

BY SOPEN B. SHAH & NICHOLAS J. SURPRISE

Orders Without Borders:

Universal Injunctions in Federal and State Courts



The recent nationwide injunction against enforcement of the Corporate Transparency Act has caught the attention of many in the legal community. It is not the first nor will it be the last instance of such a court order being requested and granted in the United States. This article discusses the “fierce and ongoing debate” about the legality and propriety of nationwide injunctions and examines whether the same arguments apply to statewide injunctions in Wisconsin.

A universal injunction, sometimes called a “nationwide injunction,” is an equitable remedy that extends beyond the parties in a lawsuit. Courts and commentators use those terms to refer to an injunction against the government that prevents it from implementing or enforcing a statute against anyone.

Federal courts have issued nationwide injunctions about immigration, health care, and the environment, sparking national debate.¹ State courts have also issued “statewide injunctions,” although those have received considerably less attention. We discuss both.

Texas Case About the Corporate Transparency Act

A Texas case about the Corporate Transparency Act (hereinafter the CTA) provides a recent example of a universal injunction.² The CTA requires certain companies to report the personal information of their “beneficial owner[s]” to the U.S. Department of the Treasury.³ Some companies and the National Federation of Independent Business sued in the U.S. District Court for the Eastern District of Texas, arguing that the CTA is unconstitutional both facially and as applied under the First, Fourth, Ninth, and Tenth Amendments to the U.S. Constitution.⁴

After concluding that the CTA is “likely [facially] unconstitutional,” the district court granted a universal preliminary injunction in *Texas Top Cop Shop v. Garland*.⁵ The plaintiffs argued that they sought relief for themselves and all members (about 300,000) of the National Federation of Independent Business, some of which were not parties.⁶ The government argued that granting relief to those entities would “in practical effect” result in

a “controvers[ial]” universal injunction.⁷ The court held that a universal injunction was “appropriate” given the “extent of the constitutional violation” and was necessary to provide the plaintiffs with meaningful, complete relief.⁸ As of press, the CTA remains enjoined following a Fifth Circuit order vacating the Fifth Circuit’s earlier decision to stay the district court’s preliminary injunction, but the government is seeking a stay of the injunction in the U.S. Supreme Court.⁹

Many people are surprised to learn that a single judge has imposed an injunction that covers the entire country. This article discusses the “fierce and ongoing debate” about the legality and propriety of nationwide injunctions.¹⁰ It also examines whether the same arguments apply to statewide injunctions in Wisconsin.

Universal Injunctions and the Federal Judicial Power

Arguments Against Nationwide Injunctions.

Critics of nationwide injunctions argue that they overstep judicial authority by affecting parties not before the court. Article III, Section 1 of the U.S. Constitution vests the “judicial Power of the United States” in federal courts, and Section 2 extends that power to certain “Cases” and “Controversies.”¹¹ The U.S. Supreme Court has interpreted the federal judicial power as the “right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction.”¹² Thus, some scholars argue that nationwide injunctions are improper because the plaintiffs “generally lack Article III standing to seek relief for anyone other than themselves.”¹³

Critics also argue that universal injunctions “may violate the due process rights of non-parties to the litigation” and “effectively transform an

individual-plaintiff lawsuit into a de facto class action, without satisfying the requirements of [Federal] Rule [of Civil Procedure] 23 or giving the injunction's purported beneficiaries notice of the suit or an opportunity to opt out."¹⁴ Some scholars believe that universal injunctions are a creature of the late 20th century and contrary to traditional principles of equity.¹⁵ And some contend that nationwide injunctions encourage forum shopping and increase the risk of "conflicting injunctions issued to the same parties."¹⁶

Arguments in Favor of Nationwide Injunctions. Others disagree. They argue that universal injunctions are "constitutionally permissible" because "[n]othing in the Constitution's text or structure bars federal courts from issuing a remedy that extends beyond the parties."¹⁷ They contend that in some cases "[universal] injunctions are also the only means to provide plaintiffs with complete relief and avoid harm

to thousands of individuals similarly situated."¹⁸ Scholars also dispute the historical claim that universal injunctions were created in the 1960s and are contrary to the equitable powers of the federal courts.¹⁹

Recent U.S. Supreme Court Views. The U.S. Supreme Court has yet to rule definitively on this issue, but some justices have weighed in. Justice Clarence Thomas wrote that he is "skeptical that district courts have the authority to enter universal injunctions" because, in his view, they "did not emerge until a century and a half after the founding" and "appear to be inconsistent with longstanding limits on equitable relief and the power of Article III courts."²⁰ Justice Neil Gorsuch also suggested that universal injunctions are problematic, concluding that they "have little basis in traditional equitable practice," "raise serious questions about the scope of courts' equitable powers under Article III," and lead to "gamesmanship and chaos."²¹

On the other hand, Justice Sonia Sotomayor concluded in one case that a district court "did not abuse its discretion by granting nationwide relief" when, given the "unique circumstances" of the case, a universal injunction was "necessary to provide complete relief to the plaintiffs."²² Justice Brett Kavanaugh, Justice Amy Coney Barrett, and Justice Ketanji Brown Jackson have signaled that the issue may be worth the

courts have wrestled with the lawfulness of universal injunctions in the meantime.²⁶ As most relevant here, the U.S. Court of Appeals for the Seventh Circuit rejected "[a]n outright prohibition of [universal] injunctions" because that "would handcuff the ability of courts to determine the relief that is proper in exceptional circumstances."²⁷ The court said that universal injunctions "present real dangers," such as forum shopping, and "will be appropriate only in rare circumstances."²⁸ The court ultimately approved of an injunction "that may have ... alter[ed] the grants of all grantees program-wide" because "that [wa]s an incidental effect" of providing complete relief to the plaintiff.²⁹ The court noted that the "perceived increase in the utilization of universal injunctions" has "spawned a veritable cottage industry of scholarly articles in the past few years" but left for "another forum" the "question ... whether any such increase signals an expanding judicial over-reach or an increasing executive autocracy."³⁰

Statewide Injunctions

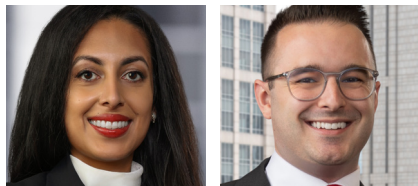
Despite the "cottage industry of scholarly articles" about nationwide injunctions, there has been little discussion about the propriety of statewide injunctions.³¹ Do universal injunctions fall within the judicial power vested in Wisconsin state courts?

The U.S. Supreme Court has yet to rule definitively on this issue, but some justices have weighed in.

Court's review.²³ The Court might opine when ruling on the government's pending stay application in *Texas Top Cop Shop*, which argues that the "universal injunction" is "vastly overbroad."²⁴ But on Jan. 10, 2025, the Court declined to review "[w]hether the court of appeals erred in ordering the district court to enter preliminary relief on a universal basis" in another case.²⁵

The Seventh Circuit's Views. Lower

The Wisconsin Constitution is meaningfully different than the U.S. Constitution, so litigants could argue that some concerns about nationwide injunctions do not apply.³² Article VII, section 2 of the Wisconsin Constitution vests the "judicial power of this state ... in ... one supreme court, a court of appeals, a circuit court, [and] such trial courts of general uniform statewide jurisdiction as the legislature may create by law."³³



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The Wisconsin Constitution contains no analog to the U.S. Constitution’s “Cases” or “Controversies” language.³⁴ Although the Wisconsin Supreme Court said that courts have the “responsibility to exercise judgment in cases and controversies arising under the law,” it has never limited the judicial power to that formulation.³⁵ Indeed, the Wisconsin

The U.S. Court of Appeals for the Seventh Circuit rejected “[a]n outright prohibition of [universal] injunctions” because that “would handcuff the ability of courts to determine the relief that is proper in exceptional circumstances.”

Supreme Court has said that standing is a matter of “sound judicial policy” rather than a limit on the jurisdiction of Wisconsin courts.³⁶ Although federal case law on standing is “persuasive authority,” standing is “construed liberally” in Wisconsin.³⁷ (The same is arguably true for other states.³⁸) As a result, criticisms of universal injunctions that are based on standing might have less weight when applied to statewide injunctions.³⁹

The Wisconsin Constitution also contains a provision absent from the U.S. Constitution that might make statewide injunctions less problematic. Under article VII, section 8, Wisconsin circuit courts “may issue all writs necessary in aid of [their] jurisdiction.”⁴⁰ Wisconsin Statutes section 753.03 provides that circuit courts have “all the powers, according to the usages of courts of law and equity, necessary to the full and complete jurisdiction of the causes and parties and the full and complete administration of justice, and to carry into effect their judgments, orders and other determinations.”⁴¹

To the extent that criticisms of nationwide injunctions are rooted in separation-of-powers principles, those might apply to statewide injunctions in Wisconsin.⁴² Federal “separation of powers principles ... inform [the Wisconsin Supreme Court’s] understanding of the separation of powers under

the Wisconsin Constitution.”⁴³ The Wisconsin Supreme Court has turned to the U.S. Constitution when examining the “judicial power” in the Wisconsin Constitution.⁴⁴

Also, because the Wisconsin Supreme Court revised the class-action rules to align with Federal Rule of Civil Procedure 23, statewide injunctions

might also arguably frustrate the class-action process.⁴⁵

Litigants could consider seeking declaratory relief instead of or in addition to an injunction. To uphold a facial challenge to a statute, in most cases a court must determine that the statute is unconstitutional in all applications.⁴⁶

The court’s reasoning might convince the governmental defendants to stop enforcing the law, although the declaration is not “immediately enforceable through contempt if the government disregards [it].”⁴⁷

Conclusion

Whether universal or nationwide injunctions are consistent with the federal judicial power is the subject of an ongoing debate and a pending application for stay in the U.S. Supreme Court. Statewide injunctions may be less problematic, although fewer scholars and commentators have analyzed the issue. Regardless, understanding the relevant arguments and precedent can help lawyers effectively advocate for their clients and anticipate potential challenges in litigation. **WL**

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ENDNOTES

¹See generally Editorial Board, *District Court Reform: Nationwide Injunctions*, 137 Harv. L. Rev. 1701, 1701-10 (2024) (discussing recent nationwide injunctions).

²See Jay D. Jerde, *Corporate Transparency Act on Hold for Now*, InsideTrack Weekly, Jan. 15, 2025, <https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=17&Issue=1&ArticleID=30820&source=carousel>.

³31 U.S.C. § 5336(b)(2)(A); see also 31 C.F.R. § 1010.380.

⁴See *Texas Top Cop Shop Inc. v. Garland*, No. 4:24-CV-478, 2024 WL 5049220, at *5-7 (E.D. Tex. Dec. 5, 2024).

⁵*Id.* at *37 (emphasis added); see *id.* at *35-36.

⁶*Id.* at *6, 35.

⁷*Id.* at *35-36.

⁸*Id.*

⁹See Application for a Stay of the Injunction Issued by the United States District Court for the Eastern District of Texas, *Garland v. Texas Top Cop Shop Inc.*, No. 24A653 (Dec. 31, 2024) [hereinafter Application for Stay], <https://www.supremecourt.gov/docket/docketfiles/html/public/24a653.html>.

¹⁰*Texas v. United States*, 515 F. Supp. 3d 627, 637 (S.D. Tex. 2021).

¹¹U.S. Const. art. III, §§ 1, 2.

¹²*Muskrat v. United States*, 219 U.S. 346, 361 (1911).

¹³Michael T. Morley, *De Facto Class Actions? Plaintiff and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 Harv. J. L. Pub. Pol'y 487, 516 (2017). But see Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 Tex. L. Rev. 67, 74-90 (2019) (rejecting the constitutional and structural objections to universal injunctions).

¹⁴Morley, *supra* note 13, at 490-91.

¹⁵See Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 424-57 (2017) ("There is an easy, uncomplicated answer to the question [of] whether the national injunction is traceable to traditional equity: no.").

¹⁶See *id.* at 463; see also Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. Rev. 615, 639-53 (2017).

¹⁷Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. Rev. 1065, 1069, 1080 (2018); see also Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 Harv. L. Rev. 920, 922-29 (2020) ("There is only one 'judicial Power,' and that power includes the power to issue injunctions that protect those who are not plaintiffs.")

¹⁸Frost, *supra* note 17, at 1068.

¹⁹Sohoni, *supra* note 17, at 924-29 (finding that the U.S. Supreme Court "issued a universal injunction in 1913" and concluding that "it would be a sharp departure from precedent and practice to treat Article III as requiring the equitable remedial powers of federal courts to be cabined [to only the plaintiff(s) in a lawsuit]").

²⁰*Trump v. Hawaii*, 585 U.S. 667, 713 (2018) (Thomas, J., concurring); see also *FDA v. Alliance for Hippocratic Med.*, 602 U.S. 367, 400-02 (Thomas, J., concurring) (critiquing associational standing and referencing universal injunctions).

²¹*Department of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in grant of stay); see also *United States v. Texas*, 599 U.S. 670, 703 (2023) (Gorsuch, J., concurring in judgment) ("[U]niversal relief, whether by way of injunction or vacatur, strains our separation of powers." Cf. *Labrador v. Poe*, 144 S. Ct. 921, 921 (2024) (Gorsuch, J., concurring in grant of stay) (describing the Court's decision to stay a universal injunction "to the extent it applies to nonparties" a "welcome development").

²²*Trump*, 585 U.S. at 751 n.13 (Sotomayor, J., dissenting) (quoting *Madsen v. Women's Health Ctr. Inc.*, 512 U.S. 753, 765 (1994)).

²³*Griffin v. HM Florida-ORL LLC*, 144 S. Ct. 1, 2 (2023) (statement of Kavanaugh, J., joined by Barrett, J., except as to footnote 1, regarding denial of application for stay) ("The question of whether a district court, after holding that a law violates the Constitution, may nonetheless enjoin the government from enforcing that law against non-parties to the litigation is an important question that could warrant our review in the future."); *Labrador*, 144 S. Ct. at 935 (2024) (Jackson, J., dissenting from grant of stay) ("[E]ven if today's application actually involved a 'universal injunction,' the emergency docket would not be the place to address the open and challenging questions that that issue raises.")

²⁴Application for Stay, *supra* note 9, at 4.

²⁵See Petition for a Writ of Certiorari, *Department of Educ. v. Career Colls. & Schs. of Tex.*, No. 24-413 (Oct. 11, 2024), <https://www.supremecourt.gov/docket/docketfiles/html/public/24-413.html> (question

#2 is "[w]hether the court of appeals erred in ordering the district court to enter preliminary relief on a universal basis"), *cert. granted*, No. 24-413 (Jan. 10, 2025), https://www.supremecourt.gov/orders/courtorders/011025zr_0811.pdf (limiting review to question #1).

²⁶See *City of Chi. v. Barr*, 961 F.3d 882, 909-32 (7th Cir. 2020); see also, e.g., *L.W. v. Skrmetti*, 83 F.4th 460, 489-91 (6th Cir. 2023), *cert. granted sub nom. United States v. Skrmetti*, 144 S. Ct. 2679 (2024); *Rodgers v. Bryant*, 942 F.3d 451, 460-65 (8th Cir. 2019) (Stras, J., concurring in part, dissenting in part).

²⁷*City of Chi.*, 961 F.3d at 917. The court listed several factors that could affect the decision to grant a universal injunction, including "the nature of the violation, the extent of the impact, the urgency of the situation, the multiplicity of litigation, and the ability of others to even access the courts." *Id.*

²⁸*Id.* at 916.

²⁹*Id.* at 931.

³⁰*Id.* at 912-13; see also *Cook Cnty. v. Texas*, 37 F.4th 1335, 1344 (7th Cir. 2022) (mentioning that the "propriety of nationwide injunctions has been debated for years").

³¹But see Panel 1 at 2024 Federalist Society Wisconsin Chapters Conference, *How Broad is a Wisconsin Circuit Court Judge's Authority to Issue Statewide Injunctions?* (May 10, 2024).

³²See *State v. Williams*, 2012 WI 59, ¶ 92, 341 Wis. 2d 191, 814 N.W.2d 460 (Abrahamson, C.J., concurring) ("The United States and Wisconsin constitutions are different with regard to the power of the courts. There is a significant body of law interpreting the phrase 'judicial power' in the federal Constitution, and interpretation is continuing. All or part of this body of law may not be applicable to the Wisconsin Constitution.")

³³Wis. Const. art. VII, § 2.

³⁴U.S. Const. art. III, § 2.

³⁵*Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶ 37, 376 Wis. 2d 147, 897 N.W.2d 384. The Wisconsin Supreme Court has also said that courts have the authority to "hear and determine controversies between parties before courts" and "to finally decide rights and responsibilities as between individuals," *Williams*, 2012 WI 59, ¶ 36, and "the duty of interpreting and applying laws made and enforced by coordinate branches of state government," *Gabler*, 2017 WI 67, ¶ 37.

³⁶*Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶ 17, 402 Wis. 2d 587, 977 N.W.2d 342 (quoting *McConkey v. Van Hollen*, 2010 WI 57, ¶ 15, 326 Wis. 2d 1).

³⁷*McConkey*, 2010 WI 57, ¶ 15. But see *Teigen v. Wis. Elections Comm'n*, 2022 WI 64, ¶ 160, 403 Wis. 2d 607, 976 N.W.2d 519 (Hagedorn, J., concurring) (referencing Wisconsin courts' judicial power and arguing that "the judicial policy buttressing our standing doctrine must stem from our constitutional role"), *overruled by Priorities USA v. Wis. Elections Comm'n*, 2024 WI 32, 412 Wis. 2d 594, 8 N.W.3d 429.

³⁸See Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 Ala. L. Rev. 1, 34 n.183 (2019) (citing *Richardson v. Ramirez*, 418 U.S. 24, 36 (1974) ("While the Supreme Court of California may choose to adjudicate a controversy simply because of its public importance, and the desirability of a statewide decision, we are limited by the case-or-controversy requirement of Art. III to adjudication of actual disputes between adverse parties.")).

³⁹See Morley, *supra* note 13, at 521-38.

⁴⁰Wis. Const. art. VII, § 8. Although federal courts can rely on the All Writs Act to "issue all writs necessary or appropriate in aid of their respective jurisdictions," that is not a constitutional provision, and it requires the writs to be "agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). No such requirement appears in the Wisconsin Constitution.

⁴¹Wis. Stat. § 753.03.

⁴²See Bray, *supra* note 15, at 472; Off. of Pub. Affairs, U.S. Dep't of Just., Attorney General William P. Barr Delivers Remarks to the American Law Institute on Nationwide Injunctions (May 21, 2019), <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-american-law-institute-nationwide>.

⁴³*Gabler* 2017 WI 67, ¶ 11.

⁴⁴Wis. Const. art. VII, § 2; see *State v. Williams*, 2012 WI 59, ¶¶ 34-36, 341 Wis. 2d 191, 814 N.W.2d 460.

⁴⁵See Morley, *supra* note 13, at 490-91; Wis. Stat. § 803.08.

⁴⁶*State v. Forrett*, 2022 WI 37, ¶ 5, 401 Wis. 2d 678, 974 N.W.2d 422.

⁴⁷Howard M. Wasserman, *Concepts, Not Nomenclature: Universal Injunctions, Declaratory Judgments, Opinions, and Precedent*, 91 U. Colo. L. Rev. 999, 1012 (2020). **WL**