

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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DONALD J. TRUMP, PRESIDENT OF THE )  
UNITED STATES, ET AL., )  
Applicants, )  
v. ) No. 24A884  
CASA, INC., ET AL., )  
Respondents. )  
- - - - -

DONALD J. TRUMP, PRESIDENT OF THE )  
UNITED STATES, ET AL., )  
Applicants, )  
v. ) No. 24A885  
WASHINGTON, ET AL., )  
Respondents. )  
- - - - -

DONALD J. TRUMP, PRESIDENT OF THE )  
UNITED STATES, ET AL., )  
Applicants, )  
v. ) No. 24A886  
NEW JERSEY, ET AL., )  
Respondents. )  
- - - - -

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24                                   Washington, D.C.

25                                   Thursday, May 15, 2025

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The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:12 a.m.

APPEARANCES:

GEN. D. JOHN SAUER, Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Applicants.

JEREMY M. FEIGENBAUM, Solicitor General, Trenton, New Jersey; on behalf of the State and City Respondents.

KELSI B. CORKRAN, ESQUIRE, Washington, D.C.; on behalf of the Private Respondents.

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P R O C E E D I N G S

(10:12 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 24A884, Trump versus CASA, Incorporated, and the consolidated cases.

General Sauer.

ORAL ARGUMENT OF GEN. D. JOHN SAUER

ON BEHALF OF THE APPLICANTS

GENERAL SAUER: Mr. Chief Justice, and may it please the Court:

On January 20, 2025, President Trump issued Executive Order 14,160, Protecting the Meaning and Value of American Citizenship. This order reflects the original meaning of the Fourteenth Amendment, which guaranteed citizenship to the children of former slaves, not to illegal aliens or temporary visitors.

Multiple district courts promptly issued nationwide or universal injunctions blocking this order, and a cascade of such universal injunctions followed. Since January 20, district courts have now issued 40 universal injunctions against the federal government, including 35 from the same five

1 judicial districts. This is a bipartisan  
2 problem that has now spanned the last five  
3 presidential administrations.

4 Universal injunctions exceed the  
5 judicial power granted in Article III, which  
6 exists only to address the injury to the  
7 complaining party. They transgress the  
8 traditional bounds of equitable authority, and  
9 they create a host of practical problems.

10 Such injunctions prevent the  
11 percolation of novel and difficult legal  
12 questions. They encourage rampant forum  
13 shopping. They require judges to make rushed,  
14 high-stakes, low-information decisions. They  
15 circumvent Rule 23 by offering all the benefits  
16 but none of the burdens of class certification.  
17 They operate asymmetrically, forcing the  
18 government to win everywhere while the  
19 plaintiffs can win anywhere. They invert --  
20 invert the ordinary hierarchy of appellate  
21 review. They create the ongoing risk of  
22 conflicting judgments. They increase the  
23 pressures on this Court's emergency docket.  
24 They create what Justice Powell described as  
25 repeated and essentially head-on confrontations

1 between the life-tenured and representative  
2 branches of government. And they disrupt the  
3 Constitution's careful balancing of the  
4 separation of powers.

5 I welcome the Court's questions.

6 JUSTICE THOMAS: General Sauer, the --  
7 these universal injunctions, as you say, have  
8 proliferated over the last three decades or so.  
9 Would you discuss, though, the origins of  
10 universal injunctions? In particular, I'm  
11 interested in sort of historical analogues or  
12 the historical pedigree, particularly the bill  
13 of peace that was proffered by Respondents.

14 GENERAL SAUER: Yes, Justice Thomas.  
15 As you, I think, first pointed out in your  
16 separate opinion in Trump against Hawaii, the  
17 bill of peace is something very distinct from a  
18 universal injunction. So the bill of peace  
19 involved a -- a resolution of a small, discrete  
20 set of claims of a small, discrete group. And,  
21 even more fundamentally, it was binding on the  
22 members of that class and those represented by  
23 the class. So it's much more analogous to a  
24 modern class action under Rule 23.

25 And, in fact, as we've argued in other

1 cases and as this Court has described in  
2 opinions like *Ortiz*, the bill of peace evolved  
3 into and has directly developed into, so to  
4 speak, the modern class action that has all  
5 the -- the same features of a bill of peace.

6 So, in the words of Chief Judge Sutton  
7 in the Sixth Circuit, the bill of peace was a  
8 domesticated animal that looks nothing like the  
9 dragon of a universal injunction.

10 JUSTICE SOTOMAYOR: I'm sorry.

11 CHIEF JUSTICE ROBERTS: You --

12 JUSTICE SOTOMAYOR: Here --

13 CHIEF JUSTICE ROBERTS: Go ahead.

14 JUSTICE SOTOMAYOR: Here, there's a  
15 discrete identified group on one issue: Does  
16 citizenship mean are you born in the territory  
17 of the United States, or does it mean are you  
18 loyal to someone else, which is your claim, or  
19 are your parents loyal to someone else?

20 So that's no different than what  
21 happened in a peace -- in a bill of peace. The  
22 United States is bigger, so it extends more  
23 broadly, but it's still an identifiable group on  
24 a discrete, singular question.

25 GENERAL SAUER: Your Honor, I'd say

1 three things in response to that.

2 First of all, our primary contention  
3 is that the Citizenship Clause related to the  
4 children of former slaves, not to illegal aliens  
5 who weren't even present as a discrete class at  
6 that time.

7 But, more fundamentally here, as to  
8 the issue of the bill of peace, there are  
9 critical differences. The bill of peace was a  
10 binding judgment that would bind absent class  
11 members. Here, we have the (a)(C)(3) --

12 JUSTICE SOTOMAYOR: Well, here, class  
13 actions don't bind anyone who opts out, so class  
14 actions are not like bills of peace.

15 GENERAL SAUER: I would think that a  
16 Rule 23(b)(2) class action, which would be the  
17 relevant analogue here, would be one that would  
18 be binding on absent class members and would not  
19 have the same notice and opt-out procedures.

20 And, more fundamentally, that sort of  
21 argument that there's a commonality here among,  
22 you know, all the people who purport to be  
23 affected by this is the sort of argument made in  
24 class certification motions that were never  
25 presented.

1 JUSTICE SOTOMAYOR: So can I ask you a  
2 question? Your theory here is argue -- arguing  
3 that Article III and principles of equity both  
4 prohibit federal courts from issuing universal  
5 injunctions. Do I have your argument correct?

6 GENERAL SAUER: We argue both of those  
7 and there are independent reasons.

8 JUSTICE SOTOMAYOR: You argue both of  
9 those?

10 GENERAL SAUER: Yeah.

11 JUSTICE SOTOMAYOR: If that's true,  
12 that means even the Supreme Court doesn't have  
13 that power.

14 GENERAL SAUER: The Supreme Court  
15 would have the authority to issue binding  
16 precedent nationwide, but as this Court --

17 JUSTICE SOTOMAYOR: But we couldn't  
18 enforce it against -- universally is your  
19 argument?

20 GENERAL SAUER: If there was a -- a --  
21 a decision that violated the precedent of the  
22 Court, then the affected plaintiffs could get a  
23 separate judgment.

24 JUSTICE SOTOMAYOR: And that means --

25 GENERAL SAUER: So -- and that is what

1 this Court --

2 JUSTICE SOTOMAYOR: -- you're --  
3 you're talking about the hundreds and thousands  
4 of people who weren't part of the judgment of  
5 the court. They would all have to file  
6 individual actions?

7 GENERAL SAUER: Not necessarily.  
8 There are other --

9 JUSTICE SOTOMAYOR: Or -- or -- or a  
10 class action?

11 GENERAL SAUER: A class action would  
12 be --

13 JUSTICE SOTOMAYOR: Isn't that -- that  
14 makes no sense whatsoever.

15 GENERAL SAUER: Respectfully, we  
16 believe that --

17 JUSTICE SOTOMAYOR: Well, what was the  
18 purpose of the bill of peace if not to settle a  
19 legal question finally?

20 GENERAL SAUER: In --

21 JUSTICE SOTOMAYOR: And if even the  
22 Supreme Court doesn't have that right and must  
23 invite hundreds of thousands of lawsuits, what  
24 are we buying into?

25 GENERAL SAUER: If a set of claims

1 satisfies the rigorous criteria of Rule 23, Rule  
2 23 is the modern analogue of a bill of peace.  
3 We have something very different here.

4 JUSTICE SOTOMAYOR: So what -- what --

5 CHIEF JUSTICE ROBERTS: Did it --

6 JUSTICE SOTOMAYOR: No, we don't,  
7 because the argument here is that the president  
8 is violating an established -- not just one but,  
9 by my count, four established Supreme Court  
10 precedents.

11 We have the Wong Ark case, where we  
12 said fealty to a foreign sovereign doesn't  
13 defeat your entitlement -- your parents' fealty  
14 to a foreign sovereign doesn't defeat your  
15 entitlement to citizenship as a child. We have  
16 another case where we said that even if your  
17 parents are here illegally, if you're born here,  
18 you're a citizen. We have yet another case that  
19 says, even if your parents came here and were  
20 stopped at the border and -- but you were born  
21 in our territory, you're still a citizen. And  
22 we have another case that says, even if your  
23 parents secured citizenship illegally, you're  
24 still a citizen.

25 So, as far as I see it, this order

1 violates four Supreme Court precedents.

2 GENERAL SAUER: Yeah. We --

3 JUSTICE SOTOMAYOR: And you are -- and  
4 you are claiming that not just the Supreme  
5 Court -- that both the Supreme Court and no  
6 lower court can stop an executive from --  
7 universally from violating that holding -- those  
8 holdings by this Court.

9 GENERAL SAUER: We are not claiming  
10 that because we're conceding that there could be  
11 a -- in an appropriate case, a Rule 23 class  
12 action.

13 JUSTICE SOTOMAYOR: Only a class --  
14 only by a class action.

15 CHIEF JUSTICE ROBERTS: Can I hear  
16 the -- can I hear the rest of his answer?

17 GENERAL SAUER: A Rule 23 class  
18 action. And then the more fundamental point as  
19 to all those Supreme Court decisions you  
20 referred to --

21 JUSTICE SOTOMAYOR: So what do we do  
22 temporarily?

23 GENERAL SAUER: Temporarily, the  
24 court may issue -- the lower courts may issue  
25 injunctions that remediate the injuries to the

1 plaintiffs that appear before them. Lower  
2 courts in appropriate cases may certify class  
3 actions --

4 JUSTICE SOTOMAYOR: So, when a new  
5 president --

6 CHIEF JUSTICE ROBERTS: Could I,  
7 counsel?

8 JUSTICE SOTOMAYOR: -- so, when a new  
9 president orders that because there's so much  
10 gun violence going on in the country and he  
11 comes in and he says, I have the right to take  
12 away the guns from everyone, then people -- and  
13 he sends out the military to seize everyone's  
14 guns -- we and the courts have to sit back and  
15 wait until every named plaintiff gets -- or  
16 every plaintiff whose gun is taken comes into  
17 court?

18 GENERAL SAUER: In appropriate cases,  
19 courts have certified class actions on an  
20 emergency basis. We found at least four cases  
21 in recent years where that was done.

22 But, more fundamentally, we profoundly  
23 disagree with the characterization of the  
24 merits. This is now fully briefed in the Ninth  
25 Circuit in Case Number 25-807, where we describe

1       how that characterization of the holding of Wong  
2       Kim Ark and the other decisions is profoundly  
3       incorrect. And that is --

4                   JUSTICE SOTOMAYOR: You still  
5       haven't --

6                   CHIEF JUSTICE ROBERTS: Counsel, could  
7       I ask you about a different type of -- of case  
8       that has broader impact than on the particular  
9       claimant, like a claimant who's alleging that  
10      the districting in a particular case has  
11      resulted in racial discrimination against him or  
12      her based on how the district is drawn.

13                   Now a judicial decision about that one  
14      plaintiff would implicate the redistricting  
15      throughout the whole case, so -- so --  
16      throughout the whole state.

17                   How -- how does your theory address  
18      that situation?

19                   GENERAL SAUER: That would be what you  
20      might call an indivisible remedy, where what the  
21      Court is doing there by, for example, redrawing  
22      the district lines is, as this Court said in  
23      Gill against Whitford, the only way to remediate  
24      the injury of voting in an unconstitutionally  
25      drawn district, that is similar to abatement of

1 a public nuisance or, for example, in the school  
2 desegregation cases, where remediating the  
3 injury to the plaintiff before the court  
4 necessarily has collateral consequences to many  
5 others.

6 Certain environmental cases might have  
7 a similar thing. For example, you stop the  
8 local plant from pouring, you know, water  
9 pollution into the water. That benefits the  
10 plaintiff. It happens to benefit a bunch of  
11 other people.

12 Now that's very different than what we  
13 have in these universal injunctions, where it is  
14 a divisible remedy. I mean, I point to the  
15 holding of the District of Massachusetts in this  
16 case looking at the individual plaintiffs. That  
17 court said: Well, obviously, I don't have to  
18 give a universal injunction to -- to protect  
19 individuals other than the individual  
20 plaintiffs. They are given complete relief by  
21 an injunction that tells federal officials only  
22 to treat their children as citizens.

23 JUSTICE JACKSON: But why -- I guess  
24 the question is: Why -- why does the law  
25 require that? I mean, I appreciate that a court

1 could, in a divisible remedy kind of case,  
2 narrow in to the plaintiff. But you seem to be  
3 suggesting that Article III or Rule 23 or  
4 something requires that, and I -- I guess I  
5 don't really understand it.

6 GENERAL SAUER: Yeah. If I may offer  
7 two responses to that.

8 JUSTICE JACKSON: Yes. Yes.

9 GENERAL SAUER: In the Article III  
10 context, that is the principle announced in  
11 Warth against Seldin, announced in Gill against  
12 Whitford, in Lewis against Casey, where this  
13 Court has said again and again: What we do in  
14 the Article III context is grant remedy that is  
15 tailored to -- grant remedies that are tailored  
16 to remove the injury to the complaining  
17 plaintiff.

18 Sometimes they have very broad  
19 collateral consequences. But, in the Article  
20 III context, what the Court has not done and  
21 every time it's focused on this in National  
22 Treasuries Union, Employees Union, in the --  
23 the Perkins against Lukens --

24 JUSTICE JACKSON: But I guess I -- I  
25 don't see why then the divisible remedies or

1 indivisible remedies is an argument. I mean, if  
2 Article III is suggesting that the Court has to  
3 focus in on the plaintiff only, then it would  
4 seem to me that that would be the power  
5 requirement across the board.

6 I thought Article III was really about  
7 limiting the Court's power with respect to  
8 jurisdiction, that we say the Court has to  
9 determine whether or not there's subject matter  
10 jurisdiction over the issue and whether or not  
11 there's personal jurisdiction over the  
12 defendant, and once you have those things, the  
13 Court can evaluate the merits of the legal issue  
14 and issue, especially in equity, appropriate  
15 relief.

16 Now I appreciate that there are some  
17 prudential concerns that the Court considers,  
18 but it seems to me that in many, many, many  
19 circumstances we have not required the Court to  
20 limit their relief to the particular plaintiff  
21 as a matter of constitutional Article III  
22 requirement.

23 GENERAL SAUER: I disagree with that.  
24 And I offer a response both, first, as to  
25 Article III and then as to the -- the scope of

1 equitable authority.

2 In the Article III context, this Court  
3 said in Warth against Seldin, for example, that  
4 the Article III judicial power exists only to  
5 redress the injury to the complaining parties.

6 Again, in Gill against Whitford and  
7 Lewis against Casey --

8 JUSTICE JACKSON: All right. So let  
9 me give you a hypothetical. So suppose we have  
10 a manufacturing plant that unlawfully releases  
11 environmental toxins into the air, and we have a  
12 plaintiff who live -- lives near the plant,  
13 brings a nuisance lawsuit and says they're being  
14 harmed by unlawful release.

15 Your argument suggests that the  
16 judgment for the plaintiff has to narrow in on  
17 preventing -- to the extent possible, preventing  
18 harm to the plaintiff. But it seems to me that  
19 that's not necessarily the case.

20 You -- you suggest with the Chief  
21 Justice in response to him that there can be  
22 incidental beneficiaries, that the Court could  
23 say no more toxins if it's unlawful for the --  
24 the defendant to do that, correct?

25 GENERAL SAUER: Yes, we -- that --

1 JUSTICE JACKSON: So why -- why if  
2 your Article III principle is correct?

3 GENERAL SAUER: Because, again, the  
4 Article III principle is remedying the injury to  
5 the plaintiff or set of plaintiffs -- it could  
6 be many -- who are before the court --

7 JUSTICE JACKSON: Right.

8 GENERAL SAUER: -- and that has  
9 collateral consequences that could help.

10 JUSTICE BARRETT: Counsel, let me --  
11 let me ask you on that point: Would one  
12 distinction be who is bound by the judgment?

13 Like, I'm wondering whether if the  
14 plaintiff needs -- you can only -- I think Judge  
15 Strauss said in the Eighth Circuit when  
16 addressing this issue you can't peel off part of  
17 a nuisance, so the whole thing has to be shut  
18 down.

19 Could a neighbor sue affirmatively to  
20 hold the nuisance-maker in contempt if he  
21 started to re-begin, you know, begin again the  
22 nuisance?

23 GENERAL SAUER: That's a great point.  
24 It would not be binding on those collaterally  
25 benefitted parties, so to speak. I don't want

1 to call them parties because they're not parties  
2 before the court. And that, of course,  
3 highlights one of the deep problems with the  
4 universal --

5 JUSTICE JACKSON: No, but why isn't  
6 that the answer, though?

7 JUSTICE BARRETT: Could you do that --

8 JUSTICE JACKSON: I mean, yeah.

9 JUSTICE BARRETT: Could you -- well,  
10 could you do that now for the universal  
11 injunction? Could another -- could a -- could a  
12 plaintiff, for example, who has the protection  
13 of the universal injunction but was not named in  
14 the suit bring a contempt action of the sort I  
15 just described?

16 GENERAL SAUER: They could not do  
17 that, but what they could do is run to any of 93  
18 other judicial districts and bring their own  
19 lawsuit if they -- if they --

20 JUSTICE BARRETT: No, no, no, no.  
21 Under the -- under the injunction as it  
22 stands -- under the injunctions as they stand,  
23 could a non-named plaintiff who has the benefit  
24 of the universal injunction that's currently in  
25 place, could that plaintiff bring a contempt

1 proceeding?

2 GENERAL SAUER: We would --

3 JUSTICE BARRETT: Or I guess I  
4 shouldn't call them a plaintiff. Could that --  
5 could that non-party?

6 GENERAL SAUER: Yeah, we would -- we  
7 would dispute that they would have the standing  
8 to do that because it goes to the heart of the  
9 problem.

10 JUSTICE BARRETT: Well, no, no, no,  
11 I -- I -- let's see. Maybe I'm not being clear.

12 Assume the universal injunction is --  
13 is good. Like, drop your argument right now.

14 GENERAL SAUER: Oh, I see.

15 JUSTICE BARRETT: As they currently  
16 stand, could someone who is not named in this  
17 suit but a beneficiary bring a contempt  
18 proceeding?

19 GENERAL SAUER: I think that that is  
20 what the Respondents --

21 JUSTICE BARRETT: You think they  
22 could?

23 GENERAL SAUER: -- would certainly  
24 contend.

25 JUSTICE BARRETT: Do you concede that

1 the plaintiffs could bring a Rule 23, like the  
2 individual plaintiffs?

3 GENERAL SAUER: We -- we would  
4 dispute -- I mean, we'd have to address the Rule  
5 23 issues, kind of all the criteria as they come  
6 up.

7 JUSTICE BARRETT: Okay. But you  
8 could -- they could seek it. Okay. And then  
9 last question.

10 GENERAL SAUER: And have done that in  
11 Western District of Washington. It's just never  
12 been briefed because the -- they laughed at it.

13 JUSTICE BARRETT: Okay. Just last  
14 question on this point. The states have a  
15 different kind of claim for financial harm, and  
16 they've pointed out that it would be very  
17 difficult to remedy that without some sort of  
18 broader relief.

19 I know you contest their standing. I  
20 want you to assume that I think they have  
21 standing. Why wouldn't they be entitled to an  
22 injunction of the scope of the one that has  
23 currently been entered?

24 GENERAL SAUER: I would say two  
25 reasons.

1           First of all, it's not necessary to  
2 provide complete relief to the plaintiffs. What  
3 we offered, for example, in the District of  
4 Massachusetts in the Second or the First Circuit  
5 was an injunction that would enjoin the federal  
6 officials and order them to treat the people who  
7 would otherwise be covered by the Executive  
8 Order as eligible for the services that result  
9 in the pocketbook injuries to the states.

10           And there's really no response to  
11 that. That is -- obviously would fully  
12 remediate their injuries and does not require  
13 the injunction to be applied in all other 50  
14 states. One state comes in and says, well,  
15 people are going to move across state lines;  
16 therefore, we've got 21 states in this case who  
17 don't want this relief. Sorry, you've got to  
18 impose it on everybody because it has to be --  
19 it has to be offered to this one particular  
20 state. So that's -- that's one response.

21           The other response is this notion that  
22 the states have to be provided complete relief  
23 because of interstate travel and patchwork. I  
24 think that's very effectively responded to by  
25 Chief Judge Sutton's opinion in the Second

1 Circuit, where he says this is a problem. If we  
2 adopt this logic, it justifies a universal  
3 injunction in every single case, and that can't  
4 be the case. The Fifth Circuit's recent DACA  
5 decision comes to the same conclusion.

6 JUSTICE GORSUCH: Well, what do you  
7 say, though, to the suggestion, General, that in  
8 this particular case, those patchwork problems  
9 for, frankly, the government, as well as for  
10 plaintiffs, justify broader relief?

11 GENERAL SAUER: As to the government,  
12 again, Chief Judge Sutton addressed that  
13 directly as well when he said that's the federal  
14 government's problem. In other words, the  
15 federal government -- for example, in the First  
16 Circuit, we offered that as a narrower scope of  
17 injunction, and the decision was: Well, that  
18 would cause you too many administrative  
19 problems. And I think Chief Judge Sutton  
20 directly addresses that when he says that's a  
21 problem for the Executive Branch in the first  
22 instance.

23 JUSTICE GORSUCH: That's your problem.  
24 All right.

25 GENERAL SAUER: Yeah.

1                   JUSTICE GORSUCH:  And then, with  
2   respect to class certification, your -- your  
3   friends on the other side point out that that  
4   takes time, and there are, as you've emphasized,  
5   hurdles that have to be met to achieve class  
6   certification.

7                   And the argument, of course, is that  
8   the injury is immediate and ongoing and, as  
9   Justice Sotomayor suggested, might be seriously  
10  questioned as to its compliance with this  
11  Court's precedents.  Your thoughts?

12                  GENERAL SAUER:  I would offer a couple  
13  things in response to that.

14                  First of all, there are tools to --  
15  for -- the courts have tools to achieve sort of  
16  class-wide universal relief.  I referred earlier  
17  that we found four recent district court  
18  decisions where class-wide relief was given on  
19  kind of an emergency basis.

20                  However, more fundamentally than  
21  that --

22                  JUSTICE GORSUCH:  And you agree that  
23  that's appropriate in -- in certain cases?

24                  GENERAL SAUER:  It may be  
25  appropriate -- we do not concede that it's

1 appropriate in this case, but it may be  
2 appropriate in other cases. Certainly, it's an  
3 equitable tool that is consistent with, for  
4 example, the grant of equitable authority in the  
5 1789 Judiciary Act, as this Court interpreted in  
6 the Grupo Mexicano decision and -- and,  
7 honestly, a line of decisions going all the way  
8 back to the early 19th century. So there are  
9 tools to address emergency situations.

10 But, more fundamentally than that, it  
11 is a feature, not a bug, of Article III that  
12 courts grant relief to the people who sue in  
13 front of them. So the notion that relief has to  
14 be given to the whole world because others who  
15 have not taken the time to sue are not before  
16 the courts --

17 JUSTICE GORSUCH: Last -- last --

18 GENERAL SAUER: -- is something that  
19 results in all of these problems.

20 JUSTICE GORSUCH: -- last question.

21 Do we need to reach the Article III question? I  
22 mean, shouldn't we -- wouldn't it be wise, even  
23 if you were to prevail, for the Court to reserve  
24 that question rather than decide that Congress,  
25 for example, could never endow this Court with

1 that authority?

2 GENERAL SAUER: All the -- that's  
3 exactly correct. The Court does not have to  
4 rest on Article III because the Court could say,  
5 and as we've argued and as Justice Thomas's  
6 separate opinion in Trump against Hawaii says,  
7 the 1789 Judiciary Act, when it said suits in  
8 equity are what the federal courts can do, had  
9 nothing like this in mind.

10 And then I'd point to the language in  
11 Grupo Mexicano where the Court said -- there,  
12 what was at issue was a preliminary injunction  
13 that froze a likely insolvent debtor's assets so  
14 that the plaintiff could collect at the end of  
15 the case, and the Court said that's a nuclear  
16 weapon in the law and we're not -- that -- that  
17 had no analogue in 1789 in the practices of the  
18 Court of Chancery.

19 And if that's a nuclear weapon, I  
20 don't know what this is, where, repeatedly, 40  
21 times in this administration, we're being  
22 enjoined against the --

23 JUSTICE KAGAN: General --

24 GENERAL SAUER: -- against the entire  
25 world.

1 JUSTICE KAGAN: -- I'm just going to  
2 ask to -- you to put yourself in a different  
3 frame of mind, hard to do, assume something you  
4 won't want to assume. But the assumption that I  
5 want you to make is that, on the merits, which,  
6 of course, you did not take to this Court, on  
7 the merits, you are wrong, that the EO is  
8 unlawful.

9 And I want to ask you, if we assume  
10 that, how do we get to that result on your view  
11 of the rules?

12 GENERAL SAUER: It is very difficult  
13 for me to attempt the hypothetical --

14 JUSTICE KAGAN: Yeah. Well --

15 GENERAL SAUER: -- but I will.

16 JUSTICE KAGAN: -- you know, I think  
17 that that's the important question in this case.  
18 Let's just assume you're dead wrong. How do we  
19 get to that result? Does every single person  
20 that is affected by this EO have to bring their  
21 own suit? Are there alternatives? How long  
22 does it take? How do we get to the result that  
23 there is a single rule of citizenship that is  
24 not -- that is -- that is the rule that we've  
25 historically applied rather than the rule that

1 the EO would have us do?

2 GENERAL SAUER: Rule 23 would be one  
3 natural path, assuming that a class could be  
4 certified, which we might dispute in this  
5 particular case.

6 JUSTICE KAGAN: Well, you might  
7 dispute it, and, you know, I mean -- I mean, I  
8 think the question is: Is there a class that's  
9 just all children of people who have entered  
10 illegally? You know, is that an appropriate  
11 class? Can the same thing be done under Rule  
12 23, or are you going to tell me that, no, Rule  
13 23 has lots of requirements, and you'll never be  
14 able to certify a class like that?

15 GENERAL SAUER: Rule 23 provides the  
16 equitable tools subject to rigorous criteria,  
17 appropriately rigorous criteria, to obtain that  
18 kind of class-wide and emergency relief.

19 JUSTICE KAGAN: That suggests to me  
20 you're going to be standing up here in the next  
21 case saying that Rule 23 is inapt for this  
22 circumstance with this number of people, maybe  
23 with some questions that are individual, who  
24 knows. So let's put Rule 23 aside, because I  
25 got to tell you that does not fill me with great

1 confidence.

2           How else are we going to get to the  
3 right result here, which is on my assumption  
4 that the EO is illegal?

5           GENERAL SAUER: That would be a  
6 profoundly wrong result. But I think what I  
7 would offer is that, very similar to Labrador  
8 against Poe, what the Court should be engaging  
9 in here is a balancing of the equitable factors  
10 as to the scope of remedial relief, not as to  
11 the underlying merits.

12           And our contention that this exceeds  
13 the traditional scope of equity that's reflected  
14 in the 1789 Judiciary Act, we're overwhelmingly  
15 likely to succeed on those merits for all the  
16 reasons that I've stated in our briefs and in  
17 the separate --

18           JUSTICE KAGAN: Yeah. I -- I mean,  
19 that's a lot of words, and I don't have an  
20 answer for, if one thinks -- and, you know,  
21 look, there are all kinds of abuses of  
22 nationwide injunctions, but I think that the  
23 question that this case presents is that if one  
24 thinks that it's quite clear that the EO is  
25 illegal, how does one get to that result in what

1 time frame on your set of rules without the  
2 possibility of a nationwide injunction?

3 GENERAL SAUER: On this case and on  
4 many similar cases, the appropriate way to do it  
5 is for there to be multiple lower courts  
6 considering it, the appropriate percolation that  
7 goes through the lower courts, and then,  
8 ultimately, this Court decides the merits in a  
9 nationwide binding precedent.

10 You have a complete inversion of that  
11 through the nationwide injunctions with the  
12 district courts --

13 JUSTICE BARRETT: But, General  
14 Sauer --

15 JUSTICE KAGAN: Let's say --

16 JUSTICE BARRETT: -- are you really  
17 going to answer Justice Kagan by saying there's  
18 no way to do this expeditiously?

19 GENERAL SAUER: Well, I'll refer to my  
20 fourth -- former answer, is Rule 23 provides the  
21 tools to do so, multiple injunctions --

22 JUSTICE BARRETT: But you resisted  
23 Justice Kagan when she said could the individual  
24 plaintiffs form a class.

25 GENERAL SAUER: We -- that has never

1       been briefed in the court below. I do not  
2       concede that we wouldn't oppose class  
3       certification in this particular case. There  
4       may be arguments that this case is or is not  
5       appropriate for class certification. And if  
6       just --

7                   JUSTICE BARRETT: If there were a  
8       class appropriate for class certification, you  
9       concede that that could resolve the question  
10      quickly?

11                   GENERAL SAUER: Yes, absolutely.

12                   JUSTICE BARRETT: You concede it could  
13      resolve the question quickly through precedent?

14                   GENERAL SAUER: Yes, absolutely, it  
15      could do so. I mean, we obviously dispute  
16      the --

17                   JUSTICE KAGAN: So just on that --

18                   JUSTICE GORSUCH: And if -- and if the  
19      Court --

20                   JUSTICE KAGAN: -- point --

21                   JUSTICE GORSUCH: Sorry. Sorry.  
22      Sorry to interrupt. Go ahead, please.

23                   All right. I got a quick one. I got  
24      a quick one. I think it's fair --

25                   JUSTICE KAGAN: Well, I'm going --

1 (Laughter.)

2 JUSTICE KAGAN: -- I'm going to say  
3 just -- I'm just going to say just on that  
4 point, so, you know, let -- let's say that we're  
5 an individual person even, let's say it wasn't a  
6 class, and goes up and gets a ruling from the  
7 Second Circuit that the EO is illegal.

8 Does the government commit to not  
9 applying its EO in the entire Second Circuit, or  
10 does it say, no, we can continue to apply the  
11 rule as to everybody else in the Second Circuit?

12 GENERAL SAUER: I can't say as to this  
13 individual case. Generally, our practice is to  
14 respect circuit precedent within the circuit,  
15 but there are exceptions to that.

16 JUSTICE KAGAN: Yes, that is generally  
17 your practice --

18 (Laughter.)

19 JUSTICE KAGAN: -- and I'm asking  
20 whether it would be your practice in this case.

21 GENERAL SAUER: I can't answer because  
22 it would depend on what the lower court decision  
23 said. So there are circumstances, as I was  
24 suggesting, where we think that we want to  
25 continue to litigate that in other district

1 courts in the same circuit as well as other  
2 circuits.

3 JUSTICE KAGAN: Yeah. So that means  
4 it's not even the normal time it takes for  
5 everything to get up, you know, through the  
6 circuit courts and to the Supreme Court because,  
7 even in those circuits that -- that say that the  
8 EO is illegal, you're going to be saying, no,  
9 you know, we only commit to saying it's illegal  
10 to this one guy who brought the suit.

11 GENERAL SAUER: Article III and the  
12 courts' traditional equitable practices provide  
13 a range of tools to address that, including a  
14 potentially nationwide class action, not --  
15 nationwide -- a universal injunction is not one  
16 of those tools.

17 JUSTICE KAGAN: A nationwide class  
18 action, which you say you're going to oppose  
19 when that gets -- gets challenged --

20 GENERAL SAUER: We are likely to  
21 oppose it on the merits.

22 JUSTICE KAGAN: -- when that gets  
23 put -- you know, proposed.

24 GENERAL SAUER: Yes, and if it does  
25 not meet the rigorous criteria of class

1 certification, the court should not enter that  
2 injunctive relief. That's -- that's a feature,  
3 not a bug.

4 JUSTICE KAGAN: Do you think -- like,  
5 suppose -- how about you're not willing to  
6 commit to abiding by the Second Circuit's  
7 precedent in my -- suppose that there's a single  
8 person who brings a suit and it gets all the way  
9 up to us after three or four or five years, and  
10 we say, you know, we really do agree with those  
11 four precedents that Justice Sotomayor started  
12 with and your EO is illegal.

13 Is -- is -- is that only going to bind  
14 the one guy who brought the suit?

15 GENERAL SAUER: No. That would be a  
16 nationwide precedent that the government would  
17 respect.

18 JUSTICE KAGAN: So, finally, once it  
19 gets to us after four years, you're going to  
20 respect that?

21 GENERAL SAUER: Yes. And in addition,  
22 we may well respect circuit-wide precedent. The  
23 Second Circuit, it just is --

24 JUSTICE KAGAN: And -- and -- and for  
25 four years, there are going to be, like, an

1 untold number of people who, according to all  
2 the law that this Court has ever made, ought to  
3 be citizens who are not being treated as such.

4 GENERAL SAUER: And, in the meantime,  
5 any of those plaintiffs could have come forward  
6 and sought, you know, preliminary injunctive  
7 relief, and they could do so on a class-wide  
8 basis. There are tools to address this, but the  
9 universal injunction which was issued here three  
10 days after the Executive Order was issued is not  
11 one of those tools.

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 counsel.

14 Three -- three years, four years,  
15 we've been able to move much more expeditiously.  
16 I think we did the TikTok case in a month.  
17 Presuming -- I gather an important part of your  
18 answer is that people can litigate differently  
19 and one goes -- one will go to Massachusetts,  
20 the other one will go to Houston, and you'll get  
21 conflicting decisions fairly quickly.

22 Is there any reason why this Court --  
23 and I gather that's your -- your safety net, is  
24 that at the end of the day, whenever -- how long  
25 the day is, this Court can issue a decision and

1 it will bind everything else.

2 Is there any reason in this particular  
3 litigation that we would be unable to act  
4 expeditiously?

5 GENERAL SAUER: Absolutely not,  
6 Mr. Chief Justice.

7 CHIEF JUSTICE ROBERTS: Okay. Thank  
8 you.

9 Justice Thomas?

10 JUSTICE THOMAS: General, when were  
11 the first universal injunctions used?

12 GENERAL SAUER: We believe that the  
13 best reading of that is what you said in Trump  
14 against Hawaii, which is that Wirtz in 1963 was  
15 really the first universal injunction. There's  
16 a dispute about Perkins against Lukens Oil going  
17 back to 1940. And, of course, we point to the  
18 Court's opinion that reversed that -- that --  
19 that universal injunction issued by the D.C.  
20 Circuit and said it's -- it's profoundly wrong.

21 Now, if you look at the -- the cases  
22 that either party cites, you see a common theme.  
23 The cases that we cite, like National  
24 Treasuries, Treasuries Employment Union, Perkins  
25 against Lukens Oil, Frothingham in -- in

1 Massachusetts against Mellon, going back to  
2 Scott against Donald, in all of those, those are  
3 cases where the Court considered and addressed  
4 the sort of universal, in that case, statewide  
5 issue of provision of injunctive relief.

6 So, when the Court has considered and  
7 addressed this, it has consistently said you  
8 have to limit the remedy to the plaintiffs who  
9 are appearing in court and complaining of that  
10 remedy.

11 JUSTICE THOMAS: So we survived until  
12 the 1960s without universal injunctions?

13 GENERAL SAUER: That's exactly  
14 correct. And, in fact, those were very  
15 limited -- very rare even in the 1960s. It  
16 really exploded in 2007 in our cert petition in  
17 Summers against Earth Island Institute. We  
18 pointed out that the Ninth Circuit had started  
19 doing this in a whole bunch of cases involving  
20 environmental claims.

21 CHIEF JUSTICE ROBERTS: Justice Alito?

22 JUSTICE ALITO: You began by outlining  
23 what you see as the practical problems that have  
24 been created by universal injunctions.

25 If we were to hold that the states

1 have standing and if it is possible for a  
2 plaintiff to get emergency certification of a  
3 class, would we -- suppose we agreed with you on  
4 universal injunctions but allowed those other  
5 two avenues.

6           Would those -- would the practical  
7 problem be rectified to any substantial degree?

8           GENERAL SAUER: Certainly, if there  
9 were an injunction that extended to, you know,  
10 all of the litigating states, that would cover a  
11 very substantial portion of the country, and  
12 also, an emergency sort of class certification  
13 decision might also grant very broad relief.

14           JUSTICE ALITO: So the answer is that  
15 the practical problem would not be solved, and,  
16 if that's the case, what is the -- what is the  
17 point of this argument about universal  
18 injunctions?

19           GENERAL SAUER: I think the point is  
20 that universal injunctions exceed traditional  
21 principles of Article III and they exceed the  
22 traditional equitable authority and that's what  
23 yields all these sort of pathologies, so to  
24 speak, of the current practice of issuing them  
25 very, very easily.

1 JUSTICE ALITO: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Sotomayor?

4 JUSTICE SOTOMAYOR: You answered  
5 Justice Gorsuch, I think, correctly that if  
6 Article III precludes universal injunctions,  
7 then even class actions are illegal. That's  
8 what you're arguing, isn't it?

9 GENERAL SAUER: I disagree with that  
10 profoundly.

11 JUSTICE SOTOMAYOR: How could it? If  
12 Article III and only prohibits injunctions that  
13 affect non-members or non-plaintiffs, how could  
14 Congress give a remedy like a class action?

15 GENERAL SAUER: In an Article -- or in  
16 a Rule 23 class, every member, represented  
17 member of the class, has standing by hypothesis.  
18 So every single one of them has an Article III  
19 injury. And Rule 23, again, provides --

20 JUSTICE SOTOMAYOR: So that would be  
21 the only method?

22 GENERAL SAUER: It would be very  
23 similar to the bill of peace, where all those  
24 parties --

25 JUSTICE SOTOMAYOR: All right. Now

1 why shouldn't --

2 GENERAL SAUER: -- even are present in  
3 a represented capacity are bound.

4 JUSTICE SOTOMAYOR: We can act quickly  
5 if we are worried about those thousands of  
6 children who are going to be born without  
7 citizenship papers that could render them  
8 stateless in some places because some of their  
9 parents' homes don't recognize children of their  
10 nationals unless those children are born in  
11 their countries.

12 They're not going to be receiving  
13 federal benefits because that's the claim of  
14 the -- of the -- of the plaintiffs here that --  
15 of the state plaintiffs, that they're going  
16 to -- they're not going to be able to provide  
17 services to those children.

18 Shouldn't we grant cert before  
19 judgment on that issue?

20 If we're afraid that this is or even  
21 have a thought that this is unlawful executive  
22 action, that it is Congress who decides  
23 citizenship, not the executive, if we believe,  
24 some of us were to believe that, why should we  
25 permit those countless others to be subject to

1 what we think is an unlawful executive action,  
2 as unlawful as an executive taking the guns away  
3 from every citizen?

4 GENERAL SAUER: Cert before judgment  
5 would be another tool through which this Court  
6 could act expeditiously.

7 JUSTICE SOTOMAYOR: Is this the kind  
8 of case where the equities would call for that?  
9 And why wouldn't it? It's a pure legal  
10 question: What does the Constitution mean with  
11 respect to citizenship? There are no individual  
12 facts that would alter our conclusion.

13 If we can't do it by a universal  
14 injunction because you say Article III doesn't  
15 permit that, Article III wouldn't permit us to  
16 give a universal injunction even if we rule, why  
17 don't we grant cert before judgment so that all  
18 of these parents would have a firm Supreme Court  
19 decision that they can take where? Because  
20 you're saying nobody can grant a universal  
21 injunction.

22 GENERAL SAUER: No party has asked for  
23 that in this case, and I think one reason is  
24 that would deny the Court of the benefit of  
25 percolation and multiple lower courts of a novel

1 and sensitive and important constitutional  
2 question.

3 JUSTICE SOTOMAYOR: Right now, we have  
4 multiple courts -- we have novel courts who  
5 have -- who have percolated this issue and said  
6 you're violating precedent. Not only precedent  
7 but the plain meaning of the Fourteenth -- of  
8 the Constitution.

9 GENERAL SAUER: Respectfully, I think  
10 what we have are lower courts making snap  
11 judgments on the merits that ignore the  
12 fundamental principle of the Fourteenth  
13 Amendment that it was about giving citizenship  
14 to the children of slaves, not to the children  
15 of illegal immigrants who really were not even a  
16 very discrete class at that time.

17 JUSTICE SOTOMAYOR: And there were --

18 GENERAL SAUER: And that's the sort of  
19 argument that deserves percolation.

20 JUSTICE SOTOMAYOR: -- and there were  
21 some people in Congress who argued against the  
22 Thirteenth Amendment just because of that, some  
23 people who argued against passing the amendment  
24 just because of that, because it would give  
25 citizenship to gypsies.

1                   GENERAL SAUER: I think the relevant  
2 history of the Fourteenth Amendment is the  
3 statements of Senator Trumbull, who emphasized  
4 that domicile was the key criteria, and he said  
5 that in a letter to Andrew Jackson, and there --  
6 we've cited in our Ninth Circuit briefing --

7                   JUSTICE SOTOMAYOR: And got  
8 rejected -- and it got --

9                   GENERAL SAUER: -- a host of decisions  
10 that back that up.

11                  JUSTICE SOTOMAYOR: -- it got rejected  
12 repeatedly. We can go into the history of  
13 citizenship, but I still go back to my question.

14                  You claim that there is absolutely no  
15 constitutional way to stop -- put this aside --  
16 to stop a president from an unconstitutional  
17 act, a clearly, indisputably unconstitutional  
18 act, taking every gun from every citizen, we  
19 couldn't stop that.

20                  GENERAL SAUER: I disagree with that  
21 for the reasons I've said, including the  
22 equitable tools that are --

23                  JUSTICE SOTOMAYOR: No, because you  
24 said to us we'd have to wait until there was a  
25 final judgment. You're not sure you would

1 respect the judgment of every circuit. You're  
2 not sure that you would respect even a final  
3 judgment of the Supreme Court because it only  
4 binds the parties before it, and, if there's no  
5 class action, that only binds the parties before  
6 the Court.

7           GENERAL SAUER: I don't think there is  
8 a, so to speak, really, really unconstitutional  
9 exception to the strictures of Article III or  
10 the scope of equitable authority, and the Court  
11 should not recognize one because what we see not  
12 just in this case but in the 39 others is that  
13 the district courts who are issuing these  
14 injunctions all passionately disagree with the  
15 thing that's being challenged in that.

16           So that principle that, well, this we  
17 think is really unconstitutional, therefore, we  
18 should ignore the general principles of Article  
19 III, is not a principle the Court ought to  
20 adopt.

21           CHIEF JUSTICE ROBERTS: Justice Kagan?

22           JUSTICE KAGAN: So, General, on this  
23 question of expedition, I mean, it -- it sort of  
24 depends on the government's own actions in a  
25 case like this one, where one can expect that

1 there is not going to be a great deal of  
2 disagreement among the lower courts.

3 I mean, let's assume that you lose in  
4 the lower courts pretty uniformly, as you have  
5 been losing on this issue, and that you never  
6 take this question to us.

7 I mean, I notice that you didn't take  
8 the substantive question to us. You only took  
9 the nationwide injunction question to us. I  
10 mean, why would you take the substantive  
11 question to us? You're losing a bunch of cases.  
12 This guy over here, this woman over here, you  
13 know, they'll have to be treated as citizens,  
14 but nobody else will.

15 Why would you ever take this case to  
16 us?

17 GENERAL SAUER: Well, in this  
18 particular case, we have deliberately not  
19 presented the merits to this Court on the  
20 question of the scope of remedies because, of  
21 course, that makes it a clean vehicle where the  
22 Court doesn't have to look at the vast --

23 JUSTICE KAGAN: You're -- you're  
24 ignoring the import of my question. I'm  
25 suggesting that in a case in which the -- the

1 government is losing constantly, there's nobody  
2 else who's going to appeal, they're winning,  
3 it's up to you to decide whether to take this  
4 case to us. If I were in your shoes, there is  
5 no way I'd approach the Supreme Court with this  
6 case.

7 So you just keep on losing in the  
8 lower courts, and what's supposed to happen to  
9 prevent that?

10 GENERAL SAUER: Again, I respectfully  
11 disagree with that forecast of the merits. But,  
12 in response to the question, what I would say is  
13 we have an adversarial system. And if the  
14 government is not -- for example, not respecting  
15 circuit precedent on the Court's hypothetical in  
16 the Second Circuit, someone easier in the Second  
17 Circuit could take the case up and they could  
18 say, look, the government is violating circuit  
19 precedent on the hypothetical of multiple  
20 circuits and so --

21 JUSTICE KAGAN: That's the case we're  
22 going to take, somebody who says -- who -- who  
23 says, you know, after we've said that -- that  
24 this all has to be done one by one by one, then  
25 we're going to take a case from somebody who

1 objects to proceeding one by one by one?

2 GENERAL SAUER: I'm not sure I  
3 understand the question. I understood the  
4 hypothetical to be --

5 JUSTICE KAGAN: If you win this  
6 challenge and say there is no nationwide  
7 injunction and it all has to be through  
8 individual cases, then I can't see how an  
9 individual who is not, you know, being treated  
10 equivalently to the individual who brought the  
11 case would have any ability to bring the  
12 substantive question to us.

13 GENERAL SAUER: They would bring a  
14 lawsuit in the federal district courts against  
15 the -- the government for an injunction  
16 protecting them. And if the government wasn't  
17 respecting, you know, on the applicable circuit  
18 precedent --

19 JUSTICE KAGAN: Yeah, and then -- and  
20 then they win, and, again, I mean, you need  
21 somebody to lose, but nobody's going to lose in  
22 this case. It's just you're --

23 (Laughter.)

24 JUSTICE KAGAN: -- you're going to  
25 have, like, individual by individual by

1 individual, and all of those individuals are  
2 going to win, and the ones who can't afford to  
3 go to court, they're the ones who are going to  
4 lose.

5 GENERAL SAUER: The tools that are  
6 provided to address hypotheticals like this,  
7 again, I --

8 JUSTICE KAGAN: This is not a  
9 hypothetical. This is happening out there,  
10 right? Every court has ruled against you.

11 GENERAL SAUER: We've only had snap  
12 judgments on the merits. You know, obviously,  
13 we're fully briefing the merits in the courts of  
14 appeals, and our arguments are compelling. More  
15 fundamentally, in response to the question --

16 JUSTICE KAGAN: I'm suggesting to you,  
17 like, the -- the -- the real brunt of my  
18 question is, in a case like this, the government  
19 has no incentive to bring this case to the  
20 Supreme Court because it's not really losing  
21 anything. It's losing a lot of individual  
22 cases, which still allow it to enforce its EO  
23 against the vast majority of people to whom it  
24 applies.

25 GENERAL SAUER: And, again, Rule 23

1 provides an avenue to present -- to address  
2 those very concerns.

3 JUSTICE KAGAN: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Gorsuch?

6 JUSTICE GORSUCH: Well, Justice Kagan  
7 asked my questions better than I could have.

8 (Laughter.)

9 JUSTICE GORSUCH: How do you suggest  
10 we reach this case on the merits expeditiously?

11 GENERAL SAUER: There's a number of  
12 tools the Court could do that -- we think this  
13 case is one that cries out for percolation, that  
14 the Court should allow the lower courts to  
15 address -- address the merits issue multiple  
16 times. It's currently on briefing in three  
17 different cases in the First, Fourth, and Ninth  
18 Circuits, and we think that that's the  
19 appropriate way to do it. If the Court  
20 disagreed, obviously --

21 JUSTICE GORSUCH: When you lose one of  
22 those, do you intend to seek cert?

23 GENERAL SAUER: If we lose, yes,  
24 absolutely.

25 CHIEF JUSTICE ROBERTS: Justice

1 Kavanaugh?

2 JUSTICE KAVANAUGH: So the technical  
3 problem here seems to be class-wide relief  
4 without the district courts going through the  
5 steps to assess whether a class should be  
6 certified, correct?

7 GENERAL SAUER: Correct.

8 JUSTICE KAVANAUGH: Okay. And if you  
9 win here on this procedural point, it seems very  
10 likely that the day after there are going to be  
11 suits filed all over the place seeking  
12 class-wide treatment, maybe statewide classes,  
13 circuit-wide classes, maybe nationwide classes.  
14 I'm sure they're being prepared now, right?

15 And on what basis would you oppose a  
16 statewide class?

17 GENERAL SAUER: I could imagine  
18 certain bases, and, again, it hasn't -- we  
19 haven't briefed this in the lower courts yet,  
20 but yes.

21 JUSTICE KAVANAUGH: You've been  
22 promising everyone here that Rule 23 is the  
23 cure-all, and I want to explore on what basis  
24 you would oppose a statewide class. Just take  
25 that one for -- for now.

1           GENERAL SAUER: For example -- and,  
2           again, this is very hypothetical because I'm not  
3           predicting that we will or will not oppose that.  
4           We haven't taken a position on that yet. But --

5           JUSTICE KAVANAUGH: If you were to  
6           oppose it, on what basis would you plausibly  
7           oppose it?

8           GENERAL SAUER: There may be problems  
9           of commonality and typicality, for example.  
10          For -- for example, there's two different sets  
11          of groups that are affected by the Executive  
12          Order. There are those where the mothers are  
13          temporarily present and those where the mother  
14          are illegally present, and in both cases, the  
15          father is neither a citizen nor a lawful  
16          permanent resident. So there might be issues of  
17          typicality. Adequacy of representation might  
18          very well be an issue. So there would have to  
19          be that rigorous application of those criteria.

20          Now the argument may be this is a case  
21          that is a natural candidate for a Rule 23(b)(2)  
22          certification. That may well be true. The  
23          government hasn't taken a position on that. Our  
24          position is not that class certification will  
25          necessarily be granted. Our position is that

1 Rule 23 is how these sorts of claims should be  
2 channeled.

3 JUSTICE KAVANAUGH: And you think, I  
4 think you just said, it's very possible that  
5 class certification may be granted?

6 GENERAL SAUER: It is possible. We  
7 don't know yet because there was a class  
8 certification motion filed at the very beginning  
9 in the Western District of Washington and it was  
10 just never briefed because, obviously, the  
11 pathology here is that the nationwide  
12 injunctions just go blowing past the class  
13 certification procedures.

14 JUSTICE KAVANAUGH: And I guess Rule  
15 23(b)(2), for a lot of the cases we've had over  
16 the past 25 years that you talked about where  
17 there have been universal injunctions or the  
18 lower courts have had that, I mean, 23(b)(2)  
19 could have been used in a lot of those  
20 presumably, correct? Eviction moratorium,  
21 student loans, OSHA vaccine mandate. Do you see  
22 the possibility that 23(b)(2) could have been  
23 used instead of -- and some of those were APA,  
24 but put aside the APA issue for now.

25 GENERAL SAUER: Yeah, we -- we do set

1       aside that issue if I may.

2                   JUSTICE KAVANAUGH:   Yes.  I got it.

3                   (Laughter.)

4                   GENERAL SAUER:  Right.  Yes, I agree  
5       with that as to some but not in the other cases.  
6       It's hard to see how, for example, Biden against  
7       Nebraska might have -- where a state was the  
8       plaintiff, might have been a 23(b)(2) class.  
9       Alabama Association of Realtors might have been  
10      a much better candidate for that.

11                   And, again, we're not taking a  
12      position on the individual merits.  The --  
13      our -- our -- our overarching point is there's a  
14      tradition of equitable -- of equity in this  
15      country that goes back to the English Court of  
16      Chancery.  And what's happening in these  
17      universal injunctions -- again, 40 times in this  
18      administration, at least 22 times in the last  
19      administration, 64 times in the administration  
20      before that -- is just disregarding those  
21      appropriate procedures to -- to seek this kind  
22      of global relief.

23                   JUSTICE KAVANAUGH:  I want to ask one  
24      thing about something in your brief.  You said:  
25      "And, of course, this Court's decisions

1 constitute controlling precedent throughout the  
2 nation. If this Court were to hold a challenged  
3 statute or policy unconstitutional, the  
4 government could not successfully enforce it  
5 against anyone, party or not, in light of stare  
6 decisis." You agree with that?

7 GENERAL SAUER: Yes, we do.

8 JUSTICE KAVANAUGH: Okay. If you  
9 prevail here -- the original executive order had  
10 a 30-day period before it took effect. If you  
11 prevail here, should there be any pause in -- so  
12 that things can happen that need to happen for  
13 30 days or some period of time, or should it  
14 just -- should we not even worry about that?

15 GENERAL SAUER: Yes, we concede that  
16 the 30-day ramp-up period that the Executive  
17 Order itself calls for never started because the  
18 injunction -- the universal TROs were granted  
19 almost immediately. And we don't dispute that  
20 there should be a 30-day ramp-up period for  
21 another reason as well, which is that we've been  
22 enjoined from even doing guidance, even  
23 formulating a policy, and that itself is another  
24 problem with these injunctions.

25 JUSTICE KAVANAUGH: On the day after

1 it goes into effect -- this is just a very  
2 practical question, how it's going to work --  
3 what do hospitals do with a newborn, what do  
4 states do with a newborn?

5 GENERAL SAUER: I don't think they do  
6 anything different. What the executive order  
7 says in Section 2 is that federal officials do  
8 not accept documents that have the wrong  
9 designation of citizenship from people who are  
10 subject to the executive order.

11 JUSTICE KAVANAUGH: How are they going  
12 to know that?

13 GENERAL SAUER: The states can  
14 continue to -- the federal officials will have  
15 to figure that out essentially.

16 JUSTICE KAVANAUGH: How?

17 GENERAL SAUER: So you can imagine a  
18 number of ways that the federal officials  
19 could --

20 JUSTICE KAVANAUGH: Such as?

21 GENERAL SAUER: Such as they could  
22 require a showing of, you know, documentation  
23 showing legal presence in the country. For a  
24 temporary visitor, for example, they could see  
25 whether they're on a B-1 visa, which would

1 exclude kind of the birthright citizenship in  
2 that kind of --

3 JUSTICE KAVANAUGH: For all the  
4 newborns? Is that how it's going to work?

5 GENERAL SAUER: Again, we don't know  
6 because the agencies were never given the  
7 opportunity to formulate the guidance. They  
8 would have had 30 days --

9 JUSTICE KAVANAUGH: They're only going  
10 to have 30 days to do this. Do you think they  
11 can get it together in time?

12 GENERAL SAUER: They're under --  
13 that's what the Executive Order instructs them  
14 to do, and, hopefully, they will do so. Again,  
15 it's a speculative and hypothetical scenario  
16 because they were enjoined from even starting  
17 that process.

18 JUSTICE KAVANAUGH: And then last  
19 question. You mentioned before this has come up  
20 in the last four or five administrations  
21 primarily. You know, I guess I've thought about  
22 that a lot too. Why? It seems why might be  
23 it's harder to get legislation through Congress,  
24 particularly with the filibuster rule.  
25 Presidents want to get things done with good

1 intentions. The executive branches that work  
2 for those presidents push hard to -- when they  
3 can't get new authority, to stretch or use  
4 existing authority, and they've been pushing,  
5 understandably, all with good intentions. All  
6 the presidents, both parties, right, with good  
7 intentions, pushing.

8           Is that your understanding of why this  
9 has happened more, that there's less ability to  
10 get legislation? Because I'm trying to figure  
11 out the why to your opening about the last four  
12 or five administrations. I agree with it. I  
13 think that might be the why, but I'm curious  
14 what you think.

15           GENERAL SAUER: I'm speculating about  
16 the motivations of the individual district  
17 judges who grant these, but one explanation  
18 might be this is an extraordinary power. It's a  
19 very strong power for the reasons the questions  
20 have reflected for a district judge --

21           JUSTICE KAVANAUGH: Well, let me --  
22 let me just pause you right there. The -- the  
23 underlying point is that these district judges  
24 are not just doing universal injunctions;  
25 they're finding these actions illegal because

1 they're exceeding existing authority, and  
2 oftentimes we are too when it gets to us,  
3 finding the actions of presidents of both  
4 parties unlawful because they exceeded existing  
5 authority.

6 So is that coming up more often  
7 because of -- why is that coming up more often?

8 GENERAL SAUER: You know, it's hard to  
9 do a historical analysis, but I would draw an  
10 analogy to the -- to the New Deal, and Professor  
11 Bray makes this point in his article, that,  
12 actually, there were very, very passionate  
13 challenges to, you know, sort of nationwide  
14 policies during the Roosevelt administration and  
15 they were not addressed by issuing universal  
16 injunctions. He cites an example where, in one  
17 case, a policy had been held illegal, and there  
18 were, like, 1600 injunctions against that policy  
19 all protecting the individual plaintiffs.

20 So, if you look at the history, it's  
21 not clear that what we have of, you know,  
22 disagreement, difficulty, gridlock, getting  
23 things through Congress and so forth, that's not  
24 just necessarily new.

25 What is new and is certainly unique to

1 the last five presidential administrations is  
2 having these given on this widespread basis and  
3 this systematic basis, 40, again, in the last  
4 four months.

5 JUSTICE KAVANAUGH: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice  
7 Barrett?

8 JUSTICE BARRETT: General Sauer, I  
9 want to ask you about a potential tension --  
10 well, no, not potential tension, an actual  
11 tension that I see in answers that you gave to  
12 Justice Kavanaugh and Justice Kagan.

13 You resisted Justice Kagan when she  
14 asked you whether the government would obey  
15 within the Second Circuit a precedent -- I'm  
16 distinguishing between opinions and judgments  
17 here.

18 Did I understand you correctly to tell  
19 Justice Kagan that the government wanted to  
20 reserve its right to maybe not follow a Second  
21 Circuit precedent, say, in New York because you  
22 might disagree with the opinion?

23 GENERAL SAUER: Our general practice  
24 is to respect those precedents, but there are  
25 circumstances when it is not a categorical

1 practice. It is -- and that is not a new  
2 policy. That's --

3 JUSTICE BARRETT: This  
4 administration's practice or the longstanding  
5 practice of the federal government?

6 And I'm not talking about in the  
7 Fourth Circuit are you going to respect a Second  
8 Circuit. I'm talking about within the Second  
9 Circuit. And can you say is that this  
10 administration's practice or a longstanding one?

11 GENERAL SAUER: As I understand it,  
12 longstanding --

13 JUSTICE BARRETT: Really?

14 GENERAL SAUER: -- policy of the  
15 Department of Justice, yes, that we generally --  
16 as it was phrased to me, generally respect  
17 circuit precedent but not necessarily in every  
18 case. And certain -- some examples might be a  
19 situation where we're litigating to try and get  
20 that circuit precedent overruled and so forth.

21 JUSTICE BARRETT: Well, okay. So I'm  
22 not -- I'm not talking about a situation in  
23 which, you know, the Second Circuit has a case  
24 from 1955 and you think it's time for it to be  
25 challenged. That's not what I'm talking about.

1 I'm talking about in this kind of  
2 situation. I'm talking about this week the  
3 Second Circuit holds that the executive order is  
4 unconstitutional, and then what do you do the  
5 next day or the next week?

6 GENERAL SAUER: Generally, we follow  
7 that.

8 JUSTICE BARRETT: So you're still  
9 saying "generally."

10 GENERAL SAUER: Yes.

11 JUSTICE BARRETT: And you still think  
12 that it's generally the policy, longstanding  
13 policy, of the federal government to take that  
14 approach?

15 GENERAL SAUER: That is my  
16 understanding.

17 JUSTICE BARRETT: Okay. So -- but it  
18 sounds to me like you accept a Cooper versus  
19 Aaron kind of situation for the Supreme Court  
20 but not for, say, the Second Circuit?

21 GENERAL SAUER: I would say --

22 JUSTICE BARRETT: So you would respect  
23 the opinions and the judgments of the Supreme  
24 Court, and you're saying you would respect the  
25 judgment but not necessarily the opinion of a

1 lower court.

2 GENERAL SAUER: And, again, in -- I  
3 think, in the vast majority of instances, our  
4 practice has been to respect the opinion as well  
5 in -- in the circuits as well, but my  
6 understanding is that has not been a categorical  
7 practice in the way respect for the precedents  
8 and the judgments of the Supreme Court has been.

9 JUSTICE BARRETT: So you're not  
10 hedging at all with respect to the precedent of  
11 this Court?

12 GENERAL SAUER: That is correct. I --  
13 I believe the --

14 JUSTICE BARRETT: Okay.

15 GENERAL SAUER: -- quotation from our  
16 application directly addresses that.

17 JUSTICE BARRETT: Okay.

18 GENERAL SAUER: And we stand by that  
19 completely.

20 JUSTICE BARRETT: Okay. Next  
21 question. So this is also a follow-up to some  
22 of your -- the questions that others have asked  
23 you about the merits of the order not being  
24 before us.

25 Did I understand your answer to be

1 because you think percolation is really  
2 important for this one?

3 GENERAL SAUER: We do think  
4 percolation is really important for this one.  
5 But the reason the merits are not before us is  
6 because we've only submitted a stay application  
7 on the scope of relief question.

8 And as Labrador against Poe indicates,  
9 the scope of relief is a separate question from  
10 the --

11 JUSTICE BARRETT: Oh, I understand  
12 it's a separate question, but there are plenty  
13 of times that the government comes to us and  
14 asks for both.

15 GENERAL SAUER: Absolutely. For  
16 example, recently, in the Wilkinson Cox  
17 application, we did exactly that.

18 JUSTICE BARRETT: And the reason why  
19 you didn't ask for both here is because you  
20 think that the merits question needs  
21 percolation.

22 GENERAL SAUER: Yes. But also, more  
23 fundamentally, it illustrates that the very  
24 problem with these nationwide injunctions is  
25 they force -- they -- they -- they force this

1 rushed, you know, fast-and-furious decisions on  
2 the merits. So I think it would be very  
3 inappropriate in this case to come to a stay  
4 application saying please give us a rushed, you  
5 know, decision on the merits of something that's  
6 very, very complex and --

7 JUSTICE BARRETT: But the government's  
8 done that in other cases too, right?

9 GENERAL SAUER: Those cases would be  
10 different from this case. The example I gave  
11 earlier we think is very clear-cut on the  
12 merits. You know, this one is, we -- we  
13 concede, a novel and central question.

14 JUSTICE BARRETT: So this one isn't  
15 clear-cut on the merits from the government?

16 GENERAL SAUER: This one -- in this  
17 case, we want the Court to address the remedial  
18 issue. If we offered the merits first, that's a  
19 vehicle problem because the Court has, in many  
20 cases, just addressed the merits and not the  
21 remedial issue. And it's imperative from the  
22 federal government's perspective that the  
23 remedial question be addressed.

24 JUSTICE BARRETT: Okay. So last  
25 question is about why that is.

1                   Justice Alito asked you, well,  
2           what's -- what's the point of this?  If the same  
3           thing could happen, which is, effectively, the  
4           EO being enjoined everywhere via class action or  
5           because it's necessary to provide complete  
6           relief, say, to the states, is there any  
7           difference in your view between, say, a class is  
8           certified of all individual plaintiffs and they  
9           win and the executive order classwide -- there's  
10          a judgment saying that it can't be enforced?

11                   Do you want to say, you know, follow  
12          up -- is there any practical distinction you  
13          see?  Why -- why does the government care?  Is  
14          it just the rigors of the certification process,  
15          or is it something more?

16                   GENERAL SAUER:  The -- the rigors of  
17          the certification process.  Keep in mind that in  
18          many of these cases we successfully oppose class  
19          action.  But we have not --

20                   JUSTICE BARRETT:  Let's assume I think  
21          you can't successfully oppose it here for  
22          individual plaintiffs.

23                   GENERAL SAUER:  Well, I mean, that  
24          opportunity to have our day in court on that is  
25          very, very important.

1 JUSTICE BARRETT: I -- I understand.  
2 But let's -- let's assume. Go with my  
3 assumption.

4 GENERAL SAUER: The -- assuming that  
5 we were to lose in -- in opposing the  
6 certification --

7 JUSTICE BARRETT: Assume the class is  
8 certified. Is there any benefit -- if a class  
9 is certified -- and let's say, you know, you  
10 were pointing out that the Executive Order  
11 targets two different kinds of people. Let's  
12 assume that it's commonality because, you know,  
13 they only target one portion of the order,  
14 right?

15 In that circumstance, does the  
16 government get anything different -- this is  
17 back to Justice Alito's question about what --  
18 what's it to you, what's the practical  
19 difference to you. Do you want to say anything  
20 about whether there's a practical difference  
21 between a universal injunction and a loss in the  
22 class?

23 GENERAL SAUER: Absolutely.

24 JUSTICE BARRETT: Okay.

25 GENERAL SAUER: Among many others, the

1 represented class members are bound in the class  
2 action context, and that means that if they  
3 lose, they're bound by that as well. So they're  
4 taking a grave risk, so to speak, by proceeding  
5 through a class action.

6 And it has this symmetry, where the  
7 government is bound if -- if -- if we lose; they  
8 are bound if we don't lose. And that's a very,  
9 very important distinction.

10 JUSTICE BARRETT: And you would  
11 respect that judgment?

12 GENERAL SAUER: If it were -- yes, if  
13 it were a judgment. You know, now we may try to  
14 litigate in other contexts to try and get a  
15 different judgment from a different --

16 JUSTICE BARRETT: Sure.

17 GENERAL SAUER: -- district court, but  
18 we would be bound by that judgment, as would  
19 they, and that's the crucial point.

20 JUSTICE BARRETT: Okay.

21 CHIEF JUSTICE ROBERTS: Justice  
22 Jackson?

23 JUSTICE JACKSON: So, as far as I can  
24 tell, your bottom line seems to be that what you  
25 call universal injunctions give relief to

1 nonparties without going through the necessary  
2 steps, which you identify in Rule 23.

3 Do I have that right? I mean, is that  
4 sort of like boiled to bare essence what you're  
5 saying?

6 GENERAL SAUER: I would say there's a  
7 lot more to it --

8 JUSTICE JACKSON: Yeah.

9 GENERAL SAUER: -- but that's one very  
10 important one.

11 JUSTICE JACKSON: That's -- that's a  
12 key point that I want to focus in on for a  
13 moment. I guess I don't understand why you are  
14 saying that these kinds of injunctions are  
15 giving relief to nonparties.

16 First of all, I think they can be also  
17 easily characterized as focusing only on the  
18 defendant pursuant to the court's jurisdiction,  
19 personal jurisdiction, over this person relative  
20 to the subject matter jurisdiction that the  
21 court has, and the relief is telling the  
22 defendant stop doing this thing that the court  
23 has found to be unlawful.

24 So, rather than characterizing it as a  
25 "universal injunction," I think one could easily

1 see that this is just about the extent to which  
2 the court can constrain a defendant over whom it  
3 has personal jurisdiction, can it do so  
4 completely or just partially with respect to --  
5 you know, just say stop with respect to this  
6 plaintiff.

7 Am I mischarac- -- like, I just -- I  
8 don't understand where this idea of universal  
9 injunctions comes from in this context.

10 GENERAL SAUER: I think the relevant  
11 distinction is an order. That order's in this  
12 case the government defendant to cease allegedly  
13 unlawful activity as to the parties who have  
14 come into court and sued and one that says to  
15 the government defendant cease the allegedly  
16 unlawful activity against everyone in the entire  
17 world.

18 JUSTICE JACKSON: No, just cease it,  
19 just stop. This thing, this Executive Order --  
20 I mean, we do this in the APA context all the  
21 time, right? The statute says you hold that  
22 the -- you set aside the conduct, right, that  
23 it's unlawful. And we don't really parse it out  
24 and say, okay, but it's unlawful only as it  
25 applies to the plaintiff or not.

1                   So it's a very common concept for the  
2 court to enjoin a defendant from doing  
3 particular unlawful behavior.

4                   And what you're now asking us to do is  
5 to require that the court have an additional  
6 limitation in its order that says you only have  
7 to stop doing this with respect to the  
8 plaintiff, and that's the part that I don't  
9 understand.

10                  I -- I guess -- I guess, from what I  
11 can read from your papers and what you've said  
12 here, that limitation, you say, comes from this  
13 principle that if you don't do that, you would  
14 be somehow giving relief to nonparties.

15                  But I -- I -- I wonder if that's  
16 right. I mean, it -- it seems to me that the  
17 relief is the judgment that you provide to the  
18 plaintiff that says stop doing this conduct, and  
19 you give it only to the plaintiff. That's where  
20 the limitation comes.

21                  The plaintiff is the only person who  
22 can go to court after you violate this order and  
23 enforce it. Other people are incidental  
24 beneficiaries of -- of a court ordering you to  
25 follow the law. I mean, that's like everyone in

1 the world. When a court says follow the law,  
2 anybody who would have been hurt by your not  
3 following the law benefits.

4 Okay. I -- I don't understand why  
5 that would limit the court in its ability to  
6 tell you: Don't do this unlawful conduct.

7 GENERAL SAUER: Two responses to that.

8 JUSTICE JACKSON: Yes.

9 GENERAL SAUER: There is a lot there.

10 JUSTICE JACKSON: Yes.

11 GENERAL SAUER: Two responses to that.

12 One is that principle that your question  
13 referred to is the holding of the Court in Warth  
14 against Seldin and it's reaffirmed in Gill  
15 against Whitford, in Lewis against Casey and  
16 similar cases, that the authority of the federal  
17 court, whether it's viewed as arising under  
18 Article III or under its traditional scope of  
19 equitably authority, is to remediate the  
20 injuries to the complaining party.

21 And then, to address your question  
22 about --

23 JUSTICE JACKSON: Can I just stop you  
24 there? I'm, as the Court, remediating the  
25 injury by telling the defendant to stop doing

1 this behavior. The plaintiff has brought a  
2 claim that this Executive Order is unlawful, I  
3 look at it, I litigate it, and I say you're  
4 right, stop doing it, you cannot enforce this  
5 order.

6 So I don't understand why that's,  
7 like, outside the scope of Warth versus Seldin.

8 GENERAL SAUER: If the Court in that  
9 case is imposing a -- what we've called an  
10 indivisible remedy, for example, vacatur under  
11 the APA -- there's a debate about what "set  
12 aside" means. Assuming it means to vacate, then  
13 the remedy that Congress has provided as a  
14 condition of its delegation to the -- the agency  
15 is, if one part of the, you know -- if the -- if  
16 the regulation is unlawful, then the remedy  
17 granted, which directly remediates the  
18 plaintiff's injury in that hypothetical, is an  
19 indivisible remedy that benefits others.

20 Here, in this case and in all the  
21 other 40 cases, we see something totally  
22 different --

23 JUSTICE JACKSON: Yeah, I understand.

24 GENERAL SAUER: -- because it's not  
25 necessary to remediate --

1 JUSTICE JACKSON: Yeah.

2 GENERAL SAUER: -- the injuries of the  
3 plaintiff before them. That is the concern of  
4 Warth versus Seldin.

5 JUSTICE JACKSON: I -- I understand.  
6 Let me just -- let me just turn your attention  
7 to one other thing because the real concern, I  
8 think, is that your argument seems to turn our  
9 justice system, in my view at least, into a  
10 "catch me if you can" kind of regime from the  
11 standpoint of the executive, where everybody has  
12 to have a lawyer and file a lawsuit in order for  
13 the government to stop violating people's  
14 rights.

15 Justice Kagan says let's assume for  
16 the purpose of this that you're wrong about the  
17 merits, that the government is not allowed to do  
18 this under the Constitution. And yet it seems  
19 to me that your argument says we get to keep on  
20 doing it until everyone who is potentially  
21 harmed by it figures out how to fire -- file a  
22 lawsuit, hire a lawyer, et cetera.

23 And I don't understand how that is  
24 remotely consistent with the rule of law, you  
25 know, a system -- and I appreciate that you go

1 back to English common law and the Chancery  
2 Court. But they had a different system. The  
3 fact that courts back in English Chancery  
4 couldn't enjoin the king, I think, is not  
5 analogous or indicative of what courts can do in  
6 our system, where "the king," the executive, is  
7 supposed to be bound by the law, and the court  
8 has the power to say what the law is.

9           And so one would think that the court  
10 could say this conduct is unlawful and you have  
11 to stop doing it.

12           GENERAL SAUER: I think the "catch me  
13 if you can" problem operates in the opposite  
14 direction where we have the government racing  
15 from jurisdiction to jurisdiction having to sort  
16 of clear the table in order to implement a new  
17 policy.

18           A great example of this is in the  
19 Shilling litigation, where the -- the military  
20 had a military readiness policy. It was  
21 universally enjoined by the DDC. It went up to  
22 the D.C. Circuit. The D.C. Circuit stayed that  
23 injunction to allow that policy to go into  
24 effect, and then, one hour later, a district  
25 court on the other side of the country

1 universally --

2 JUSTICE JACKSON: Can I just ask you  
3 one final thing, because this relates to also  
4 something that Justice Kagan said?

5 I would think we'd want the system to  
6 move as quickly as possible to reach the merits  
7 of the issue and maybe have this Court decide  
8 whether or not the government is entitled to do  
9 this under the law. Wouldn't having universal  
10 injunctions actually facilitate that?

11 It seems to me that when the  
12 government is completely enjoined from doing the  
13 thing it wants to do, it moves quickly to appeal  
14 that to get it to the Supreme Court, and that's  
15 actually what we would want.

16 What I worry about is similar to what  
17 Justice Kagan points out, is that, if the  
18 government is saying no lower court can  
19 completely enjoin it, it actually means that the  
20 government just keeps on doing the purportedly  
21 unlawful thing, and it delays the ability for  
22 this Court to reach the underlying issue.

23 GENERAL SAUER: Percolation of novel,  
24 sensitive constitutional issues is a merit of  
25 our system. It is not a -- not -- not a bad

1 feature of the system.

2 JUSTICE JACKSON: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 Mr. Feigenbaum.

6 ORAL ARGUMENT OF JEREMY M. FEIGENBAUM  
7 ON BEHALF OF THE STATE AND CITY RESPONDENTS

8 MR. FEIGENBAUM: Mr. Chief Justice,  
9 and may it please the Court:

10 This Court should deny the emergency  
11 application because this injunction was properly  
12 designed to ensure that the states would get  
13 relief for our own Article III injuries as we  
14 suffer significant pocketbook and sovereign  
15 harms from implementation of this Executive  
16 Order, including from the application of this EO  
17 to the 6,000 babies born to New Jersey parents  
18 out of state every year.

19 The U.S. prefers alternative  
20 approaches for granting that relief,  
21 alternatives it never raised in the district  
22 court below. But its approach would require  
23 citizenship to vary based on the state in which  
24 you're born or even turn on or off when someone  
25 crosses state lines, raising serious and

1 unanswerable administrability questions not just  
2 for the federal government but also for the  
3 states.

4           And it would offend the text and  
5 history of the Citizenship Clause itself. Since  
6 the Fourteenth Amendment, our country has never  
7 allowed American citizenship to vary based on  
8 the state in which someone resides because the  
9 post-Civil War nation wrote into our  
10 Constitution that citizens of the United States  
11 and of the states would be one and the same  
12 without variation across state lines.

13           The U.S. has claimed that Article III  
14 establishes a bright-line rule barring such  
15 injunctions no matter the circumstance, even  
16 where the states do need it to meet their own  
17 harms, finds no support in this Court's cases or  
18 in the history of equity.

19           Its argument that a single district  
20 court cannot decide birthright citizenship or  
21 that we need more percolation on that question  
22 for the nation overlooks that this Court already  
23 settled this exact constitutional question 127  
24 years ago and that this EO is contrary to over a  
25 century of executive practice.

1           Finally, the U.S.'s objection that  
2 nationwide PIs have simply become too common in  
3 the last few months, a complaint about other  
4 injunctions sought by other parties, cannot  
5 undermine the extraordinary bases for this one.  
6 The states, who regularly come before this Court  
7 as plaintiff and defendant alike, agree that  
8 nationwide relief can be reserved for narrow  
9 circumstances, but it was needed here.

10           I welcome this Court's questions.

11           JUSTICE THOMAS: Putting the merits  
12 aside, what -- what do you think is the origin  
13 of or at least the pedigree of universal  
14 injunctions, particularly the bill of peace, if  
15 you would discuss that?

16           MR. FEIGENBAUM: Absolutely, Your  
17 Honor. So there's two categories of these broad  
18 injunctions. So, first, although we use the  
19 term "nationwide injunction," if the nationwide  
20 injunction is actually about meeting our harm  
21 and the alternatives are not legally or  
22 practically workable, then it isn't even a  
23 universal injunction, as I know this Court's  
24 separate writings has used the term, because  
25 it's about meeting our own Article III injury,

1 which is our basic submission about this case.

2 But we do agree that there's some  
3 space for universal relief. We trace it back  
4 through the history, from the bill of peace  
5 through Equity Rule 48, which specifically  
6 clarified that in the American equitable  
7 tradition, it was not always the case that  
8 universal relief would bind the nonparties even  
9 as it might benefit the nonparties, continuing  
10 on to the tax collection injunctions in the 19th  
11 century and then continuing on as recently as  
12 this Court's order in AARP.

13 So I do think they've always been in  
14 narrow circumstances. They've never been the  
15 reflexive or norm of how relief should be  
16 granted in this country, but they have been  
17 available.

18 I don't think I need that for my case,  
19 but I do think they're available in narrow  
20 circumstances.

21 CHIEF JUSTICE ROBERTS: You say they  
22 should be available only in narrow  
23 circumstances. Why -- why is that?

24 MR. FEIGENBAUM: Yeah. So I could --  
25 I could offer the three that I think make the

1 most sense, but we're mindful of some of the  
2 concerns that the United States raises.

3 We are states who have benefitted from  
4 federal policies. We are states who have our  
5 own statutes and policies. So sometimes we are  
6 on the other side of the "v" in cases involving  
7 universal relief. So we are sympathetic to some  
8 of the concerns the United States has about  
9 percolation, about running the table in  
10 particular cases.

11 We just don't think that that supports  
12 a bright-line rule that says they're never  
13 available. And we've identified, I think, at  
14 least three circumstances where they would make  
15 sense to be available.

16 The first would be in cases where the  
17 alternative ways of remedying the harm for the  
18 parties are not practically or legally workable.  
19 That's this case, and I'll return to that in a  
20 second.

21 The second would be congressional  
22 authorization. So I took my friend on the other  
23 side to try to set aside vacatur, but I do think  
24 their Article III objections would raise serious  
25 questions for remedies like vacatur, for

1 remedies like the Hobbs Act. Even the Hobbs  
2 Act, which could set a nationwide PI after a  
3 multi- -- multi-circuit lottery, might  
4 ultimately have problems under their view of  
5 Article III.

6 And then the third thing I would say  
7 is there may be cases in which the alternative  
8 forms of getting nonparty relief are not legally  
9 or practically available. So that might be a  
10 case like AARP or even a case like this one,  
11 where district courts could consider the  
12 availability of the class action device, but if  
13 it couldn't move fast enough because Rule 23  
14 doesn't include TROs and PIs, if it couldn't  
15 move fast enough in those contexts, courts might  
16 need to step in anyway.

17 But I think we fit in the first bucket  
18 in this particular case because the alternative  
19 ways of remedying our particular significant  
20 pocketbook harms to the tunes of millions of  
21 dollars can't be remedied, as the district court  
22 found below, without granting us this kind of  
23 relief.

24 CHIEF JUSTICE ROBERTS: Well, I mean,  
25 you could benefit through percolation and a

1 decision from this Court with reasonable  
2 expedition.

3 MR. FEIGENBAUM: So I have no  
4 objections to reasonable expedition --  
5 expedition. We would have no objection to this  
6 Court even setting supplemental briefing on the  
7 merits and hearing the merits directly. I'm  
8 happy to talk about the ways in which I think  
9 the merits do bear on this emergency  
10 application.

11 But, more fundamentally to your  
12 question, Mr. Chief Justice, I would just note  
13 that I don't think the alternatives actually  
14 fully remedy our injuries in a couple of  
15 different respects.

16 So I heard my friend on the other side  
17 to specifically say today that maybe there can  
18 be an instruction to the federal government that  
19 at least when you're dealing with the Plaintiff  
20 States, you treat these individuals kind of as  
21 though they're citizens even if they're not  
22 really citizens.

23 And that doesn't work not just for the  
24 federal government. I agree, Justice Gorsuch,  
25 it may well be that the federal government can

1     decide when to take its own medicine, but I'm  
2     talking about administrability burdens on the  
3     states and I'm talking about administrability  
4     burdens on third parties as well.

5                   JUSTICE GORSUCH:  Can I ask you a  
6     question about that, counsel?  Your three  
7     buckets are very thoughtful.  The first one  
8     seems to me kind of consistent with traditional  
9     equity, which is if -- if it's required -- if  
10    you've got to remedy the plaintiffs' harm.  
11    That's your point there, and you're saying we  
12    fall in that bucket.  I get that argument.

13                   The second bucket is possibly Article  
14    III, okay, that Congress could authorize and  
15    maybe has authorized circumstances, but that  
16    doesn't answer the equity point.

17                   So we come to bucket three, and I'm --  
18    I'm struggling to understand what the rule is  
19    there.  You seem to suggest, well, if it's -- if  
20    it's really important and if you have to act  
21    expeditiously, then go ahead.  But I think every  
22    district court who enters one of these thinks  
23    that's what they're doing.

24                   So what's the constraint there?  If  
25    you share the government's concerns about the

1 rise of these things in the last few decades,  
2 what teeth does any of that have?

3 MR. FEIGENBAUM: So I do feel like  
4 something of an amicus to this question because  
5 nothing in my injunction rises or falls on  
6 this claim bucket.

7 JUSTICE GORSUCH: Exactly. So --  
8 so --

9 MR. FEIGENBAUM: But -- so I'm happy  
10 to answer questions on that.

11 JUSTICE GORSUCH: -- I -- I need all  
12 the amici I can get.

13 (Laughter.)

14 MR. FEIGENBAUM: Fair enough, Your  
15 Honor.

16 So I would say two things about that.  
17 The first is it does require reading the history  
18 in a way more like I do, which does not create a  
19 single bright-line rule that this is never  
20 available. Obviously, if someone reads the  
21 history as saying --

22 JUSTICE GORSUCH: I'm -- I'm spotting  
23 you that --

24 MR. FEIGENBAUM: Great.

25 JUSTICE GORSUCH: -- for the purposes

1 of my question.

2 MR. FEIGENBAUM: Great.

3 JUSTICE GORSUCH: I'm not granting --  
4 the -- granting the --

5 MR. FEIGENBAUM: I thought you might  
6 not, Justice Gorsuch.

7 JUSTICE GORSUCH: But I'm spotting it  
8 to you and I'm just saying, well, okay, what  
9 would that look like and how would that be any  
10 different from what we have experienced over the  
11 last few decades.

12 MR. FEIGENBAUM: So this is a way in  
13 which my first bucket and my third bucket are  
14 actually going to relate for a moment, so I  
15 think this is the --

16 JUSTICE GORSUCH: No, no, no, no, no,  
17 no, no.

18 MR. FEIGENBAUM: No, it's helpful. I  
19 promise.

20 JUSTICE GORSUCH: You don't get to  
21 squiggle out into the first bucket, okay? We're  
22 in the third bucket.

23 MR. FEIGENBAUM: I'll answer for the  
24 third bucket --

25 JUSTICE GORSUCH: Thank you.

1 MR. FEIGENBAUM: -- which is I think  
2 it requires having district courts consider the  
3 availability of the alternative and explaining  
4 why it's not workable in the case.

5 JUSTICE GORSUCH: I think we've told  
6 them to do that and, you know, gosh, how many  
7 times do we have to tell them to do that. And I  
8 think, in -- in -- in fairness to them, that's  
9 what they think they have.

10 So let's -- again, would any case over  
11 the last 30 years come out differently under  
12 your -- your view of the -- the -- the rule in  
13 the third bucket than -- than has?

14 MR. FEIGENBAUM: Yeah. So there's a  
15 couple of examples where we don't think  
16 universal relief was appropriate. I'm most  
17 familiar with the state litigation, so most of  
18 my examples will probably come from there, but I  
19 heard my friend on the other side mention the  
20 DACA litigation, where Texas sought the  
21 termination of DACA and, ultimately, the -- the  
22 Fifth Circuit terminated DACA specific to Texas  
23 alone.

24 And we thought that that decision was  
25 exactly right because of the nature of the harms

1 in that case meant that Texas could get full  
2 relief for its harms.

3 JUSTICE GORSUCH: Well, that -- now  
4 we're back to the first bucket. We're just  
5 satisfying the --

6 MR. FEIGENBAUM: Oh, I -- I take the  
7 point. I'm so sorry, Your Honor.

8 JUSTICE GORSUCH: You see what I'm  
9 saying?

10 MR. FEIGENBAUM: I take the point.  
11 Yes. So I think --

12 JUSTICE GORSUCH: I mean, I get that  
13 we're going to always revert back to the first  
14 bucket, but that means the third bucket's empty,  
15 and --

16 MR. FEIGENBAUM: I -- I -- I totally  
17 take the point. I think AARP is a good  
18 illustration of the third bucket that this Court  
19 confronted recently where it was the case that  
20 there was this rush just a few hours, not  
21 possible to go through class certification.

22 You heard my friend on the other side  
23 talk about the rigors of class certification,  
24 and I don't think my friend on the other side  
25 would agree it could be done in three hours

1 through the night, and so there were a necessity  
2 to step in --

3 JUSTICE KAVANAUGH: Do you -- do you  
4 agree about the rigors of class certification?  
5 It seems to me that 23(b)(2) classes and -- and  
6 you probably, if -- if you have to, are going to  
7 be arguing that they're not so rigorous to meet  
8 for injunctive relief for national policies that  
9 are uniform.

10 MR. FEIGENBAUM: So the most important  
11 thing that hasn't come up in the discussion this  
12 morning yet is that they're not available for  
13 state litigation. It talks about persons. It  
14 talks about appointment of class counsel. It  
15 talks about going through the certification  
16 process.

17 States -- this Court's precedents are  
18 really clear about parents that try lawsuits.  
19 States can't represent those individuals in  
20 class actions, nor would we try to. They can't  
21 represent us and you don't have classes of  
22 states.

23 So the whole framework doesn't apply  
24 to state litigation. So I understood how it  
25 might come up as an alternative for some other

1 cases you might see in the future, but for the  
2 injunction you have in front of you from the  
3 states, the whole class device doesn't even work  
4 as an alternative. So I don't see how it can be  
5 the answer for us.

6 JUSTICE BARRETT: But -- but why  
7 should you care if the class device doesn't work  
8 as an alternative if you have bucket one?

9 Like, you -- you don't really need the  
10 class device. I think what you're saying is  
11 will it be frustrating for states not to have  
12 the class device when the individuals have it,  
13 but I don't see why that's true if giving you  
14 complete relief in -- in bucket one solves your  
15 problem.

16 MR. FEIGENBAUM: So I should be very  
17 clear, and I'm sorry for the confusion on this.  
18 This goes back to my colloquies with Justice  
19 Gorsuch.

20 When states are seeking the relief,  
21 states are seeking it in bucket one and bucket  
22 two. As an amicus to the other injunction --

23 JUSTICE BARRETT: I see.

24 MR. FEIGENBAUM: -- I recognize courts  
25 are looking at, I think bucket three could be

1 available.

2           We aren't seeking relief when -- when  
3 it falls into bucket three because, as I was  
4 saying earlier, we're not going to be seeking  
5 relief for other parties. This Court's cases  
6 like Brackeen make very clear we aren't suing to  
7 vindicate the injuries that third parties and  
8 our residents are suffering.

9           So, when states come before you, the  
10 questions that you would ask are: Are the  
11 alternative ways of remedying our injury going  
12 to be practically or legally workable? And  
13 you're going to ask did Congress authorize it,  
14 which gets to the vacatur question, which gets  
15 to the Hobbs Act question and so on.

16           And on that first bucket, which I  
17 think describes this case well, I had a hard  
18 time with some of the colloquies earlier today  
19 because I think they were missing some really  
20 serious burdens that the states are still going  
21 to have to bear in this case if we get something  
22 less than a nationwide injunction.

23           I think it's going to hinder the  
24 administration of our benefits programs. I  
25 think it's going to hinder the participation in

1 our benefits programs. And I think it's going  
2 to produce unprecedented chaos on the ground.  
3 And I -- I might offer examples of each.

4 JUSTICE GORSUCH: Before you do, I'm  
5 sorry, I have one more.

6 MR. FEIGENBAUM: Not at all.

7 JUSTICE GORSUCH: How would you get  
8 this -- how would you get the merits of this  
9 case to us promptly?

10 MR. FEIGENBAUM: So there's two  
11 different ways that this Court could think about  
12 doing it.

13 So the first is I heard a couple  
14 colloquies earlier today to suggest that maybe  
15 the states should sort of have to take some of  
16 the burdens on ourselves because, okay, some  
17 people move in, maybe that's just something that  
18 equity shouldn't care about, and it may be true,  
19 this is Hornbook equity, that in some cases,  
20 states don't get complete relief for the harms  
21 that they suffer, we just have to eat some of  
22 the administrability burdens.

23 But the merits have always come into  
24 that because that is just about remedying a  
25 party's own injuries, and the strength of the

1 ability to remedy our injuries is going to turn  
2 on a peek on the merits.

3 This is partially Ohio versus EPA and  
4 building on Justice Kavanaugh's Labrador  
5 concurrence, where this Court said you might  
6 have some states who really like a policy and  
7 some states who want to get relief from the  
8 policy, and how you reconcile those two things,  
9 who should get relief, who should benefit from  
10 the policy, will turn in part on a peek at the  
11 merits because --

12 JUSTICE GORSUCH: Yes.

13 MR. FEIGENBAUM: -- we have a greater  
14 right to relief from it.

15 JUSTICE GORSUCH: I appreciate that.  
16 How do we get to the merits fast?

17 MR. FEIGENBAUM: This Court could set  
18 supplemental briefing on the merits by an order  
19 tomorrow if it wished specifically to say the  
20 federal government has proposed that states get  
21 less than complete relief in this case. We  
22 could not possibly think about giving the states  
23 less than complete relief without looking at the  
24 merits. We want briefing.

25 JUSTICE GORSUCH: Okay. Put that

1     aside.  Assume we've just got the remedial  
2     question before us and we're going to decide the  
3     remedial question one way or the other.  Then  
4     what?

5                   MR. FEIGENBAUM:  Oh, then I share some  
6     of Justice Kagan's concerns from earlier that it  
7     would -- it would --

8                   JUSTICE GORSUCH:  So I -- I appreciate  
9     you share those concerns.  How would you address  
10    them?  How -- how -- how would the states plan  
11    to get this case to the Court promptly?

12                   MR. FEIGENBAUM:  I think it's very  
13    hard to think about how the states would lose  
14    this case given the state of Supreme Court  
15    precedent.  It creates very weird incentives on  
16    the certiorari docket when there's already  
17    binding precedent from this Court.

18                   We do suffer harms from the  
19    application of this Executive Order beyond our  
20    borders that we need relief from.  If we don't  
21    get a full remedy from that, I suppose we could  
22    ultimately seek cert before judgment on the  
23    basis that we still have Article III injuries  
24    that we're suffering, but we'd be asking this  
25    Court to grant review from a circuit precedent

1 we won on the basis that we have continued  
2 injuries.

3 It's not impossible. This Court knows  
4 best when it grants cert and when it doesn't. I  
5 would think it's not the cleanest way to tee up  
6 a case historically, and so it would raise some  
7 real concerns to the colloquies earlier today  
8 about how this case would ultimately come before  
9 this Court.

10 JUSTICE ALITO: Are -- are you telling  
11 us that we really can't decide the question that  
12 we asked to have briefing and argument on  
13 without taking a -- a peek at the merits?

14 MR. FEIGENBAUM: So I'm not saying  
15 that at all. So there's two different ways to  
16 think about this case, Your Honor.

17 One is to say, absolutely, the states  
18 need to get complete relief for their injuries  
19 and then let's figure out the best way to do it,  
20 and we think the alternatives are not workable  
21 and not legal.

22 If this -- if this Court is going to  
23 entertain giving us anything less than full  
24 redress for all of the Article III injuries we  
25 bring before you, I don't see how that can be

1 entertained without a peek at the merits because  
2 you always look at the merits to decide should  
3 we get a hundred percent or 90 percent of our  
4 own injuries redressed.

5 JUSTICE ALITO: Well, would a decision  
6 in -- on the matter that is I understood to be  
7 before us, the narrow question that I understood  
8 to be before us, make any -- be helpful in any  
9 way if we do not peek at the merits and we also  
10 do not decide whether you have standing?

11 MR. FEIGENBAUM: So I'm not sure how  
12 you could decide whether or not we got an  
13 appropriate scope of relief without figuring out  
14 what our own injuries are because how you  
15 decide -- this is the United States' own  
16 argument -- how you decide whether or not we  
17 should get relief for our own injuries turns on  
18 what our injuries are that require relief.

19 And so I do think we have pretty  
20 significant pocketbook injuries like in Nebraska  
21 to the tunes of millions of dollars, and whether  
22 we get those remedies or don't get those  
23 remedied is going to turn on the merits, is  
24 going to turn on the nature of the harms, and  
25 then, ultimately, the workability of the

1 alternatives.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel.

4 Justice Thomas?

5 Justice Alito?

6 JUSTICE ALITO: Well, General Sauer  
7 began by outlining problems that he sees being  
8 created by universal injunctions, and he said  
9 that the issue was a -- a nonideological issue  
10 and a nonpartisan issue.

11 Do you agree with that?

12 MR. FEIGENBAUM: I do think presidents  
13 of both parties have objected to nationwide  
14 injunctions. I agree.

15 JUSTICE ALITO: So what do you say  
16 about the -- the practical problem? So put out  
17 of -- let's put out of our minds the merits of  
18 this and just look at the abstract question of  
19 universal injunctions.

20 What is your response to what some  
21 people think is the practical problem? And the  
22 practical problem is that there are 680 district  
23 court judges, and they are dedicated and they  
24 are scholarly, and I'm not impugning their  
25 motives in any way. But, you know, sometimes

1 they're wrong, and all Article III judges are  
2 vulnerable to an occupational disease, which is  
3 the disease of thinking that I am right and I  
4 can do whatever I want.

5           Now, on a multi-member appellate  
6 court, that is restrained by one's colleagues,  
7 but trial judge, the trial judge sitting in the  
8 trial judge's courtroom is the monarch of  
9 that -- of that realm, and there are situations  
10 in which trial judges -- the -- the president  
11 does something, it could be President Trump, it  
12 could be President Biden, it could be President  
13 Obama. The trial judge says this is unlawful  
14 and I'm going to -- I'm going to order -- I'm  
15 going to enjoin it, and I'm so -- I'm convinced  
16 I'm right, so I'm not going to stay the  
17 injunction. And then an application is made to  
18 the court of appeals to stay the injunction.  
19 The court of appeals gives it the back of the  
20 hand, and then the case comes immediately to us  
21 in the context of an emergency application.

22           And some of us have said, well, we  
23 don't think we should do anything in those  
24 situations unless the -- unless it is  
25 indisputably clear that the court below was

1 wrong. So what do you say to that practical  
2 problem?

3 MR. FEIGENBAUM: So we're mindful of  
4 the practical problems. I will say the states  
5 have had a through line as well across  
6 administrations. We have never believed, even  
7 as nationwide injunctions restrained policies  
8 that we favored, that they were categorically  
9 off the table. We've always taken the position  
10 that they are sometimes available in narrow  
11 circumstances, whether we like the policy or  
12 don't like the policy.

13 And so you might have some cases where  
14 the nature of the harm -- this is the DACA  
15 example from my friend on the other side --  
16 where the nature of the harm, which was Texas  
17 saying it had to give benefits to residents in  
18 the state, is actually entirely remedied by a  
19 nationwide -- a state-only injunction that  
20 applies just to Texas, because that might  
21 incentivize individuals to leave Texas, and then  
22 Texas doesn't have to give them benefits  
23 anymore. So you might have a case like that.

24 But sometimes you are going to have  
25 cases where it is impossible to remedy the

1 state's own injuries, and the alternatives are  
2 not practically or legally workable, and that  
3 describes this case perfectly.

4 And so I don't think the answer is a  
5 bright line that means, even in those  
6 situations, it's not possible for the states to  
7 get relief.

8 JUSTICE ALITO: In deciding the -- the  
9 question that is before us here, do you think we  
10 should -- never mind. I withdraw that.

11 I have no further questions.

12 CHIEF JUSTICE ROBERTS: Justice  
13 Sotomayor?

14 JUSTICE SOTOMAYOR: Let's start with  
15 an answer you've been trying to give and haven't  
16 completed, which are -- the General suggested  
17 there were two ways that your injuries could be  
18 remedied. He claimed they were both presented  
19 to the court below. I didn't see that, but  
20 that's a matter that we could check on.

21 Do you agree with me that they were  
22 not presented to the courts below?

23 MR. FEIGENBAUM: I do agree with you.  
24 So I want to be very clear because I think  
25 there's some confusion across the briefing here.

1 JUSTICE SOTOMAYOR: Right.

2 MR. FEIGENBAUM: We agree -- and I  
3 don't think the First Circuit disagreed. They  
4 objected to the nationwide injunction --

5 JUSTICE SOTOMAYOR: They did.

6 MR. FEIGENBAUM: -- in the district  
7 court. And we attached the briefing and we  
8 attached the transcript.

9 What they didn't do is provide some of  
10 the alternatives they've pressed in two  
11 sentences in their emergency application.

12 JUSTICE SOTOMAYOR: That's what I  
13 mean. Okay.

14 MR. FEIGENBAUM: Yes. They did not  
15 press --

16 JUSTICE SOTOMAYOR: So now go through  
17 why their -- why you question whether their two  
18 suggestions now that they've only raised before  
19 us are inadequate to remedy all of your harms.

20 MR. FEIGENBAUM: Yeah. So -- so --

21 JUSTICE SOTOMAYOR: Because complete  
22 relief, he says that there is situations in  
23 which you grant relief that will benefit third  
24 parties.

25 Why is your relief necessary to give

1 you complete relief even though it benefits  
2 these parents in other jurisdictions?

3 MR. FEIGENBAUM: So I don't think  
4 there's any serious dispute that if you limit  
5 the relief to babies born in New Jersey, we  
6 won't get complete relief, because 42 U.S.C.  
7 1396a, the Medicaid statute, requires us, the  
8 states, to do the citizenship verification. So  
9 it's not true that they can simply handle it all  
10 for themselves. Federal law requires us to  
11 undertake those responsibilities.

12 And we have in New Jersey 6,000 babies  
13 born out of state every year when they come into  
14 the state and they need benefits. The Boyle  
15 declaration from Massachusetts suggests that's  
16 going to cover 40 percent of kids. They come  
17 into our state. They need benefits. We have to  
18 do citizenship verifications, which is a burden  
19 for us.

20 JUSTICE SOTOMAYOR: That's for you in  
21 New Jersey, but there's I think how many states?

22 MR. FEIGENBAUM: That's just an  
23 example. We have --

24 JUSTICE SOTOMAYOR: Yeah.

25 MR. FEIGENBAUM: -- we have 23

1 attorneys general in this -- exactly right.

2 JUSTICE SOTOMAYOR: Twenty-three  
3 attorney generals, so 23 states are going to  
4 have babies who were born somewhere else without  
5 a birth certificate that you're now, if they  
6 move into your state, going to have to do  
7 checking on.

8 MR. FEIGENBAUM: And that comes to the  
9 United States' alternative, Justice Sotomayor,  
10 which is they say, okay, maybe their citizenship  
11 turns on when they enter New Jersey, maybe for  
12 some purposes, maybe for all purposes, depending  
13 on which sentence you're looking at in the  
14 emergency application.

15 And there are three problems either  
16 way. The first is it will undermine the  
17 administration of our benefits programs. So  
18 individuals will move in. When they were born,  
19 they were treated as noncitizens. They didn't  
20 get Social Security numbers because they  
21 wouldn't have been eligible for the enumeration-  
22 at-birth program in their states, and they're  
23 going to arrive and they're going to seek  
24 benefits that we administer.

25 But federal law requires that they

1 have Social Security numbers for the  
2 administration of those benefits. This is 7  
3 U.S.C. 2025 for SNAP. This is 42 U.S.C. 1320b-7  
4 for TANF, for Medicaid, and so on. So they're  
5 going to need to have Social Security numbers.  
6 They're going to arrive without them even though  
7 they were under this Court's precedents citizens  
8 who should have been in the enumeration-at-birth  
9 program, who should have had Social Security  
10 numbers. And it's going to be a burden on us  
11 either in delaying the benefits, training county  
12 social service workers in having to administer  
13 benefits without the -- without the SSNs on a  
14 provisional basis.

15 So that's the administration of the  
16 benefits.

17 Let me give you an example on  
18 participation, which we have responsibility for  
19 as well. These are babies who were told that  
20 they -- their families were told that the babies  
21 are undocumented, they aren't citizens, they're  
22 not eligible for these federal programs when  
23 they were born.

24 They come into our states, they think  
25 they're now ineligible. They don't realize

1 their child is a citizen entitled to these  
2 federal benefits. And so what will happen is we  
3 bear the responsibility putting in our own state  
4 Medicaid plans of getting them enrolled, and  
5 that's 42 U.S.C. 1367bb.

6           So we're responsible for putting in  
7 our plan how we're going to enroll them. We  
8 have to incur substantially more costs to get  
9 them enrolled in our programs because they think  
10 they're undocumented, they think they're  
11 ineligible because of where they were born, even  
12 though their citizenship has now turned on when  
13 they cross state lines.

14           And then the last point is we've never  
15 in this country's history since the Civil War  
16 had your citizenship turn on when you cross  
17 state lines. So we don't have answers to these  
18 workability questions, not just because it  
19 wasn't presented in the district court, not just  
20 because it's two sentences in an emergency  
21 application, but because, for over a century,  
22 executive practice has been uniformly to the  
23 contrary, building on this Court's decision in  
24 Wong Kim Ark. So we genuinely don't know how  
25 this could possibly work on the ground.

1           And although my friend on the other  
2 side has complained that they weren't able to  
3 give guidance, the states didn't object to  
4 guidance. The states have no quarrel with  
5 internal steps, and if they want to put out  
6 guidance that says, if Wong Kim Ark gets  
7 overruled, this is that we would do, that's  
8 fine. What they can't do is require us to take  
9 any steps or issue guidance that requires  
10 everyone to start planning for something that is  
11 so patently against this Court's own settled  
12 precedent.

13           JUSTICE SOTOMAYOR: Now, going back to  
14 the history question that Justice Thomas started  
15 with, you relied on the bill of peace. You  
16 relied on the tax injunction of the 19th century  
17 and not so far in the 19th century -- 1891 --  
18 just about the time that the Fourteenth  
19 Amendment was adopted, okay?

20           At any rate, there are other cases,  
21 one of our amici points out to them, the Pierce  
22 versus Society of Sisters case, the West  
23 Virginia State Board of Education case, those  
24 were earlier than the 1960s. In -- in the  
25 Pierce versus Society of Sisters, the Court

1 affirmed a universal injunction that wasn't even  
2 sought by the parents, correct?

3 MR. FEIGENBAUM: That's right.

4 JUSTICE SOTOMAYOR: And there, what we  
5 said was -- there, states were imposing criminal  
6 penalties on parents who sent their children to  
7 private school, and just two plaintiff schools  
8 sued against that penalty. They sought and won  
9 an injunction that categorically restrained the  
10 state from enforcing the law. That was 1925,  
11 correct?

12 MR. FEIGENBAUM: That's right.

13 JUSTICE SOTOMAYOR: And similarly,  
14 with West Virginia, saluting the flag by Jehovah  
15 Witnesses, the injunction was universal.

16 So, in answer to Justice Gorsuch's  
17 point, we've had universal injunctions in some  
18 form, correct, since the founding?

19 MR. FEIGENBAUM: That's right. If I  
20 can make two points on that, Justice Sotomayor?

21 JUSTICE SOTOMAYOR: In equity,  
22 correct?

23 MR. FEIGENBAUM: Exactly. So  
24 there's -- so I agree with your reading of the  
25 equitable history, that it goes back from the

1 English Bill of Peace, through Equity Rule 48,  
2 through the tax collection injunctions, through  
3 Equity Rule X, through the Ex Parte Young period  
4 you're referring to, through AARP just a few  
5 weeks ago. So I agree with your read of the  
6 history.

7 But I just want to make one quick  
8 point.

9 JUSTICE SOTOMAYOR: Well, let me -- go  
10 ahead, make your point, but I want to finish  
11 this thought, which is: You started earlier by  
12 saying universal injunctions should not be the  
13 preferred remedy, and it should be limited.  
14 You've suggested three ways to limit it.

15 I agree with you, those three -- and  
16 yours clearly falls within one, that's your  
17 claim. But the point that I think my two other  
18 colleagues are raising is: How do we ensure  
19 district courts are following that?

20 MR. FEIGENBAUM: So -- so if I can  
21 make I point about the history and then make a  
22 point about the guidance.

23 On the history, I understand that the  
24 United States at the podium today tries to make  
25 the history all about what it calls

1 indivisibility cases, cases where there's just a  
2 unitary on/off switch as it were and either  
3 something happened or it didn't happen. Like a  
4 redistricting plan needs to be completely redone  
5 or a power plant is on or it's off.

6 But if I can give an example that  
7 shows it's not quite so limited and it very much  
8 requires looking more broadly at what's  
9 practically or legally workable on the ground.  
10 I would point to apportionment as an example.

11 So say that there's an Executive Order  
12 that says: We're just not going to count  
13 minors, people under 18, in apportionment  
14 anymore; we're only going to count people who  
15 are voting age. And the State of New York files  
16 a lawsuit, and it wins its lawsuit, and all of  
17 its 17-and-under-year-olds get counted for  
18 apportionment.

19 That isn't indivisible in any way.  
20 It's not a redistricting plan. It's not a power  
21 plant. But it is going to skew apportionment in  
22 a way that is totally unfair practically and  
23 legally to third parties because now  
24 17-year-olds are being counted in New York, but  
25 they're not being counted in Oklahoma.

1           And you would end up messing up  
2           apportionment between states for that very  
3           reason. And that shows as just a broader  
4           insight that we've always looked to the harms  
5           that third parties will suffer as negative  
6           externalities of court orders.

7           And that's our submission here, that  
8           to accept what the United States wants as  
9           against our injunction and to say that it turns  
10          on or off when you cross state lines doesn't  
11          just harm the administration of our benefits,  
12          doesn't just even harm enrollment in our  
13          benefits, also puts chaos on the ground where  
14          people's citizenship turns on and off when you  
15          cross state lines.

16          If ICE has initiated a removal  
17          proceeding when you live in Philly and you move  
18          to Camden, I suppose the ICE removal is supposed  
19          to turn off at that point potentially because  
20          your citizenship status has changed.

21          I don't know if you lose it if you  
22          move back to Philly, whether you were born in  
23          New Jersey or born in Philly, moved to Camden  
24          and moved back. It's a very porous part of the  
25          country. I don't know if the ICE removal turns

1 back on when you cross state lines again.

2 And that sort of chaos on the ground,  
3 those implementation questions we don't know,  
4 are serious third-party harms we've always taken  
5 into account.

6 This is North Carolina versus  
7 Covington, where courts ask what's workable as  
8 an injunction matter. And it's also the Winter  
9 Factors, where Factor 3 looks at the balance of  
10 the equities between the parties and workability  
11 and harm to them, and Winter Factor 4 looks at  
12 public interest and the negative externalities  
13 and workability problems we're imposing on  
14 others.

15 CHIEF JUSTICE ROBERTS: Justice Kagan?

16 JUSTICE KAGAN: General, you had a  
17 chance to talk about your administrative costs  
18 and the workability problems that New Jersey  
19 would confront, but how about this magnet  
20 problem?

21 I mean, it strikes me as -- as  
22 completely obvious that if you have two states  
23 and they have different rules for citizenship  
24 and one benefits babies and the other doesn't  
25 that everybody moves to the state where the more

1 favorable rule exists. But why is it that  
2 preventing that harm from happening should count  
3 as providing you with complete relief?

4 MR. FEIGENBAUM: So I think, actually,  
5 my point is somewhat different. I agree with  
6 you that the incentives could potentially factor  
7 into the calculus because we're ultimately  
8 experiencing some harm we might not -- might not  
9 otherwise to our benefits programs.

10 But my point is different. Even if  
11 you just take normal migration -- for New  
12 Jersey, 6,000 babies born out of state, 8  
13 percent -- or 8 million every year traveling  
14 across state lines -- without worrying about the  
15 incentives, we're going to be looking at that  
16 problem for how we administer benefits programs  
17 because --

18 JUSTICE KAGAN: I got that. Are  
19 you -- are you saying we shouldn't consider the  
20 fact --

21 MR. FEIGENBAUM: No, I think you can.  
22 I think you can, Your Honor, and it's because of  
23 the nature of three things together.

24 One is it's the movement, but it's not  
25 just the movement. Two is it's the fact that

1 citizenship historically was something you had  
2 at birth or didn't have at birth, and so you  
3 arrived to our state in theory without  
4 birthright citizenship because you would have  
5 been told when you were born in the hospital  
6 what you have or don't.

7           And then the third, and this is really  
8 important, is the way that citizenship permeates  
9 so much not just for individuals but for what  
10 states are obligated to do, whether it's  
11 citizenship verification eligibility, whether  
12 it's enrollment in our own programs.

13           Over and over, you see citizenship in  
14 Congress's own laws as the on-or-off switch for  
15 our own administration of benefits. And that's  
16 actually sort of unique.

17           So I don't think every time people  
18 move between states you automatically need to  
19 have a nationwide injunction. What you need is  
20 a demonstration about how that's going to  
21 contribute to the state's harm.

22           And then -- I think this is really  
23 important to colloquies you were having with the  
24 United States earlier -- a court could, in an  
25 appropriate case, say: Well, sure, state, you

1 might have to keep some of the harm; we're only  
2 going to remedy 90 percent of your harm because  
3 it's too disruptive to everyone else.

4 But I don't think you can do that in a  
5 case without looking at the merits because  
6 whether we should get to a hundred percent of  
7 our injuries taken care of or 90 percent of our  
8 injuries taken care of will always involve the  
9 strength of our merits showing.

10 And I don't see how you could have a  
11 stronger merits showing than we have here: 127  
12 years of Supreme Court precedent, over a century  
13 of executive practice, and congressional  
14 statutes that codified both into law in 1940 and  
15 1952.

16 And given that strength of the merits  
17 and the settled precedent, combined with our  
18 nature of harm, I don't think this is a close  
19 case for why we need national relief to remedy  
20 our injuries.

21 JUSTICE KAGAN: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice  
23 Gorsuch?

24 Justice Kavanaugh?

25 Justice Barrett?

1 JUSTICE BARRETT: I have a question  
2 about the history.

3 So Grupo tells us that we have to look  
4 back to 1789 and the High -- High Court of  
5 Chancery. So I appreciate that there have been  
6 some cases from later, and you were talking  
7 about some of those with Justice Sotomayor, from  
8 the early 20th century, maybe the late 19th  
9 century.

10 Can you say -- let's say that I think  
11 the bill of peace is more like a  
12 representational suit that is a forerunner to  
13 the class action. What do you think is your  
14 very best example of something that would look  
15 at the period that Grupo tells us is relevant  
16 that would support something that looks like  
17 universal relief?

18 MR. FEIGENBAUM: So I do think, from  
19 1789, from English equity, I do think the best  
20 example is the bill of peace, and so I  
21 understand if we see it differently.

22 JUSTICE BARRETT: Right.

23 MR. FEIGENBAUM: It's a fair point.

24 I will just say quickly on Grupo  
25 Mexicano, its own tradition -- and this is sort

1 of the analogical reasoning you talked about in  
2 Rahimi -- it looks at that period, but in other  
3 times, we've also looked at American tradition  
4 to see analogically how we've liquidated that  
5 tradition or not.

6 And in American equitable tradition,  
7 this is Equity Rule 48, which specifically said  
8 nonparties are not bound by certain relief even  
9 as they may benefit from it.

10 And I take that to be the principal  
11 reason my friend on the other side thinks that  
12 bills of peace look much more like class actions  
13 than they ultimately look like universal  
14 injunctions. And Equity Rule 48 was to the  
15 contrary. Tax collection injunctions in  
16 American history were to the contrary.

17 So I just have a hard time with that  
18 reading even though I agree with you that you  
19 would be starting in the founding trying to do  
20 analogical reasoning based on what Grupo  
21 Mexicano says but using American equity to  
22 answer some of the unresolved ambiguities in  
23 this case.

24 JUSTICE BARRETT: Oh, I completely  
25 agree with you need some analogical reasoning,

1 you know, and I don't think that Grupo  
2 completely rules that out. And, I mean, I  
3 think, even if you talked about the distinction  
4 between a -- a bill of peace and a class action,  
5 you would be looking at something that doesn't  
6 have to be called the same thing.

7 I think the problem is when we have  
8 such a party-centric history, if it has to be  
9 reasoning that fits within the confines, then I  
10 think we have a little bit of trouble.

11 Let me -- let me just ask you one  
12 question about relief. So let's say that I  
13 think that the states do need something broader  
14 in order to have complete relief even if the  
15 universal injunction is too broad and  
16 inconsistent with Grupo.

17 That isn't how the court below  
18 approached the question because that isn't what  
19 the court below thought it had to do because the  
20 court below thought it could just enter a  
21 universal injunction.

22 So how would I go about crafting some  
23 sort of holding or to create a language that  
24 would take care of you and the fact that you  
25 need maybe broader complete relief than maybe an

1 individual plaintiff would, right? Because the  
2 district court didn't go through that analysis,  
3 you know, the kind of -- the analysis that  
4 you're telling us today.

5 So tell me practically what that would  
6 look like.

7 MR. FEIGENBAUM: So I think the  
8 district court in -- in the Massachusetts case  
9 did actually do a very good job of this. It  
10 specifically said New -- I'm saying "New Jersey"  
11 as a stand-in --

12 JUSTICE BARRETT: Yeah, yeah.

13 MR. FEIGENBAUM: -- 23 attorneys  
14 general -- the states need this relief. And --  
15 and he didn't grant universal relief to the  
16 individual plaintiffs in that case, so he  
17 did --- he did actually talk different --

18 JUSTICE BARRETT: Make a distinction.

19 MR. FEIGENBAUM: -- relief for  
20 different parties, and he said this is necessary  
21 for us.

22 Part of why we're talking about  
23 alternatives in a different way at the podium  
24 today is because these alternatives were not  
25 presented to the district court.

1           So the district court just had before  
2           him the idea that maybe we have to eat some  
3           harms or maybe we get universal relief. And, of  
4           course, we need universal relief given the  
5           strength of the merits showing as between those  
6           choices.

7           I think what you could say is, here,  
8           there were two sentences in an emergency  
9           application that raise new alternative ways to  
10          remedy the harms. Those sorts of things need to  
11          be raised to the district court. And when they  
12          are raised to district courts in appropriate  
13          cases when states file suit, courts should ask  
14          first are those alternatives going to be  
15          practically or legally workable for the  
16          plaintiffs and for third parties?

17          I agree, to Justice Gorsuch's point,  
18          if the federal government wants to take on its  
19          own burdens, it can do so, but it can't just say  
20          that for third parties --

21                 JUSTICE BARRETT: But you're talking  
22          about what would happen in the future. I'm  
23          talking about what would happen to you now.

24                 MR. FEIGENBAUM: Oh, so I think, if  
25          the United States seriously wanted to press

1 these alternative with facts about how they  
2 would work and put that before the district  
3 court, parties can always put new alternatives  
4 in a motion to dissolve an injunction before the  
5 district court. That's something that has  
6 happened regularly when there's changed  
7 circumstances or new alternatives. They're  
8 welcome to do that in -- in this case or in any  
9 other. But then they're going to have to put  
10 forward actual facts about how it's practically  
11 or legally workable.

12 I will say, on its face, these two  
13 sentences don't look practically or legally  
14 workable for the reasons I raised. But they'd  
15 have to make that showing in the district court  
16 in the first instance.

17 JUSTICE BARRETT: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Jackson?

20 JUSTICE JACKSON: So I guess I'm kind  
21 of hung up on the posture in which we find  
22 ourselves looking at these issues. You know,  
23 Justice Alito, I think, focused on this a little  
24 bit, you know, when he says that the district  
25 court makes this initial determination. It

1 turns out to be wrong. The remedy, I thought,  
2 was to appeal.

3 And I guess, for me, the question is  
4 whether and under what circumstances the  
5 government keeps on doing the thing that the  
6 court has found unlawful while the litigation is  
7 proceeding to determine whether or not the  
8 government's activity violates the law.

9 We're sort of in an interim posture.  
10 I -- many of your arguments, and I appreciate  
11 them, are kind of couched in, you know, the  
12 state is going to need complete relief for their  
13 injury, and that -- and that's true definitely  
14 as a final matter. But here we are at the  
15 beginning of this litigation. No one has  
16 determined whether or not the government's  
17 conduct is actually unlawful. We have a  
18 district court, several district courts and now  
19 courts of appeals that say it is, and so, as an  
20 interim matter, we are saying the government has  
21 to stop doing it while we litigate the issue of  
22 the unlawfulness.

23 To me, that kind of puts the whole  
24 thing in a different frame. It's sort of like  
25 why isn't the question in this posture, in this

1       circumstance, can the government or has the  
2       government shown that it is going to suffer some  
3       sort of harm from being made to completely stop  
4       this activity while we're litigating the  
5       lawfulness of the conduct.

6                   I don't understand -- and then you  
7       say, yes, we're going to suffer harm. This is  
8       the balance of the equities that -- you know,  
9       part of the -- the -- the PI and the stay  
10      showing, but I just don't understand why that's  
11      not the focus here. And I don't know what  
12      the -- and I -- I apologize because I didn't get  
13      a chance to ask Mr. Sauer this, but -- and maybe  
14      he can address this on his rebuttal -- but, you  
15      know, what -- what problem is the government  
16      facing as a harm matter from being completely  
17      told it has to stop doing this while we  
18      determine, we, the court system, determine  
19      whether or not its conduct is lawful?

20                   MR. FEIGENBAUM: So we -- I mean, we  
21      included this in our application. We do think  
22      this case is quite unique in that I do think  
23      it's hard for the government to show in this  
24      particular case that it needs to be able to act  
25      contrary to this Court's settled precedent.

1 That's obviously come up in a couple of  
2 questions today. It's something of I realize  
3 the elephant in the room. I've often been asked  
4 to assume that the merits are put to the side,  
5 and I'm fine assuming that for those questions.

6 But, to your point, you're not wrong.  
7 It is quite striking, obviously, that it's not  
8 just that district courts are saying this looks  
9 like it might be unlawful. They're saying Wong  
10 Kim Ark settled this exact issue 127 years ago.  
11 This Court has reaffirmed it since. Over a  
12 century of executive practice has built on that.  
13 And Congress has codified that directly into  
14 law.

15 So I do think it's a particularly  
16 unusual case for the government to be saying  
17 that it has been quite so harmed and needs this  
18 kind of relief. But, at the end of the day, I'm  
19 happy to join issue on when relief may or may  
20 not be appropriate, and I just think we're  
21 clearly on the positive side.

22 JUSTICE JACKSON: But you're saying  
23 that at least in some circumstances from your  
24 perspective, in order to even decide whether or  
25 not you are entitled to an interim complete

1 injunction, the Court's now going to have to  
2 peek at the merits while the merits are being  
3 litigated?

4 MR. FEIGENBAUM: I think the Court  
5 always has to peek at the merits in deciding  
6 whether the party itself should be getting  
7 relief from its harms, including complete  
8 relief, as even the United States accepts. So  
9 those are all four of the Winter factors. You  
10 have to figure out what the irreparable harm is  
11 that you're trying to deal with. You have to  
12 figure out if we have a sufficient merits  
13 showing in order to eliminate that irreparable  
14 harm. And, depending on the strength of the  
15 merits showing, you're also looking at Winters  
16 Factors 3 and 4.

17 So this Court has given four Winter  
18 factors that I think are quite useful in most  
19 cases. I took my friends on the other side to  
20 be saying, well, beyond the Winter factors,  
21 there's this bright-line rule from Article III  
22 or the history of equity that just says it can  
23 never get to this point.

24 I obviously disagree a bit with them  
25 on the reading of that history, but I just think

1 it has no bearing on the case that the states  
2 bring to this Court here.

3 JUSTICE JACKSON: Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 Ms. Corkran.

7 ORAL ARGUMENT OF KELSI B. CORKRAN  
8 ON BEHALF OF THE PRIVATE RESPONDENTS

9 MS. CORKRAN: Mr. Chief Justice, and  
10 may it please the Court:

11 The executive order's stripping of  
12 citizenship from U.S.-born children is contrary  
13 not only to the Fourteenth Amendment's plain  
14 text but also our common law history, this  
15 Court's precedent, a federal statute, and over a  
16 century of executive branch practice.

17 Every court to have considered the  
18 issue agrees that the order is blatantly  
19 unlawful, a determination the stay application  
20 does not challenge.

21 The government instead argues that  
22 Article III and equitable tradition  
23 categorically prohibit providing nonparty relief  
24 from the order's enforcement regardless of the  
25 order's illegality or the irreparable harm it

1       inflicts.

2                   The government is wrong. It is well  
3 settled that preliminary injunctions may benefit  
4 nonparties when necessary to provide complete  
5 relief to the plaintiffs or when warranted by  
6 extraordinary circumstances, both of which are  
7 true here.

8                   The Court should reject the  
9 government's efforts to stay a preliminary  
10 injunction that maintains a status quo all three  
11 branches of government have ratified and  
12 operated under for over a century and that  
13 prevent the catastrophic consequences that will  
14 result for the plaintiffs and our country if the  
15 government is allowed to execute an  
16 unconstitutional citizenship-stripping scheme  
17 simply because legal challenges take time.

18                   I welcome the Court's questions.

19                   JUSTICE THOMAS: You say the  
20 government is wrong about the availability of  
21 preliminary injunctions. On what do you base  
22 that?

23                   MS. CORKRAN: So I -- I think the two  
24 reasons I identified, one, it is well settled,  
25 and I understood General Sauer to agree today,

1 that universal injunctive relief is appropriate  
2 when necessary to provide complete relief to the  
3 plaintiffs. That is the case here, and I'm  
4 happy to talk about that.

5 But I also -- you know, this Court has  
6 long recognized the availability of universal  
7 injunctive relief in extraordinary circumstances  
8 where it's -- it's -- it's justified, I  
9 think focused particularly on the public  
10 interest and -- and equities prongs of the  
11 Winter test. And I'm happy to talk about that  
12 as well, but I think those are the -- the two  
13 reasons the government --

14 JUSTICE THOMAS: Do you think that  
15 if -- even if one considers the history not to  
16 support you, that the pragmatic considerations  
17 and the policy considerations should override  
18 that?

19 MS. CORKRAN: So I -- you know, again,  
20 I would put us in the complete relief bucket.  
21 So I'll -- like Mr. Feigenbaum, I'll put on my  
22 amici hat in answering that question.

23 I understand General Sauer's proposal  
24 to be that we channel all of this through Rule  
25 23. I think that is ahistorical. One, it's

1 consistent with the Rules Committee's  
2 understanding of the rules, both -- if you look  
3 at Rule 23, Rule 65, and Rule 71 together, they  
4 establish that Rule 23 is not the channeling  
5 mechanism that the government's suggesting.

6 I want to -- I'll start with Rule 71  
7 because it's responsive, Justice Barrett, to  
8 your question earlier about whether nonparties  
9 can enforce orders. Rule 71 explicitly  
10 contemplates that and says, if a nonparty  
11 receives relief, they are entitled to enforce  
12 it.

13 I'd point also to Rule 65, the  
14 preliminary injunction rule. In 2017, the Rules  
15 Committee considered a proposal from Professor  
16 Bray to amend the rule to prohibit relief to  
17 nonparties. The committee rejected that  
18 proposal because it found that it ran afoul of  
19 the Rules-Enabling Committee.

20 And then I'd end by pointing to Rule  
21 23 itself, which says nothing about it being a  
22 channeling mechanism. In *Principi v.*  
23 *Scarborough*, this Court said, you know, we don't  
24 treat the rules as excluding background  
25 equitable practices. And, here, Rule 23 doesn't

1 even contemplate preliminary relief. It's  
2 focused on permanent injunctive relief, and I  
3 think that's because, you know, as we've been  
4 discussing, it's very difficult to get class  
5 certification in time to have preliminary  
6 relief, so you're doing putative class relief,  
7 which is the exact same thing as what's  
8 happening here.

9 JUSTICE KAVANAUGH: Well, can't --

10 CHIEF JUSTICE ROBERTS: Is --

11 JUSTICE KAVANAUGH: -- why can't you  
12 get putative class relief in a preliminary  
13 injunction or TRO posture?

14 MS. CORKRAN: You mean -- sorry. In  
15 the multiple state context?

16 JUSTICE KAVANAUGH: Get relief in a --  
17 for a putative class --

18 MS. CORKRAN: Yeah.

19 JUSTICE KAVANAUGH: -- in a TRO or PI  
20 posture.

21 MS. CORKRAN: Oh, I -- I certainly --  
22 I certainly think you can. The Court did that  
23 recently in AARP.

24 My point is, when the Court does that,  
25 it's relying on the equitable authority it has

1 to enter that sort of relief, not on the Rule 23  
2 mechanism, because the class isn't binding until  
3 after certification, until after final judgment.

4 JUSTICE KAVANAUGH: If that mechanism  
5 is available, whether one way or another,  
6 doesn't that solve a large part of the problem  
7 in a way that complies with the -- the rules --

8 MS. CORKRAN: Yeah. So --

9 JUSTICE KAVANAUGH: -- the problems  
10 with universal injunctions that have been  
11 identified by administrations of both parties?

12 Go through Rule 23 and do what's  
13 needed there, and people are bound then, so  
14 that's a wrinkle, but why doesn't that just  
15 solve the problem?

16 MS. CORKRAN: Right. So they're not  
17 going to be bound until after you get past class  
18 certification, so we're talking about the --

19 JUSTICE KAVANAUGH: I understand that.

20 MS. CORKRAN: And for that reason, I  
21 would go to Justice Alito's point earlier that  
22 all you're doing is taking the -- the non-party  
23 injunctions that are happening now outside of  
24 Rule 23 and shoving them into Rule 23. It  
25 doesn't address the forum selection concerns.

1 It doesn't address the concerns about the --  
2 JUSTICE KAVANAUGH: Right, but it --  
3 MS. CORKRAN: -- emergency docket.  
4 JUSTICE KAVANAUGH: -- it complies  
5 with the rules. I mean, the law -- we -- we  
6 care about technicalities. And this may all be  
7 a technicality, but it seems to me the  
8 technicality of Rule 23 and the history of that  
9 provides -- 23(b)(2) provides a mechanism to do  
10 what's -- what's needed here in terms of getting  
11 relief to people, and if you have PIs available  
12 for putative classes, that seems to solve --  
13 solve the issue for preliminary relief and the  
14 timing issue as well.  
15 MS. CORKRAN: So (b)(2) provides for  
16 permanent injunctive relief. It does not  
17 provide for preliminary injunctive relief.  
18 JUSTICE KAVANAUGH: Right.  
19 MS. CORKRAN: Again, Rule 23 does not  
20 purport to be the exclusive channeling  
21 mechanism. And, as I said, the Rules Committee  
22 doesn't think it did, so it would be this Court  
23 kind of projecting its own policy decision to  
24 treat Rule 23 that way.  
25 And I would come back again to Justice

1 Alito's concerns. That is not actually  
2 addressing the Court's emergency docket. It's  
3 just now we're slapping a label of class  
4 certification on it.

5 So I would -- and -- and I'll make a  
6 second point on that and then say what I think  
7 the better -- the better way of approaching the  
8 problem is, which is I think that General Sauer  
9 and I are in agreement that the Venn diagram of  
10 cases that are appropriate for class  
11 certification and where injunctive relief I  
12 think would be appropriate is not coterminous.  
13 I think we could pursue successfully class  
14 certification here.

15 I heard General Sauer to disagree, and  
16 I think it's because they're -- they're just  
17 different circumstances. If you look at the  
18 class certification requirements, commonality,  
19 typicality, they were actually added to Rule 23  
20 in 1966 mostly to address the expansion of class  
21 certification to include damages suits. That  
22 makes sense there, but those were never  
23 requirements prior to 1966.

24 JUSTICE GORSUCH: Ms. Corkran, on --  
25 on the class certification point you've been

1 developing, one response might be -- and I just  
2 want to get your reaction to it -- that by  
3 proceeding through the class mechanism, even a  
4 putative class mechanism, a court is making a  
5 preliminary assessment about who are the parties  
6 going to be before it and issuing interim relief  
7 so that it preserves its jurisdiction to issue  
8 final relief with respect to those parties.

9           And that's very different, the  
10 argument would go, than simply saying everybody  
11 everywhere nationwide, universally or perhaps --  
12 perhaps cosmically, stands to benefit from this  
13 decision without ever having to suffer being  
14 bound by it. Thoughts?

15           MS. CORKRAN: So I would say again  
16 that's an ahistorical approach. You haven't had  
17 that sort of Rule 20(b)(3) --

18           JUSTICE GORSUCH: Well, assume --  
19 assume for the moment that we read bills of  
20 peace, which I understand to be your -- your --  
21 your best set of cases, to be prototypical of  
22 what is now Rule 23.

23           MS. CORKRAN: Right. And so the --  
24 the bills of peace and kind of going through, as  
25 Mr. Feigenbaum was talking about, Equity Rule 48

1 and then 38, in none of those circumstances were  
2 we doing this ex ante class certification  
3 determination.

4 So the modern class action device  
5 actually looks quite different than it was for  
6 representative suits historically. So it would  
7 be putting on an ahistorical constraint.

8 JUSTICE GORSUCH: I appreciate that  
9 argument, okay, but now we're haggling over the  
10 history, which -- which we have to do, I -- I  
11 accept, but if -- if -- if bills of peace are  
12 understood -- again, accept the premise --

13 MS. CORKRAN: I will.

14 JUSTICE GORSUCH: -- to -- to be  
15 predecessors of Rule 23, then respond to the  
16 point that there is something fundamentally  
17 different about a preliminary injunction to a  
18 putative class that you've found is likely to be  
19 certified and likely to succeed on the merits in  
20 order to preserve that court's jurisdiction to  
21 award ultimate relief to those parties before it  
22 and that that's categorically different than a  
23 universal injunction.

24 MS. CORKRAN: So starting with the  
25 presumption that was different about the bills

1 of peace is that they were binding, I think  
2 sometimes it's not clear always, at the end when  
3 they were getting to final judgment. I would go  
4 back to Grupo Mexicano to Justice Barrett's  
5 point, although that -- you know, that was a  
6 high watermark of this equitable originalism.  
7 The way the Court articulated the test, it -- it  
8 focused on 1789. But the actual analysis in  
9 Grupo Mexicano focused on 1890 through 1942.

10 And what the Court found there is that  
11 there were numerous cases expressly rejecting  
12 the Mareva injunction, and that was confirmed in  
13 the 1970s when England adopted it and said, no,  
14 we've never done this before.

15 We are in an entirely different world  
16 here. One, the cases that Justice Sotomayor  
17 laid out earlier all come from between 1890 and  
18 1942, and they suggest that nonparty relief was  
19 provided for outside of the class action  
20 context.

21 But the fact that we have, I think,  
22 these very, you know, studied scholars in this  
23 rigorous debate about what the bills of peace  
24 meant, what the railroad cases meant, I think  
25 shows that this is very different in Grupo

1 Mexicano, and for the Court to kind of delve  
2 into that and adopt the categorical rule that  
3 the government is suggesting, I think, is  
4 certainly an overcorrection. It's a hornet's  
5 nest on Article III, right? It calls into  
6 concern EPA class action, a whole sort of  
7 things. I would suggest that the Court instead  
8 focus on providing limiting principles within  
9 the confines of the Nken factors or the Winter  
10 factors.

11 JUSTICE KAVANAUGH: And is there a  
12 practical problem? So I want to put aside the  
13 history, and I take your points on that and why  
14 you don't think Rule 23 fits, and I take your  
15 point on that, but if putative class actions and  
16 preliminary relief are an option, what then is  
17 the practical problem you see as distinct from  
18 the current regime?

19 MS. CORKRAN: Well, if General Sauer  
20 is right and that there are class certification  
21 problems here, then, in this particular case,  
22 you're going to have thousands of individual  
23 suits.

24 JUSTICE KAVANAUGH: Okay. I think you  
25 would be arguing that the class should be

1 certified here.

2 MS. CORKRAN: Right, but I'm saying  
3 the government is suggesting --

4 JUSTICE KAVANAUGH: So more -- more  
5 generally taking it out of this case if you  
6 could, do you see practical problems?

7 MS. CORKRAN: Yeah. It would  
8 eliminate the associational standing trade  
9 cases, you know, the cases brought by the  
10 Chamber of Commerce, the NRA, other associations  
11 that aren't suitable for class certification.

12 I think also the questions again that  
13 the --

14 JUSTICE KAVANAUGH: Why? Can you  
15 explain that?

16 MS. CORKRAN: Well, they wouldn't --  
17 so, if we -- if we were to seek cert, it would  
18 be on behalf of our individual --

19 JUSTICE KAVANAUGH: Mm-hmm.

20 MS. CORKRAN: -- plaintiffs. You  
21 know, for the same reason that the government  
22 would have difficulty seeking class  
23 certification, the state government, I think,  
24 associations are -- are not necessarily a good  
25 fit for that -- for that framework.

1                   Again, that's also not solving the  
2 Court's problem. It's just channeling the  
3 problems through a different mechanism.

4                   JUSTICE KAVANAUGH: I don't think that  
5 can be solved just to be honest, but that's a  
6 separate issue --

7                   MS. CORKRAN: Well --

8                   JUSTICE KAVANAUGH: -- from what the  
9 right rule is as to how things transpire in the  
10 district courts.

11                  MS. CORKRAN: Could I perhaps try to  
12 solve it in a different way?

13                  JUSTICE KAVANAUGH: Mm-hmm.

14                  MS. CORKRAN: What I would suggest,  
15 you know, we spent some time trying to catalog  
16 the cases in which this Court has approved  
17 universal injunctive relief and the cases in  
18 which it's rejected it, with the aim of giving  
19 the Court maybe a suggestion how it might, you  
20 know, affirmatively articulate some limiting  
21 principles such that you would not be getting  
22 the injunctions that the Court thinks are  
23 inappropriate but the ones that the Court has  
24 approved would still be able to proceed. Again,  
25 that's not the categorical rule that the -- the

1 government is suggesting.

2 I think roughly what the Court has  
3 been doing is saying that universal injunctions  
4 are appropriate only in facial challenges  
5 involving fundamental constitutional rights  
6 where there are real concerns about whether --  
7 just the legal and practical availability of  
8 relief to similarly situated parties who are  
9 also going to experience irreparable harm.

10 I think that maybe explains AARP.  
11 Most recently, IRAP would fall into that  
12 category. Chrysafis, the New York eviction  
13 case, would fall in that category.

14 On the other side of the ledger, the  
15 Court seems to disapprove quite a bit of -- of  
16 nationwide injunctions involving discretionary  
17 benefits. So that's some of the recent ones  
18 that you have undone or stayed.

19 So I think what the Court could do is  
20 kind of identify limiting principles that would  
21 provide guidance to the lower courts on when  
22 it's appropriate to issue these injunctions.  
23 The natural home for that is the public interest  
24 prong of the Winter test, right?

25 If you're going to issue an injunction

1 that's going to have an impact on other peoples,  
2 you need to be doing a really muscular public  
3 interest assessment before doing that.

4 So that's -- that's what I would urge  
5 the Court --

6 JUSTICE KAVANAUGH: I mean --

7 JUSTICE KAGAN: Ms. Corkran, are --  
8 are you pushing back on the class certification  
9 idea because you're worried that there are cases  
10 where there will be no certification but in  
11 which broad relief is, in fact, appropriate --

12 MS. CORKRAN: Yes.

13 JUSTICE KAGAN: -- so that the two  
14 categories don't line up?

15 And if that's why you're pushing back,  
16 why are you worried about that? What are the  
17 cases you're worried won't line up properly in  
18 that way?

19 MS. CORKRAN: I mean, the government  
20 has suggested it's going to argue that here --  
21 again, I think the commonality -- so thinking  
22 about questions like common injury make a lot of  
23 sense when you're talking about class-wide  
24 damages, less so when you're talking about a  
25 facial challenge to a constitutional violation.

1                   So I just -- I think it's a bit of a  
2 mismatch. And, again, it's not -- it's not what  
3 Rule 23 was ever intended to do and it doesn't  
4 solve any of the Court's policy problems. So I  
5 think it's a -- you know, it's a lose-lose-lose  
6 proposal that the government is offering.

7                   I'm -- I'm a little concerned that I  
8 have focused a lot on my amici hat and haven't  
9 actually explained to the Court why the  
10 injunction is necessary for complete relief  
11 here, but I don't want to pivot too quickly, but  
12 I want to make sure I address our -- our primary  
13 argument as well.

14                   JUSTICE KAGAN: Tell us why it's  
15 necessary for complete relief.

16                   MS. CORKRAN: Yes.

17                   (Laughter.)

18                   MS. CORKRAN: Thank you. For two  
19 reasons. The first is that a plaintiff-specific  
20 injunction would not be administratively  
21 workable. I'll explain that in a second.

22                   But I want to note the second one is  
23 that even if it were workable, it would require  
24 the association members to identify and disclose  
25 to the government an association that puts them

1 at great risk of adverse consequences, detention  
2 or deportation, even if they're here lawfully.  
3 And so it's not complete relief to require the  
4 plaintiffs to make dangerous disclosures in  
5 order to claim the constitutional right.

6 And then maybe I'll pivot back to the  
7 workability unless there are questions about  
8 that. Yeah. So I'll -- oh, sorry.

9 CHIEF JUSTICE ROBERTS: Very briefly,  
10 and then we'll move on to the next stage of our  
11 questioning.

12 MS. CORKRAN: So the government's  
13 workability argument with respect to the -- the  
14 individual plaintiffs, the private plaintiffs,  
15 is wholly tethered to its argument that the  
16 injunction should be limited to the 16 named  
17 plaintiffs. It has offered no argument for how  
18 it would administer -- how state and local  
19 agencies could administer an injunction that was  
20 narrowed to the ASAP and CASA members. So I  
21 think that's probably the end of the road.

22 Mr. Feigenbaum made the point that the  
23 district -- they can always go back to the  
24 district court and ask for the injunction to be  
25 dissolved if they present some sort of workable

1 proposal. They haven't, and I don't -- I don't  
2 think they can. I don't want to talk for too  
3 long, but I -- if anyone is interested, I'm  
4 happy to answer questions about why I think it's  
5 unworkable.

6 CHIEF JUSTICE ROBERTS: Well, I'm sure  
7 someone will be.

8 MS. CORKRAN: Yeah.

9 CHIEF JUSTICE ROBERTS: Thank -- thank  
10 you, though, counsel.

11 Justice Thomas?

12 Justice Alito?

13 JUSTICE ALITO: Should we decide or  
14 make up our -- make up our minds on the  
15 underlying birthright citizenship question  
16 without briefing and argument and deliberation?

17 MS. CORKRAN: I -- I think that we  
18 would be very eager to do supplemental briefing  
19 on that. General Sauer noted that none of the  
20 parties had asked for cert before judgment. We  
21 couldn't because we keep winning. I will ask  
22 right now for cert before judgment.

23 (Laughter.)

24 JUSTICE ALITO: What was the -- what's  
25 the answer to my -- what's the answer to my

1 question?

2 MS. CORKRAN: Yes, I think you can  
3 grant cert before judgment. I also think --

4 JUSTICE ALITO: No, that wasn't my  
5 question.

6 MS. CORKRAN: Yeah. But I will say I  
7 think --

8 JUSTICE ALITO: All right. That's all  
9 right.

10 MS. CORKRAN: Yeah. No --

11 JUSTICE ALITO: That's all right. You  
12 don't want to answer it. That's fine.

13 MS. CORKRAN: Oh, no, no, I will. I  
14 have an -- if I could give an answer, which is  
15 that I think it's very difficult if -- or not  
16 impossible for the Court to do a meaningful Nken  
17 analysis without taking into account the fact  
18 that the government is asking the Court to allow  
19 it to ignore this Court's precedent, to ignore a  
20 duly enacted statute, and to upend a hundred  
21 years of executive branch practice.

22 So I think, you know, although the  
23 Court -- the government has attempted to  
24 separate them, that, really, the merits are  
25 embedded in the Nken factors.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Sotomayor?

3 JUSTICE SOTOMAYOR: I find it hard to  
4 understand how a district court, in looking at a  
5 preliminary injunction under the Winter factors,  
6 where we said that the likelihood of success on  
7 the merits is the keystone, how we could  
8 separate that out and say the keystone of  
9 whether you're entitled to universal injunction  
10 is the only merits question because the other  
11 factors are not eliminated by Winter. You have  
12 to balance the equities, and you can't balance  
13 the equities without the merits, correct?

14 MS. CORKRAN: I think that's right. I  
15 think also I don't -- you know, irreparable harm  
16 is going to be very difficult for the government  
17 to prove if it's not contesting that the -- or  
18 not contesting -- or at least not defending the  
19 constitutionality of the order because the  
20 government has no interest in enforcing an  
21 unconstitutional order.

22 I'd also note there's a -- there's a  
23 quote from Professor Bray in Justice Gorsuch's  
24 Texas concurrence, and it's: "In equity, it all  
25 connects. The broader and deeper the relief the

1 plaintiff seeks, the stronger the plaintiff's  
2 story has to be." So I think there really is  
3 kind of an equitable consideration here of the  
4 merits as well that just can't be extracted from  
5 the --

6 JUSTICE SOTOMAYOR: Now the state has  
7 explained why it can't pursue class actions. So  
8 it really -- it admits it's limited to whether  
9 it's entitled to complete relief.

10 But how about your organization?  
11 You --

12 MS. CORKRAN: I -- I --

13 JUSTICE SOTOMAYOR: -- you sort of  
14 answered it, but I wanted to pin you down on  
15 that.

16 MS. CORKRAN: No, I --

17 JUSTICE SOTOMAYOR: Do you believe  
18 that associational organizations can seek class  
19 action?

20 MS. CORKRAN: I believe our individual  
21 plaintiffs certainly can. I am --

22 JUSTICE SOTOMAYOR: Yes, there's no  
23 question there.

24 MS. CORKRAN: Yeah. I am -- I am  
25 nervous about the government's suggestion that

1 it's going to oppose our class certification  
2 motion if we were to file one. I think class  
3 certification can be -- can be very  
4 discovery-intensive. It could be the sort of  
5 thing that really delays the -- our plaintiffs  
6 from getting the relief that they seek.

7 JUSTICE SOTOMAYOR: Okay. Thank you.

8 CHIEF JUSTICE ROBERTS: Justice Kagan?

9 JUSTICE KAGAN: I guess what I worry  
10 about here, Ms. Corkran, is that this case is  
11 very different from a lot of our nationwide  
12 injunction cases in which many of us have  
13 expressed frustration at the way district courts  
14 are doing their business.

15 And, you know, our -- our -- the  
16 typical way in which that frustration emerges is  
17 that questions, legal questions, are hard, and  
18 they're come complicated, and different courts  
19 would decide them differently. And, instead,  
20 because of the forum selection process, a party  
21 goes to one place. You know, in the first Trump  
22 administration, it was all done in  
23 San Francisco, and then, in the next  
24 administration, it was all done in Texas.

25 MS. CORKRAN: Right.

1 JUSTICE KAGAN: And -- and -- and  
2 there is a big problem that is created by that  
3 mechanism, and that leads to the questions to  
4 you and to General Feigenbaum, which is, like,  
5 you know, your third buckets, which are, oh, if  
6 it's, like, super-important or if it's  
7 quintessentially national or whatever the way --  
8 you know, is not going to solve our problem for  
9 that set of cases, which is not this case.

10 This case, what's problematic about it  
11 is that the courts keep deciding the same way,  
12 and nobody really thinks that the lower courts  
13 are going to do anything different.

14 MS. CORKRAN: Right.

15 JUSTICE KAGAN: And it -- you know,  
16 for that reason, it does present the "catch me  
17 if you can" problem that Justice Jackson said  
18 and the problem of how are we ever going to get  
19 a case here.

20 But -- but our general case is not  
21 like that, and I just want you to sort of  
22 comment on it.

23 MS. CORKRAN: Yeah. I'd say first  
24 that the government's proposal of channeling  
25 through Rule 23 does nothing to solve anything

1 you just described.

2 I think the limiting principles that I  
3 was proposing, which, again, was just me trying  
4 to reflect back to the Court kind of the through  
5 lines that it's been identifying, are  
6 sufficiently concrete that if this Court were to  
7 articulate them, it would cut back on the number  
8 of universal injunctions. Is it a facial  
9 challenge? Does it involve a fundamental  
10 constitutional right? Right? Those are --  
11 those are concrete questions.

12 And then I would point to, you know,  
13 Justice Kavanaugh's Poe concurrence. I think,  
14 you know, vertical stare decisis is going to be  
15 important here. When courts enter these sorts  
16 of district -- these sorts of injunctions, they  
17 are immediately appealable to the courts of  
18 appeals. So, if there are any district courts  
19 that are kind of getting over their skis on  
20 these, it's correctable by the courts of  
21 appeals.

22 CHIEF JUSTICE ROBERTS: Justice  
23 Gorsuch?

24 Justice Kavanaugh?

25 JUSTICE KAVANAUGH: Some of your

1 concerns about this Court being involved, I  
2 guess I'm not sure I really understand that.  
3 When the -- when a president or an  
4 administration enacts some major new rule, the  
5 question ultimately -- and it's legally  
6 challenged -- ultimately will be a year or two  
7 from now, it'll get here and we'll make a final  
8 judgment, but the interim status of that rule,  
9 as this case illustrates and many others --  
10 vaccine mandate, eviction moratorium, go down  
11 the list -- they're really important whether  
12 they're in effect for that year or two.

13           And I guess I don't know why we --  
14 we -- you should be concerned or we should be  
15 concerned about this Court playing a role in  
16 those.

17           MS. CORKRAN: Oh, I don't have  
18 concerns about that. I was responding to  
19 General Sauer's point that this has become  
20 pathological in the number of universal  
21 injunctions that are making its way onto the  
22 Court's emergency docket, but my --

23           JUSTICE KAVANAUGH: Just because there  
24 are more significant executive actions over the  
25 last three decades --

1 MS. CORKRAN: Yeah. I certainly agree  
2 with that. And I -- you know, I --

3 JUSTICE KAVANAUGH: -- that are --  
4 that are, you know, at the -- Loper Bright and  
5 our West Virginia versus EPA are arguably some  
6 part of that story as well.

7 MS. CORKRAN: I agree completely. And  
8 to answer the question you asked General Sauer  
9 earlier about why we've seen this proliferation  
10 of these universal injunctions, I think it's  
11 directly -- I would say first that the  
12 government, I think, pretty dramatically  
13 overstates them. It's double-counting TROs and  
14 PIs in the same case.

15 But, if you look at the number of  
16 executive actions in the first six weeks of this  
17 administration, it's more than any other  
18 president issued in a year dating back to 1951  
19 during the Korean War.

20 JUSTICE KAVANAUGH: But I don't want  
21 to -- I mean, it's --

22 MS. CORKRAN: Yeah.

23 JUSTICE KAVANAUGH: You know, it's  
24 going back. It's a bipartisan phenomenon --

25 MS. CORKRAN: Agree.

1 JUSTICE KAVANAUGH: -- completely  
2 bipartisan, and completely, in my view, well  
3 intentioned because presidents want to get  
4 things done.

5 MS. CORKRAN: Right.

6 JUSTICE KAVANAUGH: And I -- I get  
7 that.

8 MS. CORKRAN: Yeah. I -- I agree with  
9 that. I think it's -- it's directly correlated  
10 to the number of unilateral executive actions  
11 we've seen over the last few years --  
12 administrations.

13 CHIEF JUSTICE ROBERTS: Justice  
14 Barrett?

15 JUSTICE BARRETT: Ms. Corkran, I just  
16 have one question. You said that you're in  
17 bucket one.

18 MS. CORKRAN: Yes.

19 JUSTICE BARRETT: So you felt like you  
20 were --

21 MS. CORKRAN: Oh, yeah.

22 JUSTICE BARRETT: -- playing kind of  
23 the amici role. I understand why you might  
24 think you're in bucket one for the associational  
25 point. Do you think you're in bucket one for

1 individual plaintiffs?

2 MS. CORKRAN: So I don't know that I  
3 would extract them because the universal --

4 JUSTICE BARRETT: Well, named  
5 plaintiff. Like, let's imagine you had  
6 individual plaintiffs that are named members of  
7 the association. So let's -- I guess what I'm  
8 saying is let's take the association outside of  
9 it and let's just say that we're talking about  
10 individual plaintiffs.

11 MS. CORKRAN: So, there, I --

12 JUSTICE BARRETT: Would you put that  
13 in bucket one?

14 MS. CORKRAN: So, there, I would go to  
15 the second injury I -- I had identified earlier,  
16 which is if you're asking -- our -- our  
17 individual plaintiffs have pseudo names right  
18 now. That would be contemplating a scenario  
19 where they would have to identify themselves to  
20 the federal government and say I am an ace -- or  
21 I -- I am the plaintiff in this case, at which  
22 point they are immediately vulnerable to  
23 deportation, even, again, if they're here  
24 lawfully.

25 We've seen the government removing

1 visa holders and -- and asylum seekers.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Jackson?

4 JUSTICE JACKSON: So I think I  
5 understand your argument. There's just one  
6 little piece of it that is confusing to me, and  
7 I hope you can clarify.

8 So, if we view the relief in this case  
9 and others like it to be a judgment ordering the  
10 defendant not to do something that the court has  
11 found to be likely -- because we're in the  
12 interim stage -- unlawful, are nonparties in  
13 that situation actually getting relief, or are  
14 they just incidental beneficiaries of an order  
15 requiring the government not to do this harmful  
16 thing?

17 I thought it was the latter.

18 MS. CORKRAN: Yeah.

19 JUSTICE JACKSON: And that just -- you  
20 know, the government is told by the Court:  
21 Don't do X. And, of course, anybody who would  
22 have been harmed by the government doing X is  
23 benefitted by that, but they're not really, I  
24 thought, getting relief.

25 But here -- here's where I get

1 confused, because I thought they're not getting  
2 relief because they can't come into court  
3 independently and seek a contempt ruling if the  
4 government continues to do the thing.

5 They weren't parties. They don't have  
6 the judgment. That's what differentiates them  
7 from, say, the class action people or the  
8 plaintiff people.

9 The reason why we have the rules for  
10 class action, et cetera, is because, at the end  
11 of the day, the members of the class are getting  
12 a judgment that they can then use to enforce  
13 this obligation as against the government,  
14 whereas the people in the universal injunction  
15 world are just benefitting if the government  
16 actually, you know, follows the order.

17 MS. CORKRAN: Yeah, I -- I think that  
18 what you're articulating is consistent with a  
19 long history of precedent and practice. I mean,  
20 it's the classic rem case, right, making a  
21 declaration about property. I think Professor  
22 Pfander's amicus brief is really helpful on  
23 that. He talks about the -- the patent laws.

24 And I think you can see that same  
25 instinct in the Court's cases that Justice

1 Sotomayor was talking about earlier, right, the  
2 railroad rates, Barnett, Pierce v. Society of  
3 Sisters.

4 JUSTICE JACKSON: And I guess my point  
5 is that's why we don't need Rule 23, because  
6 we're actually doing, conceptually, a different  
7 thing.

8 We're not trying to give all these  
9 people, everyone in the world, some sort of  
10 enforceable right as against the government. We  
11 are simply just doing what courts do, I thought,  
12 which is telling the defendant over whom they  
13 have personal jurisdiction that they have to  
14 stop doing something unlawful, and, of course,  
15 that benefits people.

16 But the thing that confuses me about  
17 your argument is that you alluded at the  
18 beginning to Rule 71 and suggested that the  
19 nonbene- -- or the nonparties could somehow  
20 enforce this universal injunction. I didn't  
21 understand that.

22 MS. CORKRAN: I think Rule 71  
23 contemplates that. It would be very onerous. I  
24 mean, I -- I think, when General Sauer, he was  
25 kind of contemplating the idea that, you know,

1       tens of thousands of people were going to have  
2       to come to court individually --

3                   JUSTICE JACKSON: Right. But I think,  
4       if you're right about that, it undermines the  
5       point that I'm making because it -- it puts  
6       people in the same place as the class action  
7       folks and the -- the parties in a way that --  
8       that I think raises legitimate concerns that  
9       some of my colleagues have put forward with  
10      respect to universal injunctions.

11                   So the thing that distinguishes them  
12      is that universal injunctions are not  
13      benefitting or giving relief to nonparties in  
14      any meaningful sense, is my theory.

15                   MS. CORKRAN: I think both have always  
16      been true, and maybe they're in tension with  
17      each other. But Rule 71's originated in Equity  
18      Rule X, which was enacted in -- or was put in  
19      place in 1842, which had this same idea of,  
20      quite apart from representative suits,  
21      nonparties enforcing orders that provided them  
22      with relief.

23                   Although maybe this -- as I'm talking,  
24      I think maybe -- I'm talking about, under Rule  
25      71, orders that --

1 JUSTICE JACKSON: Let me just --

2 MS. CORKRAN: -- provide relief.

3 JUSTICE JACKSON: But let me just ask  
4 you this --

5 MS. CORKRAN: You're talking about  
6 injunctions.

7 JUSTICE JACKSON: Yes, right.

8 MS. CORKRAN: Yes. Those are  
9 different things.

10 JUSTICE JACKSON: What I'm asking you  
11 is: In this very case, if we have a -- a series  
12 of non -- of plaintiffs, of actually named  
13 people, and they get an injunction, as the  
14 government says, against -- sorry. If they get  
15 a universal injunction or what they call a  
16 universal injunction, the -- the government  
17 cannot enforce this executive order, can someone  
18 who is not a nonplaintiff come into court to  
19 enforce that if the government violates it?

20 MS. CORKRAN: So -- so I'm hesitant to  
21 say no both because Rule 71 exists and those  
22 aren't my -- my -- my clients or my plaintiffs  
23 and we needed this universal injunction --

24 JUSTICE JACKSON: Yes, I understand.

25 MS. CORKRAN: -- for the purposes of

1 our relief.

2 JUSTICE JACKSON: I'm just trying to  
3 figure this out.

4 MS. CORKRAN: But I think both -- you  
5 know, I -- I think both what you said is true.  
6 If we look at cases like Barnett and Pierce and  
7 we go all the way back -- I would -- I think  
8 Justice Story's dissent that he signed onto in  
9 Cherokee Nation v. Georgia is terrific on this  
10 point.

11 He was the preeminent scholar on  
12 equitable remedies, and he certainly thought in  
13 the way that you're articulating we're going to  
14 make a declaration about whether Georgia can  
15 enforce its laws on Cherokee Nation property,  
16 and that is just a declaration of the law that  
17 will have an impact on -- on everyone.

18 But I would -- I'm hesitant to say  
19 that Rule 71 doesn't have any application.

20 JUSTICE JACKSON: Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel.

23 Rebuttal, General Sauer?

24

25

1 REBUTTAL ARGUMENT OF GEN. D. JOHN SAUER  
2 ON BEHALF OF THE APPLICANTS

3 GENERAL SAUER: Thank you,  
4 Mr. Chief Justice.

5 The original meaning of the  
6 Citizenship Clause extended citizenship to the  
7 children of former slaves, not to people who are  
8 unlawfully or temporarily present in the  
9 United States.

10 The merits arguments we are presenting  
11 to the lower courts are compelling. We cite,  
12 for example, a host of 19th century authorities  
13 that point out that domicile was the touchstone  
14 of noncitizens being treated as -- having their  
15 offspring treated as -- as citizens in that  
16 context.

17 That is consistent with Wong Kim Ark  
18 as well as with the slaughterhouse cases in Elk  
19 against Wilkins. And the suggestion that our  
20 position on the merits is weak is profoundly  
21 mistaken.

22 And that kind of snap judgment on the  
23 merits that was presented in the lower courts is  
24 exactly the problem with the issue of racing to  
25 issue these nationwide injunctions.

1           The Chief Justice correctly pointed  
2           out that this Court, if it wishes to address the  
3           merits expeditiously, has many tools to do so.  
4           Cert before judgment is one possible tool.  
5           There are also others.

6           But this Court should also address the  
7           scope of remedy, the remedial question that's  
8           presented in the application. That is an  
9           extremely urgent question.

10           And one of the reasons an extremely  
11           urgent question is the limiting principles that  
12           my friends on the other side have been offering  
13           have all proven to be completely ineffective to  
14           slowing the essentially slaughter -- flood or  
15           cascade of universal injunctions that we see in  
16           these cases.

17           The states here have a unique issue  
18           that hasn't come up yet, but for the reasons we  
19           state in our application, they lack third-party  
20           standing very clearly under cases like Murthy  
21           and Haaland and Katzenbach and Kowalski. So no  
22           injunctive relief should run to the states in  
23           this particular case anyway.

24           And, most fundamentally, the vision of  
25           the district courts that's reflected in the

1 issuance of these nationwide injunctions is a  
2 vision of them as a roving commission to correct  
3 every legal wrong that they -- that they can  
4 consider and to exercise general legal oversight  
5 over the executive branch, which is what this  
6 Court rejected in TransUnion.

7 And, for those reasons, we ask the  
8 Court to grant the applications.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11 The case is submitted.

12 (Whereupon, at 12:29 p.m., the case  
13 was submitted.)

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