorded by courts of equity" at the founding.[43] Because English Chancery courts typically issued only party-specific remedies, the Court held that federal district courts today cannot generally enjoin government action beyond the immediate parties before them.[44] "The universal injunction was conspicuously nonexistent for most of our Nation's history," Justice Barrett wrote, noting that these injunctions did not appear until the 1960s and remained rare until the 21st century.[45]

In seeking the universal injunction, the plaintiffs had pointed to equitable proceedings for a "bill of peace."[46] However, the Court held that the closest analog to the bill of peace is the "modern class action."[47] The Court pointed to the procedural limitations in Federal Rule of Civil Procedure 23 and explained that universal injunctions cannot properly be used to circumvent class-action procedure.[48] The majority opinion left open the possibility that broader injunctions may be permissible in certain cases when needed to afford "complete relief" to named plaintiffs, but the Court left further development of that standard to the district courts.[49]

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[41] *See* Trump v. CASA, Inc., 606 U.S. 831, 837 (2025).
[42] *Id*.
[43] *Id.* at 841.
[44] *See id.*
[45] *Id.* at 845.
[46] *Id.* at 847.
[47] *See id.* at 849, 854.
[48] *See id.*
[49] *See id.* at 851.

The *CASA* decision reflected the majority's acceptance of several long-standing criticisms about universal injunctions. Justice Barrett's opinion explicitly acknowledged that these broad remedies incentivized forum shopping.[50] The majority also embraced concerns about asymmetric litigation effects, observing that universal injunctions operated unfairly against the government because "a plaintiff must win just one suit to secure sweeping relief" while "to fend off such an injunction, the Government must win everywhere."[51] Additionally, the Court worried that universal injunctions forced courts into "rushed, high-stakes, [and] low-information" decision-making, as quoted from Justice Gorsuch's earlier writings, undermining the quality of judicial decisions on important legal questions.[52] While critics had also argued that universal injunctions prevented beneficial "percolation" of legal issues through multiple circuits, the majority treated this more as a secondary concern, focusing primarily on fairness to defendants and the integrity of the judicial process.[53]

The separate writings reveal the Justices' expectations for how future litigation may play out. Justice Thomas, joined by Justice Gorsuch, emphasized that "complete relief" operates as a ceiling rather than a mandate, warning lower courts against treating broad relief as automatically required.[54] His concurrence stressed that courts must carefully examine whether genuinely "indivisible" remedies are necessary, setting a high bar for cases where broad relief might still be permissible.[55]

In a separate concurrence, Justice Alito, joined by Justice Thomas, warned of potential "loophole[s]" that could undermine the decision's practical significance.[56] He specifically cautioned against reflexive grants of third-party standing to states seeking to vindicate their residents' rights, and against hasty class certification that might circumvent the new restrictions.[57]

Justice Kavanaugh's lengthier concurrence attempted to reassure practitioners that the Court's emergency docket would continue to provide nationwide uniformity when major federal policies are challenged. His acknowledgment that district courts could still award "preliminary classwide relief that may, for example, be statewide, regionwide, or even nationwide" through Rule 23 proceedings highlights the importance of class-action procedures in challenging future governmental policies.[58]

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[50] *See id.* at 855.

[51] *Id.*

[52] *Id.* at 855 (citing Labrador v. Poe, 144 S.Ct. 921, 927 (2024) (Gorsuch, J., concurring in grant of stay)).

[53] *CASA*, 606 U.S. at 939 n.9 (Jackson, J., dissenting) (explaining that "while many accuse universal injunctions of preventing percolation, the facts of this very suit demonstrate otherwise" and noting that multiple district courts in different circuits had weighed in on the case).

[54] *See id.* at 863 (Thomas, J., concurring).

[55] *Id.* at 865.

[56] *Id.* at 868 (Alito, J., concurring).

[57] *See id.*

[58] *Id.* at 869 (Kavanaugh, J., concurring).

Justice Sotomayor's dissent, joined by Justices Kagan and Jackson, focused on the merits of the underlying case. She pointed out that birthright citizenship has been the settled law since the founding, rooted in English common law's *jus soli* principle, confirmed by the Fourteenth Amendment's Citizenship Clause, and repeatedly upheld by the Supreme Court.[59] As a result, the dissent concluded that the executive order limiting birthright citizenship was "patently unconstitutional."[60]

Justice Jackson's separate dissent went even further, characterizing the majority's approach as an "existential threat to the rule of law."[61] Jackson argued that the Court's decision effectively permits "executive lawlessness" by creating zones where constitutional violations can continue unabated.[62] Her description of the resulting system as potentially creating "a mortal wound" to constitutional governance reflects the depth of liberal justices' concern about the decision's implications.[63]

The dissents' criticism of the ruling suggested potential pathways for future litigation. Given the Court's limitation of preliminary injunctive relief, Justice Sotomayor concluded that "the parents of children covered by the Citizenship Order would be well advised to file promptly class-action suits and to request temporary injunctive relief for the putative class pending class certification."[64] However, it is also possible that the concerns of both the majority and dissenters could be significantly allayed by new legislation that preserves the function of preliminary relief without falling into some of the procedural traps that led so many on both sides of the aisle to criticize the growing strategic use of universal injunctions.

C. The Risks and Benefits of Restoring Injunctive Authority

The factors that originally led to the proliferation of universal injunctions remain present in the post-*CASA* landscape, raising important questions about whether Congress should act to restore broader injunctive authority. First, congressional gridlock continues to drive presidents toward ever more assertive executive policies that often rest on legally tenuous ground.[65] Second, increasing political polarization means both that there is less room for compromise between the parties and less perceived legitimacy for actions taken

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[59] *See id.* at 882 (Sotomayor, J., dissenting).
[60] *Id.* at 915.
[61] *Id.* at 921 (Jackson, J., dissenting).
[62] *Id.* at 941.
[63] *Id.* at 932.
[64] *Id.* at 920 (Sotomayor, J., dissenting).
[65] Elysa M. Dishman, *Generals of the Resistance: Multistate Actions and Nationwide Injunctions*, 54 Ariz. St. L.J. 359, 409 (2022) ("Congressional gridlock prompts presidential administrations to rely on executive orders or agency regulations. In response, AGs have pursued litigation to challenge executive actions.").

by the opposing party.[66] As a result, lawsuits challenging executive action will likely remain common regardless of *CASA*'s restrictions.[67] Finally, and perhaps most importantly, plaintiffs are still able to file lawsuits in districts with judges known to be ideologically favorable, even if they now must either do so on an individual basis or seek class certification.[68]

The Supreme Court's concerns about the pre-*CASA* system were well-founded.[69] Judge shopping drove much of the chaos surrounding preliminary injunctions, as plaintiffs from both parties identified district court judges predictably favorable to their lawsuits, increasing the odds of obtaining nationwide relief to pause challenged government action.[70] As Professor Amanda Frost has pointed out, the plaintiffs challenging President Obama's deferred action "appeared to have strategically filed their case in the Brownsville Division of the Southern District of Texas, where they were nearly certain to have the case assigned to Judge Andrew Hanen, who was already on record as opposing Obama's immigration policies."[71] Similarly, challenges to Trump administration policies were "filed in 'blue states' such as Hawaii, Washington, and Maryland, where the judges were more likely to rule in the plaintiff's favor."[72]

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[66] *See* Alex Zhang, *Ostracism and Democracy*, 96 N.Y.U. L. Rev. Online 235, 239 (2021) (noting the erosion of "longstanding commitments to democratic norms and the perceived legitimacy of one's political opponents").

[67] Brian Highsmith, *Partisan Constitutionalism: Reconsidering the Role of Political Parties in Popular Constitutional Change*, 2019 Wis. L. Rev. 911, 992 (2019) ("[T]his type of litigation appears to be becoming an increasingly frequent occurrence—made both more attractive and feasible by the background condition of hyperpolarization and divided government that uniquely characterizes our modern politics."); Ernest A. Young, *State Standing and Cooperative Federalism*, 94 Notre Dame L. Rev. 1893, 1924 (2019) ("[T]his proliferation is hardly confined to state litigation, and it seems to be largely a symptom of broader maladies of polarized politics and, perhaps, an excess of adversarial legalism generally.").

[68] Alexander Gouzoules, *Choosing Your Judge*, 77 SMU L. Rev. 699, 712 (2024) ("[T]he ideal that judges decide cases based on the neutral application of legal principles—as opposed to politics or ideology—may be undermined when partisan actors (like movement advocacy groups or state attorney generals) shop for judges appointed by their own party."); Alma Cohen & Rajeev H. Dehejia, *Judges Judging Judges: Partisanship and Politics in the Federal Circuit Courts of Appeals* 15 (Nat'l Bureau of Econ. Rsch., Working Paper No. 32920, 2024), https://www.nber.org/system/files/working_papers/w32920/w32920.pdf [https://perma.cc/6ECX-CN76] (reporting increased political polarization within the federal judiciary at the appellate level).

[69] *See* Dishman, *supra* note 65, at 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.").

[70] Ashton Hessee, *Another Opinion by Judge Kacsmaryk: Certifying a Class Action Challenging ACA Regulations on Gender-Affirming Care*, 5 LGBT L. Notes 5, 6 (2022) (stating that the decision to file suit in Amarillo was "brazen judge-shopping," as "[t]here is no particular reason to sue defendants in Amarillo, Texas, other than the fact that suing . . . virtually guaranteed the assignment of the case to Trump-appointee Kacsmaryk," a judge "who is on record as having stated that transgender people are suffering from a delusion and transgender status is in some sense not real").

[71] Frost, *supra* note 18, at 1104–05.

[72] *Id.* at 1105.

This forum shopping—or, more precisely, judge shopping—creates significant legitimacy problems. First, such explicitly partisan judge shopping creates the perception that legal outcomes depend more on judicial selection than on legal reasoning.[73] This is a significant problem for judicial legitimacy, which rests on the foundation of public faith in the impartiality of American courts.[74] The American public is already deeply polarized and inclined to be skeptical of judicial neutrality.[75] Further eroding the public trust would undermine the rule of law.[76]

Furthermore, there is reason to be skeptical of the judges whose districts have served as magnet forums for nationwide injunction cases. These judges tend to issue rulings that are predictably aligned with the plaintiffs' partisan interests.[77] Professor Stephen Vladeck has referred to the process as "the cherry-picking of outlier judges."[78] That is, the judge was chosen by the plaintiffs specifically for his or her perceived partiality—the very opposite of what scholar Ronald Cass has referred to as "rule-of-law values."[79]

Yet, the complete elimination of universal injunctive authority may create equally serious problems for constitutional governance. As the dissenting justices in *CASA* emphasized, injunctions are sometimes necessary to protect the rule of law itself, especially when constitutional and civil rights are threatened.[80] The birthright citizenship litigation illustrates this tension: Citizenship is not just a fundamental right—it is the cornerstone from which other civil and political rights derive.[81] Without injunctive access in citizenship cases,

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[73] *Id.* at 1104 ("[T]he federal judiciary's reputation as impartial and nonpartisan suffers when the public watches judges in the 'red state' of Texas halt Obama's policies, and judges in the 'blue state' of Hawaii enjoin Trump's.").

[74] Cassandra Burke Robertson, *Judicial Impartiality in a Partisan Era*, 70 Fla. L. Rev. 739, 740 (2018) ("Public faith in the impartiality of our courts is the bedrock of American democracy and the rule of law.").

[75] *See id.*

[76] Daniel Perez, *A Political Question Solution to the Alarming Rise of Nationwide Injunctions*, 19 J.L. Econ. & Pol'y 139, 161 (2024) (noting that "[f]orum and judge shopping create the appearance of unequal treatment of the laws and precedent," an issue that "has important ramifications for the rule of law").

[77] *See id.* at 160.

[78] Stephen I. Vladeck, *F.D.R.'s Court-Packing Plan Had Two Parts. We Need to Bring Back the Second*., N.Y. Times (Jan. 7, 2022), https://www.nytimes.com/2022/01/07/opinion/supreme-court-vaccine-mandate.html [https://perma.cc/CV5V-9WFS].

[79] Cass, *supra* note 4, at 20.

[80] *See* Trump v. CASA, Inc., 606 U.S. 831, 900 (2025) (Sotomayor, J., dissenting) (noting that "[t]he universal injunctions in these cases . . . are more than appropriate," because they "protect newborns from the exceptional, irreparable harm associated with losing a foundational constitutional right and its immediate benefits," and "thus honor the most basic value of our constitutional system: They keep the Government within the bounds of law").

[81] Cassandra Burke Robertson & Irina D. Manta, *(Un)civil Denaturalization*, 94 N.Y.U. L. Rev. 402, 462 (2019) ("Citizenship, as the foundation of voting and political participation—which are 'preservative of all rights'—has the requisite importance and historical pedigree to qualify as a fundamental right."); Catherine Yonsoo Kim, *Revoking Your Citizenship: Minimizing the Likelihood of Administrative Error*, 101 Colum. L. Rev. 1448, 1466–70 (2001) (summarizing precedent that "[c]itizenship, once attained, constitutes a fundamental right"); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) ("Though not regarded strictly as a natural right, but as a

affected individuals may face immediate exclusion from fundamental civic participation, including voting rights, access to federal benefits, and protection from deportation, while lengthy litigation proceeds.[82] Such harms cannot be remedied retroactively even if plaintiffs ultimately prevail on the merits.[83]

The practical challenges of post-*CASA* litigation reveal why some form of broad injunctive authority may be necessary. Not every challenge to government authority needs to result in a preliminary injunction.[84] And not every preliminary injunction against government actions needs to apply universally throughout the country.[85] But in cases like the citizenship litigation, nationwide injunctions play an important role. First, they prevent immediate and irreparable harm to individuals who cannot quickly bring their own lawsuits.[86] Second, they protect constitutional rights at the societal level, not just the individual level—an important factor, for example, in the school desegregation litigation where issuing relief only to named plaintiffs would not have remedied the underlying harm in an otherwise segregated institution.[87] Finally, and importantly, nationwide injunctions are sometimes necessary to avoid administrative chaos and confusion. Again, the birthright citizenship orders offer a compelling case in this regard—if the injunction were narrowed geographically, babies born in some states would be recognized as citizens at birth, and babies born in other states would not be.[88] But of course, there is freedom of movement within the United States, so families might move from a state in which their child's citizenship is recognized to a state in which it is not—or vice versa. It would be unrealistic for the government to be able to manage such a system, especially as there is no national database of individual

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privilege merely conceded by society, according to its will, under certain conditions, nevertheless [voting] is regarded as a fundamental political right, because preservative of all rights.").

[82] Disputed citizenship claims for children also increase the risk that U.S. citizens will be wrongfully deported, as reportedly occurred when a four-year-old U.S. citizen undergoing cancer treatment was deported to Honduras along with his mother, despite having a valid claim to birthright citizenship. *See* Daniella Silva, *ICE Sent 3 U.S. Citizen Children, Including Boy with Cancer, to Honduras with Their Deported Moms*, NBC News (Aug. 13, 2025), https://www.nbcnews.com/news/us-news/ice-deport-us-citizen-kids-stage-4-cancer-honduras-rcna224501 [https://perma.cc/2TKG-2B9M].

[83] One ongoing risk, for example, is that government officials may refuse to abide by settled law. *See* Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 Tex. L. Rev. 67, 72 (2019) ("The touchstone for when nationwide injunctions are most necessary and appropriate is when the government acts in bad faith by refusing to abide by settled law.").

[84] Baude & Bray, *supra* note 11, at 169–70 ("It is standard remedial doctrine that preliminary injunctions are supposed to be rare.").

[85] Howard M. Wasserman, *"Nationwide" Injunctions Are Really "Universal" Injunctions and They Are Never Appropriate*, 22 Lewis & Clark L. Rev. 335, 386 (2018) ("Class actions, associational standing, and third-party standing would have allowed for sufficiently broad and protective injunctions prohibiting enforcement of the challenged laws, regulations, and policies, even if those injunctions were not universal and were particularized to the parties.").

[86] Frost, *supra* note 18, at 1094–95 ("Nationwide injunctions are at times the only way to prevent irreparable injury to individuals who cannot easily or quickly join in litigation.").

[87] *Id.* at 1082.

[88] *See* CASA, Inc. v. Trump, 763 F.Supp.3d 723, 746 (D. Md. 2025) (stating that citizenship is "a national concern that demands a uniform policy").

residences.[89] And the passport difficulties would be extreme—a baby born in a location subject to the injunction would be entitled to a United States passport, but would the government revoke that passport if the family moved to a different state?

CASA thus presents Congress with a choice between two imperfect systems. The pre-*CASA* practice of universal injunctions encouraged extreme judicial partisanship and undermined rule-of-law values through judge shopping. But *CASA*'s complete elimination of universal authority threatens to leave constitutional violations unchecked, forcing vulnerable populations to endure ongoing harm while navigating complex procedural requirements. The challenge is designing institutional reforms that preserve meaningful constitutional protection without recreating the legitimacy problems that made universal injunctions so controversial.

III. Institutional Safeguards Through Multi-Judge Panels

CASA's reliance on statutory interpretation rather than constitutional limitations opens a clear path for congressional reform. Because the Court grounded its decision in the text and historical understanding of the Judiciary Act of 1789, Congress retains full authority to authorize broader preliminary injunctive relief through new legislation. This Article proposes that Congress restore universal injunctive authority by requiring three-judge district courts for cases seeking universal preliminary injunctions against federal government action.[90] The proposal offers a balanced legislative reform that would largely preserve the constitutional protection benefits of preliminary injunctions while mitigating their costs and excesses under the current system. This presents an opportunity to address the legitimate institutional concerns that made universal injunctions controversial while preserving meaningful judicial protection against government overreach. Rather than simply restoring the problematic status quo ante, Congress could implement structural reforms that enhance both the deliberative quality and perceived legitimacy of preliminary injunction decisions.

Such a three-judge framework would harness the deliberative advantages of multi-judge panels while avoiding the administrative burdens that plagued earlier incarnations of these courts. Three-judge district courts were popularized in the mid-twentieth century, particularly for highly politicized cases.

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[89] In spite of these difficulties, the government asserted in briefing to the Supreme Court that "the courts could have fully redressed state respondents' asserted financial injuries by directing the government not to apply the Citizenship Order in the States that have sued, even to persons who were born elsewhere but who later move to those States." Application for a Partial Stay of the Injunction Issued by the United States District Court for the District of Maryland at 23, *Trump v. CASA, Inc.*, 145 S. Ct. 2540 (2025) (No. 24A884), 2025 WL 817770, at *23. The government did not offer any suggestions about how such a policy might be done.

[90] *See infra* Part III.B.

They fell out of favor later in the century due to a combination of perceived administrative burdens and a sense of diminished need for such tribunals.[91]

Today, three-judge district courts maintain jurisdiction primarily over constitutional challenges to legislative redistricting, with panels regularly convened to hear gerrymandering claims and disputes over congressional and state legislative maps.[92] Three-judge courts also retain authority in cases brought under specific federal statutes, including certain provisions of the Voting Rights Act[93] and the Bipartisan Campaign Reform Act.[94] The continued success of three-judge courts in politically sensitive litigation suggests that the mechanism remains viable and could be expanded to address the contemporary challenges posed by nationwide injunctions against executive action.[95]

A. The Three-Judge District Court

Three-judge district courts represent a specialized procedural mechanism in the federal judiciary with a rich historical legacy. These panels were created by Congress in 1910 as a direct response to the Supreme Court's controversial decision in *Ex parte Young*, which allowed federal courts to enjoin state officials from enforcing allegedly unconstitutional state laws despite sovereign immunity doctrines.[96] The legislative solution required that three federal judges—typically consisting of the district judge before whom the case was originally filed plus two additional judges, one being a circuit judge—would convene to hear any case seeking to enjoin state legislation on constitutional grounds.[97] Judgments from three-judge district courts could be immediately appealed to the Supreme Court, without requiring intermediate appellate review.[98]

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[91] Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. Mich. J. L. Reform 79, 85–86 (1996) (explaining that lawyers believed at the time that "[m]odern rules of procedure safeguarded against district judges granting precipitous ex parte injunctions"); David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. Chi. L. Rev. 1, 1–8 (1964).

[92] Joshua A. Douglas & Michael E. Solimine, *Precedent, Three-Judge District Courts, and the Law of Democracy*, 107 Geo. L.J. 413, 443 (2019) ("Although it is not clear why Congress kept the three-judge district court for redistricting and campaign finance cases while abolishing it in most other instances in 1976, it seems that an animating rationale was that three judges at the outset are superior for cases involving the political process.").

[93] 52 U.S.C. §§ 10301–10314 (1965).

[94] 52 U.S.C. §§ 30101–30146 (2002).

[95] *See infra* Part III.B.

[96] 209 U.S. 123, 148 (1908). Michael E. Solimine & James L. Walker, *The Strange Career of the Three-Judge District Court: Federalism and Civil Rights, 1954-1976*, 72 Case W. Rsrv. L. Rev. 909, 914 (2022); *see also* Michael T. Morley, *Vertical Stare Decisis and Three-Judge Courts*, 108 Geo. L.J. 699, 727 (2020) ("Many representatives in Congress reacted with alarm at the prospect of federal judges issuing ex parte temporary restraining orders against state laws, sometimes immediately upon their enactment and potentially lasting for months.").

[97] *See* Solimine & Walker, *supra* note 96, at 912.

[98] *Id.*

The creation of these panels served multiple purposes. Senator Lee Slater Overman (D-N.C.), who championed the legislation, saw it as a remedy against federal overreach into state legislative power, memorably stating that it was a "sad day when one subordinate Federal judge can enjoin the officer of a sovereign State" and thereby have "tied the hands of a sovereign State."[99] The three-judge court was designed to address the perception that it was disproportionate for a single federal judge to overturn the work of an entire state legislature. As noted by Professor Michael Solimine, perhaps the nation's foremost expert in the history of three-judge district courts, some legislators believed that "three judges rendering a decision would be less likely to face resistance" than would a single judge.[100] The structure also aimed to reduce the likelihood of hasty or politically motivated decisions by requiring collaborative deliberation.

Over the decades following their creation, three-judge district courts saw their jurisdiction steadily expanded.[101] In 1913, Congress expanded the jurisdiction of three-judge courts to include review of injunctions against orders of state administrative boards.[102] In 1925, Congress extended the three-judge requirement to requests for permanent injunctive relief, not just temporary remedies.[103] Most significantly, in 1937, Congress extended the jurisdiction of three-judge courts to include constitutional challenges to federal legislation—a move that, as Solimine describes, was "a relatively minor remnant of President Roosevelt's storied Court-packing plan."[104]

The three-judge court system gained particular prominence during the Civil Rights Era of the 1950s and 1960s.[105] Solimine explains that civil rights litigators, especially those representing the NAACP and NAACP Legal Defense Fund, "wanted the cases to be before such courts because it negated the prospect of a single, possibly unsympathetic, judge hearing the case, and because three judges were more likely to take the bolder legal steps, on both the merits and remedies, that the cases demanded."[106] Landmark cases like *Brown v. Board of Education*[107] and *Roe v. Wade*[108] were litigated before

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[99] Michael E. Solimine, *Congress*, Ex Parte Young*, and the Fate of the Three-Judge District Court*, 70 U. Pitt. L. Rev. 101, 114 (2008).

[100] *Id.*

[101] *See id.* at 123–34.

[102] *Id.* at 123.

[103] *Id.*

[104] *Id.* at 124; *see also* Douglas & Solimine, *supra* note 92, at 420 ("The theory was that an injunction against a federal statute was as significant as one against a state statute, such that a single federal judge should not have the sole power to enjoin a federal enactment.").

[105] Solimine & Walker, *supra* note 96, at 926 (noting that three-judge district court cases rose from around fifty per year in the 1950s to 320 in 1973).

[106] Solimine, *supra* note 91, at 127.

[107] Brown v. Bd. of Educ., 98 F. Supp. 797 (D. Kan. 1951) (three-judge court), *rev'd*, 347 U.S. 483 (1954).

[108] Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970) (per curiam) (three-judge court), *rev'd in part and aff'd in part*, 410 U.S. 113 (1973), overruled by Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

three-judge district courts with direct appeal to the United States Supreme Court.[109] Overall, plaintiffs challenging the constitutionality of state law tended to have somewhat greater success before three-judge district courts, though the effect was relatively modest.[110]

As three-judge district court cases grew more common, however, they also started to face some backlash. Although some of the cases that qualified for three-judge courts dealt with major policy issues of national importance, many others did not.[111] Convening a special panel for minor cases felt unduly burdensome, and the mandatory Supreme Court appeal wasted limited resources.[112] Congress first curtailed the use of three-judge district courts in reviewing agency actions and antitrust cases.[113] In 1976, Congress went even further and "transferred default responsibility for virtually all constitutional litigation—including challenges to the validity of federal and state statutes—back to single-judge district courts."[114] By this time, the change was viewed as a relatively uncontroversial procedural matter; trust in the judiciary was higher than it had been earlier in the century, and fears of judicial overreach had largely receded.[115]

B. Building Support for Three-Judge Panels as a Path to Restoration

Several commentators and judges have mentioned three-judge district courts as a potential solution to the problems posed by nationwide injunctions. The idea was first floated by Judge Gregg Costa in a response to Professor Samuel Bray's seminal article[116] criticizing nationwide injunctions.[117] Legal

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[109] *See* Morley*, supra* note 96, at 701 (explaining that "[s]ome of the most critical cases in the constitutional canon" were litigated before three-judge courts).

[110] *See* Solimine & Walker, *supra* note 96, at 943 (finding that "there is some support for the notion that three-judge district courts were somewhat more supportive of civil rights plaintiffs than individual district judges").

[111] *See* Morley, *supra* note 96, at 740 (noting that district courts found the requirements "burdensome," and that the Supreme Court faced "numerous routine appeals of agency actions that lacked national importance").

[112] *See* Bradford Mank & Michael E. Solimine, *State Standing and National Injunctions*, 94 Notre Dame L. Rev. 1955, 1981 (2019) ("Dissatisfaction with both types of three-judge district courts festered in the 1960s and 1970s among federal judges and by policymakers, premised on the logistical awkwardness of assembling three judges to try a case; the burdens of direct appeals on the Supreme Court's docket; and the belief that the normal course of litigation was appropriate for challenges to state or federal statutes, just like all other litigation in federal court.").

[113] Morley*, supra* note 96, at 741.

[114] *Id.* at 744.

[115] *Id.* ("[T]his was treated as a purely procedural change that would conserve judicial resources without affecting litigants' rights.").

[116] Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417 (2017).

[117] Gregg Costa, *An Old Solution to the Nationwide Injunction Problem*, Harv. L. Rev. Blog (Jan. 25, 2018), https://harvardlawreview.org/blog/2018/01/an-old-solution-to-the-nationwide-injunction-problem/ [https://perma.cc/579P-UHKZ] ("A new statute requiring a three-judge panel could include even stronger medicine against forum shopping at the trial level by requiring

scholar Stephen Vladeck has similarly written an op-ed in favor of the idea.[118] These academic proposals have also found expression in concrete legislative efforts. In May 2023, Representative Deborah Ross (D-N.C.) and Senator Ronald Wyden (D-Or.) introduced the Fair Courts Act, which would prohibit district courts from granting nationwide relief unless the request is heard by a panel of three judges, while also addressing judge shopping through random case assignment requirements.[119]

However, such proposals have largely failed to gain traction, as scholars worry that any revival of such panels would face the same administrative challenges that led Congress to curtail their jurisdiction in the 1970s.[120] Professor Solimine has expressed a cautious optimism that nevertheless sounds a warning about logistical difficulties.[121]

These concerns are understandable when considering a wholesale return to the historical three-judge court model. However, this Article proposes a more targeted and modernized approach that harnesses the deliberative benefits of multi-judge panels while avoiding the administrative burdens that plagued the system in its earlier incarnation. By tailoring the three-judge requirement specifically to universal injunction cases and modifying the appellate review structure, this legislative framework would authorize broader relief while preventing the judge-shopping problems that concerned the Court, creating institutional safeguards that address both constitutional protection and legitimacy concerns.

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that lawsuits seeking nationwide injunctions be randomly assigned to one of the regional circuits for selection of the three-judge panel.").

[118] *See* Vladeck, *supra* note 78 (arguing that requiring three-judge district courts to hear injunction cases "would reduce the cherry-picking of outlier judges because it's harder to find three (or two) such judges than one. And with three-judge panels, we could also expect more consistent decision making and a more efficient path to full merits review by the Supreme Court"); *see also* Alan Morrison, *It's Time to Enact a 3-Judge Court Law for National Injunctions*, Bloomberg Law (Feb. 6, 2023), https://news.bloomberglaw.com/us-law-week/its-time-to-enact-a-3-judge-court-law-for-national-injunctions [https://perma.cc/EL3D-5NDC] (also arguing in favor of multi-member injunction panels).

[119] Fair Courts Act, S. 1758, 118th Cong. (2023); Press Release, Representative Deborah Ross, Ross, Wyden Announce Bill to Stop Judge Shopping and Prevent Rogue Judges From Wielding Undue Power Over Millions of Americans (May 24, 2023), https://ross.house.gov/2023/5/ross-wyden-announce-bill-to-stop-judge-shopping-and-prevent-rogue-judges-from-wielding-undue-power-over-millions-of-americans [https://perma.cc/A6WF-789U].

[120] *See* Howard M. Wasserman*, Congress and Universal Injunctions*, 2021 Cardozo L. Rev. De-Novo 187, 198 (2021) (arguing that the approach creates "perverse incentives" that increase the administrative burden on the courts, potentially recreating "the docket burdens that compelled the Justices to resist prior three-judge statutes and Congress to eliminate routine three-judge courts in 1976"); *see also* Thomas P. Schmidt, *Judicial Minimalism in the Lower Courts*, 108 Va. L. Rev. 829, 907 (2022) ("[T]here would be significant complications around defining the class of cases that should be channeled to three-judge courts and serious inefficiencies around managing the litigation beyond just the entry of the problematic relief.").

[121] *See* Michael E. Solimine, *Three-Judge District Courts, Direct Appeals, and Reforming the Supreme Court's Shadow Docket*, 98 Ind. L.J. Supp. 37, 53 (2023) ("One of the criticisms of the three-judge district court was that it was logistically awkward for multimember trial courts, constituted temporarily by judges pulled from other courts, to permit full adjudication and assemble a full record.").

1. The Case for Reviving Three-Judge Panels

The historical context that initially spurred the creation of three-judge courts bears striking similarities to our present circumstances. Congress established these panels in 1910 amid concerns about single federal judges blocking state legislation, creating institutional tensions between federal courts and state governments.[122] Today, we face an analogous crisis of legitimacy, as political polarization has intensified skepticism about judicial neutrality—and while *CASA* eliminated single-judge universal injunctions, it has not resolved the underlying tensions about judicial intervention in politically sensitive executive policies.[123] The three-judge solution that once helped navigate tensions between federal and state authority could similarly help address contemporary tensions between judicial intervention and executive policymaking.

Three-judge panels offer practical advantages for improving both decision quality and public perception. First, collegial deliberation among multiple judges tends to moderate extreme positions and produce more carefully reasoned decisions.[124] Even when judges disagree, the necessity of articulating positions to colleagues with potentially different perspectives encourages more rigorous analysis.[125] Second, and perhaps more importantly, decisions from multi-judge panels carry enhanced legitimacy—both actual and perceived—especially in politically sensitive cases.[126] A preliminary injunction endorsed by a politically diverse panel of judges signals that the legal concerns transcend partisan interests, potentially reducing the perception that judicial intervention reflects merely political opposition to the administration's policies.[127]

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[122] *See supra* Part III.A; Solimine*, supra* note 99, at 114 (quoting Senator Overman's concern about "one subordinate Federal judge" tying "the hands of a sovereign State").

[123] *See* Robertson, *supra* note 74, at 740 ("Public faith in the impartiality of our courts is the bedrock of American democracy and the rule of law. In an increasingly partisan era, however, there is a growing skepticism of the judiciary's neutrality on politically sensitive issues.").

[124] *See* Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. Pa. L. Rev. 1639, 1650 (2003) ("If one's reasoning or writing admits of ambiguities that one did not intend or legal consequences that one did not foresee, these can be cured through the give-and-take of collegial deliberation.").

[125] *Id.*

[126] *See* Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. Rev. 1219, 1263 (2013) (explaining that "[l]ack of confidence in a single individual is also minimized by selecting a larger panel of decision makers").

[127] *See, e.g.*, Nina Varsava, Michael A. Livermore, Keith Carlson & Daniel N. Rockmore, *Judicial Dark Matter*, 91 U. Chi. L. Rev. 1949, 1985 (2024) (noting that "ideological diversity" will generally "lead to better deliberations and decisions"); Cass R. Sunstein, David Schkade & Lisa Michelle Ellman*, Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 Va. L. Rev. 301, 348 (2004) ("The existence of politically diverse judges and a potential dissent increases the probability that the law will be followed."); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 Yale L.J. 2155, 2176 (1998) ("While a partisan split panel does not negate all partisan influences on *Chevron* review, it clearly moderates such influences and makes doctrine more likely to be followed.").

The administrative burdens that once made three-judge courts unwieldy have substantially diminished in the digital age.[128] When Congress curtailed these courts in 1976, convening judges from different locations required significant logistical coordination and travel expenses. Today, technological advances—particularly remote video proceedings that became standard practice during the COVID-19 pandemic—have dramatically simplified multi-judge proceedings.[129] Judges in different courthouses can now participate in hearings, confer with colleagues, and review joint opinions with minimal disruption to their regular dockets.[130] This technological transformation makes the revival of three-judge courts considerably more practical than when they were restricted nearly five decades ago.

2. *Designing an Effective Three-Judge Framework for Nationwide Injunctions*

This Article proposes a modernized three-judge district court system with several key design features: (1) panels comprised of three district judges from within the circuit in which the case was filed, reducing judge shopping while maintaining reasonable geographic connection; (2) jurisdiction limited specifically to cases seeking universal preliminary injunctions against federal government action, conserving judicial resources; (3) appellate review directed to circuit courts rather than mandatory Supreme Court review, allowing for percolation of legal issues; and (4) leveraging modern technology to minimize the administrative burdens that once made these courts unwieldy.

Some scholars have suggested addressing the concerns about single-judge injunctions by enhancing appellate review rather than reviving three-judge district courts. For example, Professor Thomas Schmidt has proposed a modified appellate approach in which "any district court injunction against a federal policy whose benefit extends beyond the plaintiffs to the dispute would be automatically stayed (except as to the parties) when the government files a motion to stay in the applicable court of appeals," and could not go into

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[128] *See* Mank & Solimine, *supra* note 112, at 1981 (noting that dissatisfaction with three-judge district courts arose in part from the "logistical awkwardness of assembling three judges to try a case"); *see also* Andrew Guthrie Ferguson, *Courts Without Court*, 75 VAND. L. REV. 1461, 1490–91 (2022) ("Online courts offer a measure of transparency and external accountability never before available. New video technology democratizes who can observe and new digital technology captures what is happening in court. Both provide external mechanisms for outsiders to see inside the justice system.").

[129] *See* Christabel Narh, *Zooming Our Way Out of the Forum Non Conveniens Doctrine*, 123 COLUM. L. REV. 761, 803 (2023) ("The pandemic has unprecedently accelerated the normalization and use of videoconferencing proceedings across jurisdictions, thus strengthening the prior weak ties between videoconferencing and the legal field.").

[130] *See, e.g.*, David Freeman Engstrom, *Digital Civil Procedure*, 169 U. PA. L. REV. 2243, 2261 (2021) (explaining that remote proceedings can reduce transaction costs, especially in the "parade of smaller-scale proceedings—status conferences, arguments on motions trained on a specific piece of discovery or claim, and pretrial hearings—that make up civil litigation").

effect unless and until a circuit court panel denies the stay.[131] This approach would provide additional judicial scrutiny without creating a separate procedural mechanism.

However, collegial deliberation at the district court level offers distinct advantages. Most crucially, it allows for collaborative judicial participation during the factual development of the case, rather than merely on review of a completed record. In preliminary injunction hearings, judges can actively question counsel, probe evidentiary weaknesses, and test legal theories while the factual record is still being developed.[132] Multiple judges engaging in this process can identify different factual questions and legal concerns, leading to more thorough development of the issues central to the injunction decision. By contrast, appellate review—even on an expedited basis—necessarily operates on a record already assembled by a single judge, whose individual perspective and priorities shaped the factual development.[133]

To avoid the administrative burdens that led Congress to restrict three-judge courts in the 1970s, a revived system should incorporate several key modifications. First, the requirement for multi-judge panels should be triggered only for preliminary injunctions seeking nationwide relief against federal government action, not for injunctions limited to named plaintiffs or narrower geographic areas. This targeting would focus judicial resources on precisely those cases where the greatest legitimacy concerns arise.[134] Additionally, a single judge should retain authority to deny an injunction without convening a panel, or to grant a time-limited temporary restraining order (typically not exceeding two weeks) to preserve the status quo while a three-judge panel is assembled.[135] This approach would conserve judicial resources while still ensuring multi-judge consideration before any significant nationwide policy suspension takes effect.

Perhaps most importantly, a modernized three-judge court system should decouple these panels from mandatory Supreme Court review. Unlike the historical model where three-judge court decisions were appealed directly to the Supreme Court as of right, a revised system should direct appeals to the appropriate circuit court of appeals with discretionary Supreme Court review

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[131] Thomas P. Schmidt, *Judicial Minimalism in the Lower Courts*, 108 Va. L. Rev. 829, 907–08 (2022).

[132] *See* Anderson v. City of Bessemer, 470 U.S. 564, 574 (1985) ("The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise.").

[133] *Id.* at 575 (explaining that deference to the trial court's fact-finding is appropriate and that "[d]uplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources.").

[134] *See* Cass, *supra* note 4, at 49 (discussing how national injunctions by single judges raise rule-of-law concerns).

[135] This approach maintains the emergency relief function of preliminary injunctions while ensuring more deliberative consideration for longer-term injunctions. *See* Fed. R. Civ. P. 65(b) (allowing temporary restraining orders of limited duration).

available through the normal certiorari process.[136] This modification would address what was perhaps the most significant administrative concern that led to the restriction of three-judge courts—the substantial burden that direct appeals placed on the Supreme Court's docket.[137] With the volume of nationwide injunction cases challenging executive action, expecting the Supreme Court to hear every such case would be unrealistic and inefficient. Circuit court review would allow for issues to percolate through the judicial system, with the Supreme Court retaining authority to grant certiorari in cases raising particularly significant legal questions and resolve circuit splits. Importantly, allowing percolation through the intermediate courts would minimize the risk of further politicizing the Supreme Court docket.[138]

The panel composition should also be structured to mitigate judge shopping while maintaining reasonable geographic connection to the litigation. Rather than randomly assigning judges from across the country, the panel should be comprised of three district judges from within the same circuit where the case is filed.[139] This approach preserves some plaintiff discretion in forum selection—they could still file in circuits perceived as more favorable to their arguments—but significantly dilutes the advantage of selecting a specific, predictably sympathetic judge. For example, plaintiffs challenging Republican administration policies might still file predominantly in the Ninth Circuit, while those challenging Democratic administration policies might prefer the Fifth Circuit, but they could no longer count on assignment to a specific judge with known views on the precise issue at hand.

Critics might argue that three-judge panels could potentially increase the likelihood of nationwide injunctions in high-profile cases, as multiple judges might be more willing than a single judge to take controversial steps.[140] Additionally, such panels might feel less constrained by normal geographic jurisdictional limits when issuing nationwide relief. These concerns, however, are mitigated by the circuit court appeal process proposed here. The appellate court would retain authority not only to affirm or reverse the injunction but

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[136] *Cf.* Mank & Solimine, *supra* note 112, at 1981 (noting that direct appeals to the Supreme Court created "burdens" on the Court's docket).

[137] *See* Szymon S. Barnas, *Can and Should Universal Injunctions Be Saved?*, 72 Vand. L. Rev. 1675, 1709 (2019) ("The administrative difficulties of convening three-judge panels and the increased docket pressure on the Supreme Court's then-larger caseload led Congress to abolish three-judge panels in all but a few areas in 1976.").

[138] *See* James E. Pfander, *The Supreme Court, Article III, and Jurisdiction Stuffing*, 51 Pepp. L. Rev. 433, 469 (2024) ("Bringing such litigation directly to the Supreme Court may not obviously advance the stated goal of lowering the political temperature and redirecting the Court's attention to less politicized docket.").

[139] This approach builds on the existing geographic organization of the federal judiciary while reducing the most problematic aspects of judge shopping. *See* Gouzoules, *supra* note 68, at 712 (discussing problems with partisan judge shopping).

[140] *See, e.g.*, Solimine & Walker, *supra* note 96, at 970 ("Three judges might be more willing to than just one to take the controversial step of issuing a nationwide injunction in a high-profile case.").

also to modify its scope, potentially limiting relief where appropriate.[141] This additional layer of review provides an important check against overly broad injunctions, allowing tailoring of relief to the specific circumstances of each case.

The proposed three-judge framework would restore necessary constitutional protection while addressing the problems that led to *CASA*—offering a legislative solution that preserves judicial protection of constitutional and civil rights while eliminating the most problematic aspects of judge shopping. It maintains the possibility of Supreme Court oversight in cases implicating fundamental constitutional questions, while not burdening the Court with mandatory review of every nationwide injunction case. By enhancing the legitimacy and deliberative quality of preliminary injunction decisions, this approach addresses both procedural and substantive concerns about the current system, offering a promising path forward in an era of increasing judicial polarization. Most importantly, Congress could restore universal injunctive authority without recreating the legitimacy crisis that plagued the pre-*CASA* system, achieving the constitutional oversight function that universal injunctions served while eliminating the institutional problems that made them controversial.

IV. Injunction Security Bonds

The Supreme Court's decision in *CASA* represents one approach to limiting the perceived excesses of universal preliminary injunctions, but it was not the only strategy under consideration. Before *CASA* eliminated single-judge universal injunctions, the Trump administration had attempted to use security bond requirements as an alternative method to constrain nationwide preliminary relief.[142] Now that the Court has directly restricted universal injunctive authority, bond requirements are no longer needed as a limiting mechanism—yet they remain relevant for the narrower forms of injunctive relief that survive *CASA* and for any legislative framework that might restore broader preliminary relief through three-judge courts. High-cost security bonds effectively convert access to preliminary injunctive relief—often the only meaningful protection against potentially unlawful government actions—into a privilege

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[141] *See* Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 Ala. L. Rev. 1, 40 (2019) (explaining that "the decentralized, hierarchical structure of the federal judiciary reflects Congress's deliberate decision to limit the effects of lower courts' rulings rather than maximize protection for third-party nonlitigants"); Zayn Siddique, *Nationwide Injunctions*, 117 Colum. L. Rev. 2095, 2113 (2017) ("When the facts are less straightforward, courts first identify the geographic scope of a plaintiff's injury and then limit injunctive relief accordingly.").

[142] *See Fact Sheet: President Donald J. Trump Ensures the Enforcement of Federal Rule of Civil Procedure 65(c)*, The White House (Mar. 6, 2025), https://www.whitehouse.gov/fact-sheets/2025/03/fact-sheet-president-donald-j-trump-ensures-the-enforcement-of-federal-rule-of-civil-procedure-65c/ [https://perma.cc/G4QC-ZJK2].

available primarily to well-resourced litigants.[143] When government policies potentially violate constitutional guarantees or exceed statutory authority, the affected individuals' ability to seek timely judicial protection should not depend on their capacity to post significant financial security.

This Part argues that security bonds, while serving legitimate purposes in commercial litigation, pose significant problems when applied to constitutional challenges against the government. Courts should generally waive or minimize bond requirements in such cases because substantial bonds create financial barriers that effectively deny access to judicial review for vulnerable plaintiffs seeking to vindicate fundamental rights. Any legislative framework restoring universal injunctive authority should preserve existing judicial discretion under Federal Rule of Civil Procedure 65(c) rather than mandate specific bond amounts that could compound the access-to-justice problems that *CASA* has already created.

If Congress adopts legislation requiring three-judge district courts for universal preliminary injunctions, there will likely be some support to include the issue of security bonds in such a statute. President Trump, confronting more than one hundred lawsuits filed against his administration during the first two months of his second term,[144] issued a memorandum directing administration lawyers to seek security bonds in all cases involving preliminary injunctions.[145] He was not alone in that view. Professor Bray, who has written extensively about preliminary injunction procedures, suggests that expanding the use of security bonds could help constrain some of the procedural device's potential abuses.[146] While *CASA* has eliminated single-judge universal injunctions, security bond issues remain relevant in two key contexts: first, for the individual litigation and class actions that now represent the primary avenues for challenging government policies; and second, for any legislative framework that would restore broader preliminary relief—particularly since three-judge courts could still issue injunctions with nationwide effect under appropriate statutory authorization.

The federal rules of civil procedure set an expectation for security bonds. Federal Rule of Civil Procedure 65(c) establishes that courts "may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs

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[143] *See, e.g.*, Reina Calderon, *Bond Requirements Under Federal Rule of Civil Procedure 65(c): An Emerging Equitable Exemption for Public Interest Litigants*, 13 B.C. Envtl. Aff. L. Rev. 125, 133–34 (1986).

[144] *See Litigation Tracker: Legal Challenges to Trump Administration Actions*, Just Security (Aug. 25, 2025), https://www.justsecurity.org/107087/tracker-litigation-legal-challenges-trump-administration/ [https://perma.cc/W2R9-AZY4].

[145] *See* The White House, *supra* note 142.

[146] *See* Samuel L. Bray, *The Purpose of the Preliminary Injunction*, 78 Vand. L. Rev. 809, 862 (2025) ("An injunction bond allows the court to protect the challenger of the legal norm against irreparable injury by granting a preliminary injunction against enforcement, while ameliorating the irreparable injury of the government defendant (should it ultimately win at trial).").

and damages sustained by any party found to have been wrongfully enjoined or restrained."[147] This rule combines a mandatory directive (courts may issue a preliminary injunction "only if" the movant gives security) with a discretionary safeguard ("an amount that the court considers proper").[148] Although the circuits have taken somewhat different approaches to injunction security bonds,[149] courts generally have interpreted this provision to allow substantial flexibility—including the discretion to require nominal bonds or waive the requirement entirely in appropriate cases.[150] The bond requirement makes considerable sense in commercial disputes, where a defendant's economic interests could suffer measurable financial harm from an erroneously issued injunction, and where the rule's protection ensures that defendants can recover documented financial losses.[151]

The policy rationale for injunction security is different when it comes to suits against the government. Government funds, after all, are ultimately the public's money. When policy implementation is wrongfully delayed, taxpayers bear that cost. On the other hand, when government action unlawfully violates constitutional rights, the public suffers a far more fundamental harm—the erosion of liberty itself. Unlike financial losses, which can be calculated and potentially recovered, infringements on constitutional freedoms cause irreparable damage that money cannot restore. Requiring substantial security bonds from plaintiffs seeking injunctive relief against government action introduces asymmetric barriers to judicial review that undermine foundational constitutional structures.[152] The government, with its virtually unlimited resources, faces no comparable financial barrier when it seeks to enforce its policies against individuals.

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[147] Fed. R. Civ. P. 65(c).

[148] *Id.*; *see also* Corrigan Dispatch Co. v. Casa Guzman, S. A., 569 F.2d 300, 302–03 (5th Cir. 1978) (stating that FRCP 65 "requires security only in 'such sum as the court deems proper'" and that "[t]he amount of security required is a matter for the discretion of the trial court; it may elect to require no security at all"); Coquina Oil Corp. v. Transwestern Pipeline Co., 825 F.2d 1461, 1462 (10th Cir. 1987) ("[U]nlike the case in which a bond is denied as unnecessary after full consideration, when a trial court fails to contemplate the imposition of the bond, its order granting a preliminary injunction is unsupportable.").

[149] *See* Michael T. Morley, *Erroneous Injunctions*, 71 Emory L.J. 1137, 1165 (2022) (describing the various circuit approaches).

[150] *See* Hoechst Diafoil Co. v. Nan Ya Plastics Corp., 174 F.3d 411, 421 (4th Cir. 1999) (noting that directive is "mandatory and unambiguous" but acknowledging that a "nominal bond" may be appropriate in certain circumstances).

[151] *See* Crowley v. Loc. No. 82, Furniture and Piano Moving, Furniture Store Drivers, Helpers, Warehousemen, and Packers, 679 F.2d 978, 1000 (1st Cir. 1982), *rev'd on other grounds*, 467 U.S. 526 (1984) ("Applicants in commercial cases-merchants, manufacturers, and others-can be assumed capable of bearing most bond requirements, so hardship to them is less of a factor.").

[152] *See* Bray, *supra* note 146, at 863 (acknowledging that "with the injunction bond, over time the plaintiffs are increasing the amount they might have to pay").

A. Recent Judicial Approaches to Security Bonds

Courts have generally recognized the problematic nature of requiring substantial security bonds from plaintiffs challenging government action. In practice, judges are meant to exercise their discretion to require only nominal bonds or waive the requirement entirely in constitutional cases against the government.[153] This pattern reflects an intuitive understanding of the power imbalance between individual plaintiffs and the state.

However, this judicial practice often lacks thorough analytical foundations, often merely replicating the injunction factors themselves. For example, in *PFLAG, Inc. v. Trump*, the plaintiffs sought an injunction against executive orders that conditioned federal funding for medical facilities on denying gender-affirming care to individuals under the age of nineteen.[154] The district court granted an injunction forbidding the government from withholding or terminating existing federal funding.

It found that the plaintiffs had demonstrated a strong likelihood of success on the merits, explaining that "[t]he challenged provisions of the Executive Orders place significant conditions on federal funding that Congress did not prescribe."[155] The court further found that the plaintiffs would face irreparable harm without the injunction, as plaintiffs faced an interruption in medical treatment.[156] The court likewise held that the balance of equities and public interest supported the injunction, noting that while "the Executive is no doubt free to pursue [its desired policies] at the federal level," such changes must go through Congress.[157]

When it came to consideration of the security bond, the government asked for a bond "because 'any preliminary relief would potentially mandate that the Executive spend money that may not be recouped once distributed.'"[158] The court, however, noted that because the plaintiffs had such a high likelihood of success on the merits, it was unlikely that the government would suffer any harm at all.[159] The court therefore declined to order a bond.

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[153] *See, e.g.*, PFLAG, Inc. v. Trump, 769 F. Supp. 3d 405, 455 (D. Md. 2025) (declining to require a bond); Pacito v. Trump, 768 F. Supp. 3d 1199 (W.D. Wash. 2025) (same); CASA, Inc. v. Trump, 763 F. Supp. 3d 723 (D. Md. 2025) (same).

[154] *See PFLAG, Inc.*, 769 F. Supp. 3d at 417 (noting "[t]he Healthcare Order directs all federal agencies to 'immediately take appropriate steps to ensure that institutions receiving Federal research or education grants end'" gender-affirming medical treatment to individuals under the age of nineteen).

[155] *Id.* at 416.

[156] *See id.* at 419 ("After the issuance of the Healthcare Order, medical institutions across the country announced that they were either pausing or cancelling gender-affirming medical care for transgender youth.").

[157] *Id.* at 451 ("Seeking to effectively enact legislation by executive order clearly exceeds the bounds of Article II and thus does not serve the public interest.").

[158] *Id.* at 454.

[159] *See id.* (quoting Md. Dep't of Hum. Res. v. Dep't of Agric., 976 F.2d 1462, 1483 (4th Cir. 1992) (stating that district court has "discretion to set a bond amount of zero where the enjoined or restrained party faces no likelihood of material harm").

The court's bond analysis did not explicitly consider whether the bond analysis should differ when the government is a party. If there is a single standard for both private and public litigation, then the court's analysis would suggest that security bonds should be vanishingly rare in injunction cases. After all, the "likelihood of success on the merits" prong of the injunction analysis is already the most influential factor in the decision of whether or not to grant an injunction.[160] Without such a finding, plaintiffs are unlikely to obtain an injunction at all. But with a finding that the plaintiffs have a high likelihood of success on the merits, the defendants will almost never be able to demand a security bond—after all, if it is more likely than not that they would lose on the merits, then it would necessarily be more likely than not that there would be no damages from being "wrongfully enjoined or restrained."[161]

Several other recent cases denied security bonds with minimal discussion. In one case, refugees and former refugees challenged the government's decision to indefinitely suspend activities under the United States Refugee Assistance Program. The district court granted a preliminary injunction, finding that "Plaintiffs are likely to prove that the Agency Suspension and the Refugee Funding Suspension are arbitrary and capricious and must therefore be set aside under the APA."[162] The court summarily denied the government's request for a security bond without discussion.[163] Likewise, in two of the birthright citizenship cases, the courts denied the government's request for a security bond without significant discussion. The first stated merely that the "security requirement is hereby waived because the defendants will not suffer any costs from the preliminary injunction and imposing a security requirement would pose a hardship on the plaintiffs."[164] The second noted briefly that "[n]o security under Federal Rule of Civil Procedure 65(c) is necessary or warranted in the circumstances of this case," as "the plaintiffs are an individual and two local non-profit organizations, they seek to vindicate an important constitutional and federal statutory right, and the injunction will not expose the defendants to financial loss."[165]

The district court engaged in a somewhat more searching analysis of the security bond requirement in a case where plaintiffs sued to challenge the executive orders aimed at ending "Diversity, Equity, and Inclusion" programs in higher education. It noted that although the government had asked for a

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[160] *See* Baird v. Bonta, 81 F.4th 1036, 1041 (9th Cir. 2023) (concluding that likelihood of success on the merits is often "decisive" in the preliminary injunction analysis); Thomas D. Jeitschko & Byung-Cheol Kim, *Signaling, Learning, and Screening Prior to Trial: Informational Implications of Preliminary Injunctions*, 29 J. L. Econ. & Org. 1085, 1089 (2013) (explaining that likelihood of success on the merits is typically "the critical factor for a successful motion" for a preliminary injunction).

[161] Fed. R. Civ. P. 65(c).

[162] Pacito v. Trump, 768 F. Supp. 3d 1199, 1234 (W.D. Wash. 2025).

[163] *See id.* at 1239 ("No security bond is required under Federal Rule of Civil Procedure 65(c).").

[164] CASA, Inc. v. Trump, 763 F. Supp. 3d 723, 747 (D. Md. 2025).

[165] Doe v. Trump, 766 F. Supp. 3d 266, 289 (D. Mass. 2025).

security bond, it could "point to no example of a court ordering a bond in analogous circumstances."[166] It also noted that courts had "frequently waived the bond requirement in cases where a fundamental constitutional right [was] at stake."[167] Finally, the court explained that setting a substantial bond would likely "forestall Plaintiffs' access to judicial review."[168] As a result, the court ultimately "set a nominal bond of zero dollars."[169]

B. The Risk That Security Bonds Will Impair Constitutional Oversight

Engaging in a deeper analysis about why security bonds may be denied or reduced in fundamental-rights cases is important. As noted above, courts frequently reduce or waive bond requirements without fully articulating why traditional security concerns should apply differently when the government is the defendant.[170] This analytical gap leaves the doctrine surrounding security bonds in government litigation underdeveloped and vulnerable to inconsistent application. There are valid reasons why judges might exercise their discretion to deny security bonds when issuing preliminary injunctions in litigation against the government.[171] Articulating a more principled framework would better secure access to justice while providing clearer guidance to both litigants and courts.

One part of that framework should consider the existing power imbalance between the parties in constitutional litigation. This imbalance is particularly stark when considering that constitutional litigation often involves individual citizens of modest means confronting the full power and resources of the state.[172] The asymmetry also appears in the impact of erroneous decisions: if the government wrongfully enforces an unlawful policy, affected individuals often have no practical remedy for the resulting harm, while the government can recover against a bond if an injunction is later deemed improper.

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[166] Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump, 767 F. Supp. 3d 243, 290 (D. Md. 2025), *opinion clarified*, 769 F. Supp. 3d 465 (D. Md. 2025).

[167] *Id.* at 291 (citing Honeyfund.com, Inc. v. DeSantis, 622 F. Supp. 3d 1159, 1186 (N.D. Fla. 2022) (First Amendment); Thomas v. Andino, 613 F. Supp. 3d 926, 956 (D.S.C. 2020) (voting rights); Nat. Res. Def. Council, Inc. v. Morton, 337 F. Supp. 167, 168 (D.D.C. 1971) (environmental litigation)).

[168] *Id.*

[169] *Id.*

[170] *See supra* Part IV.A.

[171] *See* Mary Kay Kane & Alexandra D. Lahav, *§ 2954 Requirement of Security for the Issuance of a Preliminary Injunction or Temporary Restraining Order, in* 11A Federal Practice & Procedure n.29 (3d ed. 1998 & Update May 2025) (collecting cases); *see also* Charles Alan Wright & Arthur R. Miller, 11A Federal Practice and Procedure § 2954 (3d ed. 2025).

[172] *See* Dan B. Dobbs, *Should Security Be Required as a Pre-Condition to Provisional Injunctive Relief?*, 52 N.C. L. Rev. 1091, 1112 (1974) ("Though [the bond premium] is not likely to represent a large sum of money—premiums run only about twenty dollars a year per one thousand dollars—it may be too large for the indigent plaintiff who nevertheless has a legitimate claim to provisional relief.").

Such requirements thus contradict the basic constitutional design that assigns to courts the responsibility to enforce legal constraints on governmental power regardless of the financial status of those whose rights are threatened. When government policies potentially violate constitutional guarantees or exceed statutory authority, the affected individuals' ability to seek timely judicial protection should not depend on their capacity to post significant financial security.[173] The practical impact of this principle becomes clear when examining recent high-profile constitutional challenges.

Consider the DACA cases discussed above as well as the recent birthright-citizenship cases.[174] The plaintiffs in these cases included pregnant asylum seekers, and young adults from immigrant families.[175] Had significant bond requirements been imposed, even the few individual plaintiffs who managed to bring cases might have been unable to obtain preliminary relief, leaving thousands to suffer potentially irreparable harm while awaiting final adjudication. This dynamic effectively creates a two-tiered system of constitutional protection, where access to judicial review depends on financial capacity rather than the strength of one's legal claims.

The security bond requirement presents particularly acute problems in cases involving core constitutional rights or affecting vulnerable populations.[176] Executive actions addressing immigration, voting rights, religious freedoms, or similar matters frequently impact thousands of individuals who lack substantial financial resources. Demanding bonds sized to reflect the government's claimed costs of delayed implementation would place preliminary injunctive relief beyond reach for most affected parties, regardless of the merit of their legal claims.[177] This practical immunity from preliminary injunctive

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[173] *See* Erin Connors Morton, *Security for Interlocutory Injunctions Under Rule 65(c): Exceptions to the Rule Gone Awry*, 46 Hastings L.J. 1863, 1904 (1995) ("In noncommercial cases, such as those involving the vindication of constitutional rights or public benefits rights under a federal statute, waiver may be appropriate."); *see also Recovery for Wrongful Interlocutory Injunctions Under Rule 65(c)*, 99 Harv. L. Rev. 828, 835 (1986) (arguing that courts should be required to set bond in an amount "sufficient to compensate fully an injured defendant," except in cases "involving indigent or public interest plaintiffs"); Alexander T. Henson & Kenneth F. Gray, *Injunction Bonding in Environmental Litigation*, 19 Santa Clara L. Rev. 541, 552 (1979) ("[T]he bond requirement is unjustified as a tool of deterrence and presents a serious obstacle to environmental litigation."); Complete Angler, LLC v. City of Clearwater, Fla., 607 F. Supp. 2d 1326, 1335 (M.D. Fla. 2009) ("Waiving the bond requirement is particularly appropriate where a plaintiff alleges the infringement of a fundamental constitutional right.").

[174] *See supra* Part II.

[175] *See id.*

[176] *See* Borough of Palmyra, Bd. of Educ. v. F.C. Through R.C., 2 F. Supp. 2d 637, 646 (D.N.J. 1998) ("The court should also consider whether the applicant seeks to enforce a federal right and, if so, whether imposing the bond requirement would unduly interfere with that right."); *see also* Abdullah v. Cnty. of St. Louis, Mo., 52 F. Supp. 3d 936, 948 (E.D. Mo. 2014) ("Given the constitutional issues at stake here and taking into account plaintiff's status as employee of a not-for-profit entity, I will set the bond in the amount of $100.").

[177] *See* Dobbs, *supra* note 172, at 1112 ("Though [the bond premium] is not likely to represent a large sum of money—premiums run only about twenty dollars a year per one thousand dollars—it may be too large for the indigent plaintiff who nevertheless has a legitimate claim to provisional relief.").

processes for many government actions contradicts the carefully calibrated system of checks and balances established in our constitutional framework.[178] While the executive branch legitimately enjoys significant authority to implement policy, that authority remains bounded by constitutional and statutory constraints that courts must enforce.[179] Security bond requirements that shield many government actions from judicial review during their implementation phase undermine this constitutional balance and weaken the judiciary's vital role in ensuring government actions stay within legal boundaries.

C. Balancing Judicial Discretion

Given these constitutional interests underlying litigation against the government, how should courts interpret Federal Rule of Civil Procedure 65 to avoid requiring plaintiffs to pay simply to protect their constitutional rights? While the text of Rule 65 grants discretion to judges, that discretion operates within boundaries—the rule requires security in "an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained."[180] This language raises critical interpretive questions: What factors should courts consider when determining a "proper" amount in cases challenging government action? Can courts legitimately set bonds at nominal amounts—or waive them entirely—when plaintiffs seek to vindicate fundamental constitutional rights? And can courts consider less than the full amount of claimed administrative costs when determining what is "proper" in the constitutional context?

Several interpretive principles can guide courts in answering these questions while respecting both the text of Rule 65 and the unique context of constitutional litigation against the government. First, in considering financial costs, courts should assess whether the government's stated costs for policy delay would be offset by implementation savings.[181] When the government is attempting to establish a new policy—whether restricting birthright citizenship or prohibiting gender-affirming care—the costs of delaying implementation through an injunction may be balanced by avoiding immediate

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[178] *See* Temple U. v. White, 941 F.2d 201, 220 (3d Cir. 1991) ("A district court should consider the impact that a bond requirement would have on enforcement of such a right, in order to prevent undue restriction of it.").

[179] *See* Christine Cheung, *Judicial Overreach or a Necessary Check on Executive Power? The Implications of Trump v. Hawai'i and the Resulting Push Against Nationwide Injunctions*, 93 S. Cal. L. Rev. Postscript 89, 107 (2020) (stating that "[e]xecutive aggrandizement is problematic because the president can obtain the positive effects of legislating through executive order while maintaining the first-mover advantage compared to Congress").

[180] Fed. R. Civ. P. 65(c).

[181] This standard imports a general principle from commercial law—that "expenses saved" are a component of damages. *See* David W. Barnes & Deborah Zalesne, *A Unifying Theory of Contract Damage Rules*, 55 Syracuse L. Rev. 495, 543 (2005) (explaining that "[w]hether costs are anticipated or actual, the surplus-based rule reflects the impact on damages of 'expenses saved'").

expenditures on new administrative systems. Developing procedures, training personnel, and establishing compliance mechanisms all carry expenses that might be averted while litigation proceeds. If these implementation costs potentially outweigh the costs of waiting until the merits can be litigated, courts would be justified in finding that the government faces no substantial financial loss even if the injunction is later deemed erroneous.

Second, the bond analysis should recognize the asymmetry of party interests inherent in government litigation. In non-governmental disputes, both parties typically act in their private interest.[182] When the government takes lawful action, it is by definition acting in the public interest.[183] But when the government's action is unlawful, it is the challengers who are acting in the public interest, especially when protecting constitutional and civil rights.[184] Thus, in action against the government, the risk of unwarranted injunctive relief is a risk borne by the public—when lawful government action is restrained, it is the public interest that is harmed.[185] This remains true even in purely financial terms, as any cost to the government is ultimately paid by taxpayers.

As a result, it would be improper for the court to weigh only the financial cost to the government in setting injunction bonds. A more principled approach would weigh the public interest in avoiding unlawful government action against the risk of harm from wrongly restraining government action.[186] In most cases challenging government policies where the injunction factors are otherwise satisfied, a nominal injunction bond should typically offer sufficient security.[187]

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[182] Thus, for example, courts in the United States do not normally award attorneys' fees without a statutory basis for doing so, but may do so in the rare case that the party was acting as a "private attorney general" who sought to benefit more than their own interests. *See* Aaron Bartholomew & Sharon Yamen, *Businesses Beware: The Changing Face of Attorney-Fee Awards in U.S. Courts*, 13 Am. U. Bus. L. Rev. 1, 19 (2024).

[183] This is not to say that the government correctly gauges what is best for the public at any given time; rather, it is a function of our constitutional system that "it falls to some particular government official or agency to determine the content of the public interest on the matter in question." *See* W. Bradley Wendel, *Government Lawyers in the Trump Administration*, 69 Hastings L.J. 275, 302 (2017).

[184] In fact, promoting the public interest is one of the factors supporting the grant of a preliminary injunction. *See, e.g.*, McGuire v. Reilly, 260 F.3d 36, 42 (1st Cir. 2001) (requiring "that the granting of prompt injunctive relief will promote (or, at least, not denigrate) the public interest").

[185] *See, e.g.*, Machesky v. Bizzell, 414 F.2d 283, 289 (5th Cir. 1969) ("First Amendment rights are not private rights . . . so much as they are rights of the general public.").

[186] *See* Rhonda Wasserman, *Equity Transformed: Preliminary Injunctions to Require the Payment of Money*, 70 B.U. L. Rev. 623, 688 (1990) (suggesting that courts might require a higher threshold showing of the injunction factors in cases where the plaintiffs would be unable to pay a substantial bond, and explaining that "[t]his kind of balancing . . . guarantees that preliminary injunctions to require the payment of money will be granted only when the risk of harm to the plaintiff exceeds the risk of harm to the defendant").

[187] *See, e.g.*, Nat. Res. Def. Council, Inc. v. Morton, 337 F. Supp. 167, 169 (D.D.C. 1971) ("The Court believes that the public interest will be far more gravely damaged by failure of the courts to rigorously and consistently enforce NEPA than by any harm which could possibly

Finally, to the extent that costs remain, the government holds a significant advantage in its ability to distribute implementation costs across the entire tax base. Individual plaintiffs, in contrast, would be required to bear the entire financial burden of the bond themselves.[188] This disparity is most pronounced in cases involving vulnerable populations or fundamental rights, where plaintiffs' limited resources contrast sharply with the government's vast financial capacity. Thus, even when plaintiffs suing the government are required to pay a security bond, the individual plaintiffs should not be required to cover the entire cost to the federal government—instead, they should be asked to pay their proportional share. Bonds of a few thousand dollars or less can play a role in deterring meritless injunction applications without being so high as to deny plaintiffs' right to seek judicial review.[189]

These interpretive principles suggest that existing judicial discretion under Rule 65(c) should provide an adequate framework for addressing security bonds in constitutional litigation against the government. Courts already possess the analytical tools necessary to balance access to justice concerns against legitimate government interests, and the cases discussed above show that judges generally reach appropriate outcomes even when their reasoning could be more fully developed. Rather than mandating specific bond amounts or procedures through statute, Congress should preserve this flexibility while trusting that enhanced deliberation in three-judge courts will lead to more thoughtful and consistent bond determinations.

Should Congress nevertheless choose to address security bonds in legislation authorizing three-judge district courts for nationwide preliminary injunctions, any such provision should codify the principles outlined above rather than impose rigid requirements. Appropriate statutory language might specify that courts should consider: (1) whether claimed government costs would be offset by implementation savings; (2) the public interest in preventing unlawful government action; (3) the financial capacity of plaintiffs relative to the government; and (4) the fundamental nature of the rights at stake. Such guidance would provide a clearer analytical framework for courts while preserving the case-by-case flexibility that constitutional litigation demands. Most importantly, any statutory provision should explicitly authorize courts to waive bond requirements entirely when substantial bonds would impair access to judicial review of potentially unlawful government action—ensuring that constitutional protection remains available regardless of plaintiffs' financial resources.

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result from delaying this lease sale long enough to resolve the important legal issues presented by this suit.").

[188] *See id.* at 169 ("It would be a mistake to treat a revenue loss to the Government the same as pecuniary damage to a private party.").

[189] *See* Bragg v. Robertson, 54 F. Supp. 2d 635, 653 (S.D.W. Va. 1999) (imposing a $5,000 bond in an action seeking to enjoin mining activity based on the allegation that state and federal agencies had improperly approved permit applications).

V. Conclusion

The Supreme Court's decision in *Trump v. CASA* represents a watershed moment in the evolution of federal litigation, ending the era of routine universal preliminary injunctions while creating new challenges for constitutional enforcement. While the Court's elimination of single-judge nationwide injunctions addressed legitimate concerns about forum shopping and judicial partisanship, it may have overcorrected—potentially leaving government overreach unchecked while affected parties navigate the complexities of class certification and coordinated litigation. The deeper structural tensions that gave rise to universal injunctions—congressional gridlock driving executive unilateralism, political polarization eroding institutional trust, and the courts' role as primary arbiter of policy disputes—remain unresolved after *CASA*.

Congress now faces a critical choice. The Court's reliance on statutory interpretation rather than constitutional limitations provides a clear pathway for legislative action to restore broader injunctive authority. However, any such restoration should learn from the problems that made universal injunctions so controversial, implementing structural reforms that enhance both the deliberative quality and perceived legitimacy of preliminary relief decisions.

The revival of three-judge district courts for nationwide preliminary injunctions offers precisely such a balanced approach—one that acknowledges both the legitimate need for judicial protection against potentially unconstitutional government actions and the importance of ensuring these extraordinary remedies receive appropriate multi-judge consideration. By modernizing the three-judge court mechanism—limiting its application to nationwide preliminary injunctions, preserving circuit court review, and leveraging technological advances—Congress can restore meaningful constitutional oversight without recreating the legitimacy problems that plagued the pre-*CASA* system. This structural reform would protect constitutional rights while reducing the most problematic aspects of judicial polarization and judge shopping.

Should Congress choose to address security bonds in such legislation, existing judicial discretion under Federal Rule of Civil Procedure 65(c) provides an adequate framework for balancing access to justice against legitimate government interests. Mandating specific bond requirements would risk creating financial barriers that prevent vulnerable plaintiffs from seeking judicial protection for fundamental rights, undermining the very constitutional oversight function that preliminary injunctions are meant to serve.

In an era where both Republican and Democratic administrations have experienced the disruptive consequences of litigation challenging executive action, a modernized three-judge court system presents a rare opportunity for bipartisan institutional reform. By enhancing the deliberative legitimacy of preliminary relief while preserving robust constitutional protection, this approach offers a path forward that strengthens the rule of law and respects the proper balance between judicial review and executive authority in our constitutional system.