WHEN CONGRESS REQUIRES NATIONWIDE INJUNCTIONS

DAVID HAUSMAN*

A curious provision of the Immigration and Nationality Act (INA) precludes class actions challenging expedited removal, the system of fast-track deportations for individuals who have recently entered the country. The same provision authorizes nationwide relief in non-class actions, but it requires that plaintiffs in such non-class systemic challenges file their claims in the federal District Court for the District of Columbia and that they do so within sixty days of the challenged change to the system.

This framework should matter to scholars of nationwide injunctions for two reasons. First, Congress took for granted in 1996 that federal district courts may issue nationwide injunctions without certifying a nationwide class. Second, by limiting individual nationwide actions to a single judicial district, Congress prevented plaintiffs from trying their luck in multiple judicial districts and prevented courts from issuing conflicting nationwide injunctions.

The expedited removal statute therefore eliminates two of the most commonly cited harms of non-class nationwide injunctions—heightened plaintiff forum shopping and the possibility of conflicting injunctions. At the same time, it requires a court to issue such injunctions when the federal government violates the law. In other words, this provision illustrates that solving the (real) policy problems posed by nationwide injunctions does not require the drastic measure of limiting all injunctive relief to the plaintiffs. More modest solutions are possible.

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*Ph.D. Candidate, Stanford Department of Political Science; Graduate Fellow, Regulation, Evaluation and Governance Lab, Stanford Law School. Many thanks to Leah Fugere, Austin Slaughter, Alan Trammell, Valerie Young, and the participants at the 27th Annual Ira C. Rothgerber Conference for helpful comments. Disclosure: I worked as an attorney at the American Civil Liberties Union Immigrants' Rights Project from 2016 to 2019, and I continue to consult occasionally. All opinions and errors are mine alone.

INTRODUCTION

On July 23, 2019, the Department of Homeland Security issued a notice expanding expedited removal, a fast-track system that allows the government to deport people without any hearing.[1] Before that notice, the expedited removal program was limited to people encountered within one hundred miles of the border who had entered the country less than fourteen days before.[2] The July 2019 notice, however, instructed immigration officials nationwide to presume that *anyone* they encounter is a noncitizen and—if the person is unable to satisfy the officer that he or she has a lawful immigration status or has been in the United States for more than two years—to order that person deported without a hearing.[3]

A nationwide injunction prevented this drastic policy from taking effect.[4] At first glance, that injunction seems similar to the many others that district courts have issued against President Trump's policies.[5] There is one important difference: here, Congress *required* the court to redress the unlawful government action with a nationwide, non-class injunction. Within sixty days of any written change in expedited removal policy, Congress authorized suits—solely in the District of Columbia—

1. Notice Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409 (July 23, 2019).

2. Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,879 (Aug. 11, 2004).

3. There are narrow exceptions, both in the statute and as a result of recent litigation. *See* Sections I.A. & I.B. and note 15 below for details.

4. Make the Rd. N.Y. v. McAleenan, 405 F. Supp. 3d 1 (D.D.C. 2019).

5. *See, e.g.*, Samuel Bray & Amanda Frost, *One For All: Are Nationwide Injunctions Legal?*, 102 JUDICATURE 70, 70 (2018) (noting that Attorney General Sessions counted twenty-two nationwide injunctions against the federal government in the Trump Administration's first year).

concerning the "validity of the [expedited removal] system,"[6] allowing a court to determine whether written policies are unconstitutional or "not consistent with applicable provisions of this subchapter or . . . otherwise in violation of law."[7] The statute requires the court to determine whether a change in policy is lawful—as applied system-wide, not just to an individual—but the same section prevents such challenges from being brought as class actions.

The statute includes at least two lessons for critics of nationwide injunctions. First, the statute requires the court, if it finds a legal violation, to issue a nationwide injunction without certifying a class. Second, nationwide injunctions issued under this provision are not vulnerable to several of the standard objections to such injunctions: no forum shopping is possible because the District of Columbia is the only available forum, and conflicting injunctions are not possible for the same reason.

This curious and restrictive provision of the Immigration and Nationality Act (INA) therefore highlights the lack of fit between the common criticisms of the nationwide injunction and the most common proposed solution: that relief be limited to individual plaintiffs. This short Article proceeds in two Parts. First, I describe the expedited removal framework and its limited judicial review provisions, which require that plaintiffs seek system-wide relief without filing a class action. Second, I explain why these unusual restrictions on judicial review—including a short time limit and a requirement that cases be filed in the District Court of the District of Columbia—mean that nationwide injunctions of expedited removal provisions do not raise the policy concerns raised by nationwide injunctions in other contexts. I conclude that those restrictions, while themselves unjustifiably restrictive, point toward other possible ways of addressing the legitimate policy concerns articulated by opponents of the nationwide injunction.

6. 8 U.S.C. § 1252(e)(3) (2018).
7. *Id.* § 1252(e)(3)(A).

I. LESSONS FROM LIMITATIONS ON JUDICIAL REVIEW OF EXPEDITED REMOVAL PROCEDURES

A. Background on Expedited Removal

When Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,[8] it created new procedures designed to fast-track the deportation of people who had recently arrived in the country. Those procedures allow immigration officers to order people who arrive (or have recently arrived) without entry documents to be "removed from the United States without further hearing or review."[9] Initially, those procedures applied only to people arriving at a port of entry, but the statute gave the government the power to apply the expedited removal procedure to any person:

> who has not been admitted or paroled into the United States, and who has not affirmatively shown, to the satisfaction of an immigration officer, that [he or she] has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility under this subparagraph.[10]

From 2004 to July 2019, the government applied this provision only to people apprehended within one hundred miles of the border who could not show that they had been present in the United States for more than fourteen days.[11]

The expedited removal scheme includes a shortened process for asylum seekers to obtain a hearing. If a noncitizen expresses a fear of persecution or the intent to apply for asylum, the immigration officer must refer the noncitizen for a screening hearing before an asylum officer.[12] At that hearing, the asylum officer decides whether the individual has established a "credible fear of persecution,"[13] which the statute

8. Pub. L. 104-208, 110 Stat. 3009 (1996).
9. 8 U.S.C. § 1225(b)(1)(A) (2018).
10. *Id.* § 1225(b)(1)(A)(iii)(II).
11. Designating Aliens for Expedited Removal, 69 Fed. Reg. at 48,879.
12. 8 U.S.C. § 1225(b)(1)(A)(ii).
13. *Id.* § 1225(b)(1)(B)(ii).

defines as "a significant possibility . . . that the alien could establish eligibility for asylum."[14]

B. Judicial Review of Expedited Removal Procedures

The expedited removal statute envisions two avenues for judicial review. First, in habeas petitions, the statute allows judicial review of whether a person is a noncitizen, has previously been granted asylum, is a lawful permanent resident, or was ordered removed under section 1225(b).[15] Second, and relevant here, the expedited removal statute creates one narrow path for affirmative challenges "on [the] validity of the system," so long as those challenges are brought "in the . . . District of Columbia" and concern a section of the statute, regulation, or written policy.[16] Such challenges must be brought no later than sixty days after the challenged action is implemented.[17] Finally, and counterintuitively, although the statute foresees challenges "on [the] validity of the system," it prohibits district courts from certifying a class in any such challenge.[18]

14. *Id.* § 1225(b)(1)(B)(v).

15. 8 U.S.C. § 1252(e)(2) (2018). This provision could be read, particularly in light of constitutional avoidance concerns, to allow habeas petitions from any noncitizen challenging an expedited removal order, but no circuit has accepted that broader reading to date, and only one circuit has held that the Suspension Clause itself requires courts to hear such challenges. The Ninth Circuit has, however, held that the writ of habeas corpus must be available to asylum seekers in expedited removal proceedings (at least if apprehended within the United States) challenging the sufficiency of the procedures for review of their credible fear claims under the Constitution and the immigration statute. Thuraissigiam v. U.S. Dep't of Homeland Sec., 917 F.3d 1097 (9th Cir. 2019), *cert. granted*, Oct. 18, 2019; *but see* Castro v. U.S. Dep't of Homeland Sec., 835 F.3d 422, 448–49 (3d Cir. 2016) (holding that Petitioners lacked any right to invoke the Suspension Clause).

16. 8 U.S.C. § 1252(e)(3)(A).

17. *Id.* § 1252(e)(3)(B).

18. *Id.* § 1252(e)(1)(B). The statute also deprives courts—apart from the Supreme Court—of "jurisdiction or authority to enjoin or restrain the operation of the [expedited removal provisions] . . . other than with respect to the application of such provisions to an individual alien against whom proceedings under such [part] have been initiated." *Id.* § 1252(f)(1). That provision likely does not apply to systemic challenges under § 1252(e)(3)—it could render them useless absent Supreme Court review. But even if it does apply, it surely does not apply to suits challenging the adequacy of procedures under the statute, since those challenges support, rather than challenge, the operation of the statute.

C. Systemic Challenges to Expedited Removal

Since the statute was passed in 1996, only a few cases have raised systemic challenges to expedited removal under section 1252(e)(3). The first of those cases challenged the initial implementation of expedited removal for individuals arriving at ports of entry.[19] On appeal, the D.C. Circuit held that the plaintiffs lacked standing and did not address the question of the scope of relief.[20]

The second case was decided in 2018. The plaintiffs in *Grace v. Whitaker*[21] obtained a nationwide permanent injunction preserving legal standards that had long been applied in credible fear interviews (the asylum screening interviews for people in expedited removal proceedings). The plaintiffs challenged a memorandum that implemented a decision by the Attorney General precluding asylum for most victims of domestic or gang violence.[22] The court held that the legal standard promulgated by the Attorney General—which, among other things, required asylum seekers to show that their home government either condoned their persecution or was completely helpless to prevent it—was inconsistent with the immigration statute.[23] The court then enjoined the application of the memorandum (which required asylum officers to apply this standard in credible fear interviews) nationwide.[24]

As it entered a nationwide injunction, the court noted that a provision authorizing system-wide challenges but only individual relief would make no sense. The court reasoned, first, that section 1252(e)(3), by authorizing systemic challenges, implicitly authorized systemic injunctive relief.[25] The court

19. Am. Immigr. Lawyers Ass'n v. Reno, 199 F.3d 1352, 1359 (D.C. Cir. 2000).

20. The court did suggest that § 1252(f)(1), which restricts relief to individuals, might apply in the context of challenges under § 1252(e)(3), but it did not have the opportunity to rule on the question. *Id.* at 1359–60.

21. 344 F. Supp. 3d 96 (D.D.C. 2018), *appeal docketed sub nom.* Grace v. William Barr, No. 19-5013 (D.C. Cir. Jan. 30, 2019). Disclosure: this case was brought by the ACLU Immigrants' Rights Project, where I am an attorney. I was not on the briefs.

22. *In re* A-B-, 27 I. & N. Dec. 316 (Att'y Gen. 2018).

23. *Grace*, 344 F. Supp. 3d at 127–30.

24. *Id.* at 141–46.

25. *Id.* at 141–43. The court also held that § 1252(f)(1)—which limits that relief enjoining the operation of the section regarding the expedited removal statute to an individual noncitizen—did not preclude systemic relief because the plaintiffs were not seeking to enjoin the *operation* of the statute itself but rather to prevent actions *inconsistent* with the statute. *Id.* at 143–44.

rejected the government's argument that any relief it issued must benefit only the plaintiffs in the case, noting the lack of support for the view that "a Court may declare an action unlawful but have no power to prevent that action."[26] In other words, Congress surely did not provide the D.C. Circuit with the power to determine the legality of written changes to expedited removal procedures, but then, in the same section, strip that court of any power to enforce its determination. Indeed, subsequent individual suits would be impossible because of the sixty-day limit, so systemic injunctive relief—rather than just precedent on point—is the *only* cure for a legal violation. The government's reading of the statute would therefore make systemic challenges an empty exercise.[27]

All of these points apply in the more recent challenge to the Administration's attempt to expand expedited removal, and the same court issued a nationwide injunction of that policy.[28]

II. IMPLICATIONS: NATIONWIDE INJUNCTIONS THAT DO NOT FOSTER FORUM SHOPPING OR STYMIE PERCOLATION

The nationwide injunction issued by the court in *Grace* is curiously immune to the common policy objections to such injunctions: forum shopping, lack of percolation, and conflicting injunctions.[29] All three of these problems are inapplicable or irrelevant to injunctions in cases challenging system-wide changes to expedited removal.

26. *Id.* at 144.

27. The district court also suggested, in a footnote, that the statute's prohibition on class certification might prevent the district court from entering *retrospective* injunctive relief (i.e., require the government to conduct new credible fear interviews or allow deported individuals to return) for anyone but the plaintiffs. *See id.* at 144 n.31. Whether the statute could be read to authorize that relief as well is an open question, but in any event, the plaintiffs did not request it.

28. Make the Rd. N.Y. v. McAleenan, 405 F. Supp. 3d 1 (D.D.C. 2019). The opinion in that challenge, in which the plaintiffs successfully argued that the government was required to conduct notice-and-comment rulemaking, also relied on the Administrative Procedure Act's provision allowing courts generally to set aside agency action inconsistent with the law.

29. *See, e.g.*, Howard M. Wasserman, *"Nationwide" Injunctions are Really "Universal" Injunctions and They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. 335 (2018); Samuel Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 418 (2017); Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 ALA. L. REV. 1 (2019).

First, critics argue that if a nationwide injunction is available, plaintiffs are more likely to shop for a favorable forum in order to obtain an injunction that binds other circuits, and they can shop *repeatedly*, because losing in one district or circuit does not preclude a new case in another.[30] But forum shopping is impossible for plaintiffs challenging changes to expedited removal, since the D.C. Circuit is the only available forum.

Second, critics note that the nationwide injunction prevents decisions from percolating through circuit splits.[31] But, in the expedited removal context, no percolation is possible because only a single district has jurisdiction to hear the claims. The lack-of-percolation objection therefore applies not to nationwide *relief* under that section but rather to Congress's decision to confine *judicial review* to a single district.

Third, critics suggest that injunctions issued in different circuits or districts may conflict.[32] Again, this concern simply does not apply in the context of section 1252(e)(3). Conflicting injunctions are not possible within a single district.

The smaller doctrinal oddities identified by critics as the results of nationwide injunctions are similarly irrelevant in the context of section 1252(e)(3). For example, nonmutual offensive issue preclusion does not run against the government.[33] In other words, the federal government is normally not precluded from raising arguments that it has unsuccessfully raised when litigating against other plaintiffs, and nationwide injunctions do preclude such arguments. But nonmutual offensive issue preclusion has no application where review is limited to a two-month period in a single judicial district.

In another putative oddity, Federal Rule of Civil Procedure 23(b)(2) sets out requirements for class-wide relief in actions for injunctive and declaratory relief, and nationwide injunctions in non-class actions ignore these requirements. But the expedited removal statute specifically precludes class-wide re-

30. Bray, *supra* note 29, at 457–61; Morley, *supra* note 29, at 32; Wasserman, *supra* note 29, at 363–64.

31. Bray, *supra* note 29, at 461–62; Morley, *supra* note 29, at 20, 32, 52; Wasserman, *supra* note 29, at 378, 381.

32. Bray, *supra* note 29, at 462–63; Morley, *supra* note 29, at 60; Wasserman, *supra* note 29, at 383–84.

33. *See* Bray, *supra* note 29, at 464; *but see* Zachary D. Clopton, *National Injunctions and Preclusion*, 118 MICH. L. REV. 1 (2019) (arguing that the federal government does not merit an exception from the general rule concerning nonmutual collateral estoppel).

lief, indicating that Congress did not believe those safeguards were necessary in this context. Finally, critics note that there are limits on a district court judge's power to establish the law in other districts.[34] However, as explained above, Congress intended to give district courts exactly that power in this context, and in any event, district judges routinely determine the law in other districts in class actions and even cases that include individual plaintiffs dispersed across judicial districts.

Given that none of these criticisms apply to system-wide challenges to expedited removal, such challenges present an archetypical situation in which a nationwide injunction is appropriate. That such a situation exists at all should give the most uncompromising critics of those injunctions pause and should make courts skeptical of the view that injunctions should never benefit nonplaintiffs. But what can section 1252(e)(3) tell us about *when* nationwide injunctions are appropriate?

First, injunctions that reach beyond the plaintiffs may be especially appropriate when class-wide relief is unavailable or insufficient. Consider, for example, a hypothetical case in which no individual plaintiff would have standing to challenge a policy—perhaps because the injury to each individual was small, or the individuals harmed were abroad—but an organization could establish an injury. A class action might be impossible, but an organizational plaintiff could establish that the challenged policy was illegal. Or, even if some individuals had standing, a comprehensive class action might be impossible if the challenged action affected the potential plaintiffs in widely differing ways. In these situations, relief reaching beyond an individual or organizational plaintiff can be appropriate without a class action. Courts might therefore more explicitly consider, in determining the scope of injunctive relief, whether a case could practicably be brought as a class action. In cases where class relief is not practicable and many people are harmed, injunctions reaching beyond the plaintiffs are more often urgently needed.

Second, nationwide relief would raise fewer concerns if courts could solve the forum shopping problem: plaintiffs should not be able to keep trying new districts until they find one that issues the nationwide order that they seek. A simple remedy for this problem would be to give preclusive effect to

34. Bray, *supra* note 29, at 465; Morley, *supra* note 29, at 52.

decisions in cases in which the plaintiffs seek nationwide relief, whether the court issues the injunction or refuses to do so. Preclusion of absent plaintiffs' future claims is the result of both nationwide class actions and section 1252(e)(3)'s requirement that plaintiffs file in the D.C. Circuit within sixty days of any challenged policy change. Of course, allowing such preclusion raises problems of its own: class actions include safeguards for absent class members[35] precisely because their claims will be precluded by the class action. Courts might adopt similar safeguards even without class certification, though devising such procedures could require revising the Federal Rules of Civil Procedure. But safeguards for absent individuals may be less necessary in at least one of the situations where nationwide relief is most appropriate—where an individual plaintiff would lack standing to bring his or her own case but an organizational plaintiff does have standing.[36]

Finally, it is possible to imagine other rules that address preclusion and lack-of-percolation concerns. Consider, for example, a default rule that a loss would have preclusive effect—but only in the circuit of the relevant court. In that case, plaintiffs could still try their luck elsewhere, but at least not in the same circuit. Such a rule would be less draconian than section 1252(e)(3)'s one-shot-within-sixty-days requirement, but it could still help address critics' worries that nationwide injunctions prevent percolation.

In sum, system-wide challenges to expedited removal require nationwide injunctions, but such injunctions lead to none of the bad results that concern critics of the nationwide injunction. That should make both critics and defenders think about what other tweaks to existing rules could limit and improve nationwide injunctions.

CONCLUSION

In the peculiar context of challenges to expedited removal, nationwide relief is not subject to the most common policy ob-

35. These include notice, *see* FED. R. CIV. P. 23(c)(2), and, in (b)(3) class actions, the opportunity to be excluded from the class. *Id.* 23(c)(2)(B).

36. Moreover, as Alan Trammell has pointed out, courts already bind nonparties in many ways—most obviously, by binding future litigants through precedent. *See* Alan Trammell, *Precedent and Preclusion*, 93 NOTRE DAME L. REV. 565, 568 (2017).

jections to nationwide relief in other contexts. That is because Congress has required that plaintiffs bring non-class, system-wide challenges and has made sure that plaintiffs only get one chance at those challenges (by requiring that plaintiffs bring suit in the District of Columbia within sixty days of a change in policy). The most common complaints about nationwide injunctions—that they give plaintiffs an incentive to try their luck repeatedly in different districts and that such injunctions could conflict—are beside the point when all cases are in a single district. The expedited removal context should therefore make critics think hard about whether their objections are to the inherent results of nationwide injunctions or instead can be addressed, without eliminating the possibility of such relief, by changing rules concerning preclusion and the geographic scope of relief.