Professional Perspective

# The Current State of Nationwide Injunctions

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# The Current State of Nationwide Injunctions

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This article provides an update on the caselaw and policy surrounding nationwide injunctions. Injunctions in general are an extremely useful tool for civil litigators, and nationwide injunctions, which halt actions from taking place nationwide, can be especially powerful.

Nationwide injunctions have been on the rise over the last few decades, yet there is little in published judicial opinions, or in academic literature, regarding systematic treatment of this phenomenon or how to evaluate the appropriate scope of such an injunction. Recently, nationwide injunctions have been the subject of heated debate and significant criticism.

## Preliminary Injunctions: A Refresher

The authority for a federal court to issue a preliminary injunction (PI) comes from Federal Rule of Civil Procedure 65. In contrast to some other provisional remedies such as temporary restraining orders (TRO), which can typically only last 14 days, preliminary injunctions can be in place for the duration of a litigation. See *Shenzhen Smoore Tech. Ltd. v. Anuonuo Int'l Trade Co.*, No. 19-CV-9896 (LGS) (RWL 2020 BL 413843 (S.D.N.Y. Oct. 23, 2020). In addition, the adverse party must receive notice of a PI before it can be entered. See *Garcia v. Yonkers Sch. Dist.*, 561 F.3d 97, 106 (2d Cir. 2009).

In federal courts, to obtain a PI, the party must establish "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). To obtain a PI in the Second Circuit specifically, an applicant must show "(1) the likelihood of irreparable injury in the absence of an order or injunction; (2) either (a) likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation; and (3) a balance of hardships 'tipping decidedly in the movant's favor.'" *IBM v. De Freitas Lima (IBM)*, No. 7:20-cv-04573 (PMH), 2020 BL 338185 (S.D.N.Y. Sept. 3, 2020).

## Nationwide Injunctions on the Rise

Nationwide injunctions have the effect of halting an action from taking place or a rule or regulation from going into effect nationwide, rather than binding only the litigants in a particular case. They are typically used in response to executive orders or other federal agency rules, regulations, or policies.

The issuance of nationwide injunctions has increased over the last several decades. In a speech on Feb. 12, 2020, Deputy Attorney General Jeffrey Rosen estimated that during the last three administrations, there were 12 nationwide injunctions issued against the Bush administration; 19 nationwide injunctions issued against the Obama administration; and 55 issued against the Trump administration in just over three years.

### *Nationwide Injunctions in Response to Executive Orders*

Nationwide injunctions are often issued in relation to executive orders because they provide an avenue for challengers to quickly prevent implementation and enforcement of such orders.

For example, Executive Order 13673, issued by President Barack Obama on July 31, 2014, was the target of a nationwide injunction. That executive order required government contractors to disclose labor law violations and government contracting officers to consider the information provided when issuing new government contracts.

In challenging the executive order, plaintiffs alleged that it was preempted by federal labor law and violated the First Amendment. *Associated Builders & Contractors of Se. Tex. v. Rung*, 1:16-CV-425, 2016 BL 373832 (E.D. Tex. Oct. 24, 2016). After agreeing with plaintiffs and issuing an injunction, the court noted that it had the authority to enjoin the executive order on a nationwide basis "and found that it [was] appropriate to do so in this case."

On Aug. 6, 2020, President Donald Trump issued Executive Order 13943 that effectively banned the popular WeChat social media app in the U.S. The administration alleged that because the app was owned and operated by the Chinese company Tencent Holdings Ltd., the Chinese government had access to Americans' personal and proprietary information.


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Before the order went into effect, a group of users asked a California federal court to issue a nationwide injunction preventing its implementation. After finding that plaintiffs "have shown serious questions going to the merits of the First Amendment claim," the California federal court issued "a nationwide injunction against the implementation of Executive Order 13943." *U.S. WeChat Users All. v. Trump*, No. 20-cv-05910-LB, 2020 BL 360542 (N.D. Cal. Sept. 19, 2020).

Arguing that national security warranted the executive order, the Trump administration asked the U.S. Court of Appeals for the Ninth Circuit for a stay of the injunction pending appeal. *U.S. WeChat Users All. v. Trump*, No. 20-16908, (9th Cir. Oct. 26, 2020). In a short order issued Oct. 26, 2020, the Ninth Circuit rejected this request.

***Nationwide Injunctions in Response to Federal Agency Policies***

Nationwide injunctions also are issued in relation to the rules, regulations, and policies promulgated by other arms of the executive branch or federal agencies. For example, nationwide injunctions were awarded recently in *Rural & Migrant Ministry v. United States Environmental Protection Agency*, No. 20-cv-10645 (LJL), 2020 BL 505530 (S.D.N.Y. Dec. 29, 2020), and *Northern Plains Resource Council v. U.S. Army Corps of Engineers*, 454 F. Supp. 3d 985 (D. Mont. 2020) (NPRC).

In *Rural & Migrant Ministry*, the plaintiffs (organizations advocating for farm workers) sought a TRO to enjoin a new regulation of the U.S. Environmental Protection Agency, which was scheduled to go into effect on Dec. 29, 2020. 2020 BL 505530. The regulation at issue would roll back previous policies that were aimed at protecting workers from pesticide spray. The court granted the plaintiffs' motion for a TRO and stayed the effective date of the EPA regulation for 14 days, pending a preliminary injunction hearing. The court explained that when a court stays agency action, it does so as applied to all parties and not just parties before the court. Recognizing the skepticism surrounding nationwide injunctions, the court drew an important distinction:

> Although the Second Circuit has noted that "[t]he issuance of nationwide injunctions has been the subject of increasing scrutiny in recent years," *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d at 58, the cases it cited all arose in circumstances where a court enjoined an agency from enforcing a rule that is already in effect. It is by no means obvious that the same analysis follows when the question is whether a regulation should be permitted to go into effect and when the relief sought or granted is not a restraint on officers enforcing a regulation that already has the force of law and that the agency has the responsibility to apply, but instead an order vacating agency action that has never taken effect so the agency can comply with the APA. One concern with nationwide injunctions is that they can leave agency officers under conflicting obligations. When one court enjoins enforcement of a rule already in effect and another court rejects a motion for an injunction, the agency can be left with conflicting duties— the obligation to enforce the law and regulations as in effect in the jurisdiction that has rejected the injunction and the obligation not to do so and to honor a court order where the court has issued an injunction. No such conflict arises in the circumstances here where the Final Rule is not yet in effect.

*Id.* at *24 n.6.

In *NPRC*, in an effort to stop construction of the Keystone XL Pipeline, plaintiffs challenged the U.S. Army Corps of Engineers reissuance of the permit that streamlines the process for maintenance, repair, and removal of electric, telephone, internet, radio, and television cables, lines and wires, as well as any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, including oil and gas pipelines (Nationwide Permit 12). The plaintiffs alleged that Nationwide Permit 12 was improperly issued because the U.S. Army Corps of Engineers (the Corps) failed to adequately consult with the Fish and Wildlife Service regarding possible impacts to endangered species. 454 F. Supp. 3d at 987. After considerable briefing, the district court agreed with plaintiff and issued an order enjoining "the Corps from authorizing any dredge or fill activities under [Nationwide Permit] 12."

The injunction in *NPRC* was very broad because of the scope of activity Nationwide Permit 12 encompassed. Without Nationwide Permit 12 in place, routine maintenance work by any private actor across the country could arguably require an individual permit from the Corps. After a motion for rehearing, the district court modified its order to enjoin, permitting only "projects constructing new oil and gas pipelines," and reinstated the Nationwide Permit for "non-pipeline construction activities and routine maintenance, inspection, and repair activities." *N. Plains Res. Council v. U.S. Army Corps of Eng'rs*, 460 F. Supp. 3d 1030, 1041 (D. Mont. 2020).

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Still concerned this might have a substantial nationwide impact, the Corps appealed to the Ninth Circuit. After the Ninth Circuit rejected a stay pending appeal, the Corps petitioned the U.S. Supreme Court. In a short order issued on July 6, 2020, the Supreme Court rolled back the nationwide reach of the district court's order by staying the injunction "except as it applies to the Keystone XL pipeline, pending disposition of the appeal." *U.S. Army Corps of Eng'rs v. N. Plains Res. Council*, 141 S. Ct. 190 (2020). In effect, the Supreme Court converted the nationwide injunction into one impacting only the parties to the case.

Most recently, on Jan. 26, 2021, a U.S. District Court in Texas blocked—through a nationwide injunction—a Department of Homeland Security 100-day pause on the removal of undocumented individuals from the U.S. *Texas v. United States*, No. 6:21-cv-00003, 2021 BL 25757 (S.D. Tex. Jan. 26, 2021). The judge found that Texas was likely to succeed on the merits on at least two claims: that the 100-day pause should be set aside because it violates federal law, and that defendants arbitrarily and capriciously departed from its previous policy without sufficient explanation. Further, the court found that Texas had presented sufficient evidence that it would suffer injuries if the injunction was not entered in the form of, for example, increased state-provided benefits to non-citizens. Finally, the court found that the injury to Texas outweighed any possible harm to defendants and the injunction would not undermine the public interest.

The court held that the scope of the relief would be nationwide, which the court said was warranted due to a need for uniformity in immigration policies. Even in doing so, the judge recognized that "Nationwide injunctions of executive action are a topic of fierce and ongoing debate in both the courts and the legal academy."

## Impact of Nationwide Injunctions on Individual Litigants

Nationwide injunctions relating to actions of the president or federal agencies can have an impact on civil litigants as well. For example, in 2016, U.S. District Court for the Eastern District of Texas issued a nationwide injunction enjoining the Department of Labor from implementing a new proposed Fair Labor Standards Act Overtime Rule. *Nevada v. U.S. Dep't of Labor*, 218 F. Supp. 3d 520, 534 (E.D. Tex. 2016). The new rule "raised the salary threshold of executive, administrative, or professional employees exempted from the FLSA's requirement that employers provide overtime pay," effectively making more people eligible for overtime pay from their employers.

In June 2017, a full year after the Texas court issued the nationwide injunction, which was still in place, Carmen Alvarez sued her employer, Chipotle, in the U.S. District Court for the District of New Jersey seeking overtime pay pursuant to the Department of Labor Overtime Rule. *Alvarez v. Chipotle Mexican Grill, Inc., et al.*, No. 2:17-cv-04095-KM-JBC (D.N.J. June 8, 2017).

Chipotle filed a motion before the district court in Texas to hold Alvarez and her attorneys in contempt of that court's earlier ruling by commencing suit in federal court in New Jersey, which the court in Texas granted. *Nevada v. U.S. Dep't of Labor*, 321 F. Supp. 3d 709, 729 (E.D. Tex. 2018). Alvarez appealed the contempt ruling to the U.S. Court of Appeals for the Fifth Circuit, which reversed the district court on the grounds that Alvarez was "not in privity with the DOL and not otherwise bound by the injunction." *Texas v. U.S. Dep't of Labor*, 929 F.3d 205, 213 (5th Cir. 2019).

Therefore, Alvarez, as a private party, could seek overtime from her employer, another private party, pursuant to the Overtime Rule. So, while the Department of Labor was enjoined from enforcing the rule, the effective date of the rule was not stayed, and private parties who were not in privity with the DOL were not enjoined from seeking benefits under the rule.

In summary, although in this case the Fifth Circuit reversed the district court's contempt order, the parties were embroiled in litigation for over two years to determine whether a federal agency rule that had been enjoined by a federal court in Texas could nonetheless still have effect as applied to unrelated private parties in New Jersey.

## Nationwide Injunctions in Private Party Litigation

While nationwide injunctions— which are in effect nationwide and apply to parties other than those in the case—almost always arise in the context of executive orders or federal agency actions, the concept of "nationwide" injunctions also appears in private party litigation, but with an important distinction. In the latter instance, while the injunctions are geographically unlimited, they usually apply only to the parties of the case. When such injunctions are issued, it is typically because that is the only mechanism to provide complete relief to the plaintiff. As such, they are not subject to the same criticism.

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One recent example demonstrates this distinguishing factor. In *General Wire Spring Co. v. Vevor Corp.*, 20-CV-00087-RS, 2020 BL 424613 (N.D. Cal. July 6, 2020), the plaintiff alleged that the defendant infringed on its trademark and violated federal competition law by selling products through an Amazon storefront that was nearly identical to the plaintiff's. In granting an injunction prohibiting the defendant from "importing, dealing, marketing, distributing, and selling" the infringing product, the court emphasized that "an injunction should be tailored to eliminate only the specific harm alleged … but should not be so narrow as to invite easy evasion." Because defendant sold and distributed products nationwide, the court held that "an injunction here must similarly extend to the entire U.S. to afford [plaintiff] meaningful relief."

## Increasing Criticism of Nationwide Injunctions

Along with the growth in the number of nationwide injunctions has come a corresponding increase in the voices of disapproval and criticism. For example, federal legislation—entitled the "Nationwide Injunction Abuse Prevention Act of 2019"—was introduced by Senator Tom Cotton and Congressman Mark Meadows, and was referred to the Senate and House Judiciary Committees in September of 2019. S.2464, 116th Cong. (introduced 2019). This proposed legislation would have limited federal injunctions to the parties before the court, and the judicial district of the issuing court. This legislation, however, appears to have stalled and no new legislation appears to have been proposed on this topic since.

Then, in January 2020, U.S. Supreme Court Justice Neil Gorsuch, joined by Justice Clarence Thomas, authored a concurrence in the U.S. Supreme Court case Department of Homeland Security, v. New York in which he criticized the concept of nationwide injunctions. 140 S. Ct 599, 600-01 (2020) (Gorsuch, J., concurring) Gorsuch wrote, "Whether framed as injunctions of 'nationwide,' 'universal,' or 'cosmic' scope, these orders share the same basic flaw—they direct how the defendant must act toward persons who are not parties to the case. … It has become increasingly apparent that this Court must, at some point, confront these important objections to this increasingly widespread practice."

In February 2020, the Senate Judiciary Committee held hearings on nationwide injunctions. The Committee heard testimony from various commentators, including law professors, law firm partners and the D.C. solicitor general, debating the history, wisdom, and constitutionality of nationwide injunctions. At the hearings, the general consensus among those who testified was that nationwide injunctions are, as noted, on the rise. However, there was no agreement on whether Congress or the courts are better suited to address the issue.

## Conclusion

There is no reason to think that the frequency of nationwide injunctions will abate—short of a legislative overhaul or judicial action. Moreover, with President Joe Biden issuing 17 executive orders during his first day in office, the ongoing debate regarding nationwide injunctions is certain to have continuing relevance. Therefore, it will be worthwhile for civil litigants to stay abreast of any forthcoming guidance from federal caselaw regarding the principles which should govern the issuance of nationwide injunctions.

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