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NATIONWIDE INJUNCTIONS AND FEDERAL REGULATORY PROGRAMS

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NATIONWIDE INJUNCTIONS AND FEDERAL REGULATORY PROGRAMS

Zachary Clopton, Mila Sohoni, and Edward H. Stiglitz*

EXECUTIVE SUMMARY

Legal observers have recently devoted considerable attention to examining the legality and the desirability of nationwide relief, including the question of whether the Administrative Procedure Act authorizes federal courts to vacate or set aside rules on a universal basis. Most commentary regarding these remedies focuses on courts or doctrinal questions. This report turns attention to a neglected aspect of the debate over universal relief: how these remedies affect federal agency rulemaking activity. How do federal agencies understand, implement, and respond to nationwide injunctions and universal vacaturs?

This study addressed this question quantitatively and qualitatively. On the quantitative side, data was collected on the number and types of cases in which courts issued nationwide injunctions or universal vacaturs. This study reports on important variation in the extent to which agencies were subjected to nationwide injunctions or universal vacaturs, as well as temporal variation in the rate at which these remedies were issued that is broadly consistent with the narrative of a recent rise in nationwide injunctions.

On the qualitative side, this study investigated how officials across the executive branch understood and responded to orders of universal effect. Through interviews and surveys with officials at over a dozen agencies, the study provides a composite picture of what occurs when an agency receives such an order, determines how to comply with it, and attempts to respond to it. These interviews suggest that agency officials regard good-faith compliance with court orders as their utmost priority, regardless of the order's scope. Agency officials reported few administrative difficulties in complying with nationwide injunctions or universal vacaturs because of their scope, and they expressed little to no familiarity with orders that set aside rules in geographically limited or party-specific ways. Instead, agency officials tended to voice frustration not with the general category of orders with universal scope, but rather only with vaguely written orders that were challenging to comply with because they were hard to understand. In a similar vein, agency officials expressed little sensitivity to, familiarity with, or interest in the kinds of formal legal distinctions that legal commentators focus on—for example, the differences between nationwide injunctions and universal vacaturs, or nationwide class actions and nationwide injunctions, or vacaturs issued by the D.C.

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Circuit as opposed to a district court or another court of appeals. In response to the legal environment, agency officials tended to express that their paramount interest was pursuing their programmatic objectives by making their rules as resistant to legal challenge as possible—regardless of the scope of the remedy that might follow.

Taken as a whole, these findings suggest that the difficulty of compliance is not a major reason to consider reform to universal relief. Universal relief may be problematic for other reasons, but agencies appear able to comply with universal orders—at least when the scope of relief is clear. We thus conclude with a suggestion for future study not of the scope of relief but of its clarity. The possibility of expanding channeling statutes to encompass challenges to rulemaking by additional agencies is another subject worthy of future study.

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ACRONYMS AND ABBREVIATIONS

ACUS	Administrative Conference of the United States
APA	Administrative Procedure Act
BOP	Federal Bureau of Prisons
CFPB	Consumer Financial Protection Bureau
CFR	*Code of Federal Regulations*
CFTC	Commodity Futures Trading Commission
DHS	Department of Homeland Security
DOC	Department of Commerce
DOD	Department of Defense
DOE	Department of Energy
DOI	Department of the Interior
DOJ	Department of Justice
DOL	Department of Labor
DOS	Department of State
DOT	Department of Transportation
Ed	Department of Education
EEOC	Equal Employment Opportunity Commission
EPA	Environmental Protection Agency
FCC	Federal Communications Commission
FDA	Food and Drug Administration
FEC	Federal Election Commission
Fed	Board of Governors of the Federal Reserve System
FERC	Federal Energy Regulatory Commission
HHS	Department of Health and Human Services
HUD	Department of Housing and Urban Development
IRS	Internal Revenue Service
NLRB	National Labor Relations Board
NRC	Nuclear Regulatory Commission
NWI	Nationwide Injunction
NYU	New York University
ODNI	Office of the Director of National Intelligence
OFR	Office of the Federal Register
OMB	Office of Management and Budget
SBA	Small Business Administration
SEC	Securities and Exchange Commission
SSA	Social Security Administration
USA	United States of America
USPS	U.S. Postal Service
UST	Department of the Treasury
VA	Department of Veterans Affairs

INTRODUCTION

In recent years, lawmakers, judges, and legal scholars have devoted considerable attention to examining the legality and the desirability of nationwide or universal injunctions.[1] More recently, that debate has expanded to encompass a discussion of whether the APA authorizes federal courts to vacate or set aside rules on a universal basis. These remedies—the nationwide injunction and the universal vacatur—have been evaluated primarily by reference to their effects upon the federal judicial system. What has been relatively neglected is the federal administrative state. Federal agencies are on the receiving end of the lion's share of these injunctions. But we lack a clear picture of how these remedies affect federal agencies on the inside.

The purpose of this project was to put on the table that missing piece of information. How do federal agencies understand, implement, and respond to nationwide injunctions and universal vacaturs?

Our study broke this question down into two pieces: one quantitative and one qualitative. On the quantitative side, we sought to gain a systematic if not comprehensive perspective on the number and types of cases in which courts issued nationwide injunctions or universal vacaturs. Although our quantitative empirical study was by necessity limited in scope, we discovered important variation in the extent to which agencies were subjected to nationwide injunctions or universal vacaturs, and we also discovered temporal variation in the rate at which these remedies were issued.

Our qualitative empirical study sought to investigate how officials scattered across the executive branch understood and responded to such orders. Through interviews and surveys with officials at over a dozen agencies, we sought to construct a composite picture of what occurs when an agency receives such an order, determines how to comply with it, and attempts to respond to it. Our findings from these interviews, which are synthesized and presented below, suggest that agency officials regard good-faith compliance with court orders as their utmost priority, regardless of the order's scope. Agency officials reported few administrative difficulties in complying with nationwide injunctions or universal vacaturs, and they expressed little to no familiarity with orders that set aside rules in geographically limited or party-specific ways. In fact, agency officials tended to voice frustration not with the general category of orders with universal scope, but rather only with vaguely written orders that were challenging to comply with because they were hard to understand. In a similar vein, agency officials expressed little sensitivity to, familiarity with, or interest in the kinds of formal legal distinctions that some courts and commentators have dwelt on—for example, the differences between nationwide injunctions and universal vacaturs, or nationwide

[1] *See* Admin. Conf. of the U.S., Forum, *Nationwide Injunctions and Federal Regulatory Programs* (Feb. 12, 2020), https://www.acus.gov/event/forum-nationwide-injunctions-and-federal-regulatory-programs.

class actions and nationwide injunctions, or vacaturs issued by the D.C. Circuit as opposed to a district court or another court of appeals. On the whole, agency officials tended to express that their paramount interest was pursuing their programmatic objectives by making their rules as resistant to legal challenge as possible—regardless of the scope of the remedy that might follow.

Taken together, these findings suggest that the difficulty of compliance is not a major reason to consider reform to universal relief. Universal relief may be problematic for other reasons, but our findings suggest that agencies are able to comply with universal orders—at least when the scope of relief is clear. We thus conclude with a suggestion for future study not of the scope of relief but of its clarity. We suggest as well that a future study examine the possibility of expanding to additional agencies the coverage of statutes, such as the Hobbs Act, that "channel" judicial review of rulemaking to specified courts.

I. LEGAL BACKGROUND

This Part provides a brief overview of the procedural and remedial law relevant to cases involving challenges to agency rules or rule-like actions. In the type of case of interest to us in writing this report, a plaintiff sues an agency because the agency issued a rule or a rule-like agency action that the plaintiff contends is legally invalid.[2] The plaintiff may, for example, allege that the agency promulgated a rule without adequately responding to comments, or that the rule is ultra vires of the agency's enabling act or the Constitution.

One remedy frequently sought in such a case is a "vacatur": an order through which the court vacates or "set[s] aside" the rule or rule-like action and deprives it of legal effect.[3] In recent years, as courts and scholars have debated the scope of administrative-law remedies, some have adopted the term "universal vacatur" to emphasize that the rule is set aside not merely as to the plaintiff, but as to anyone.[4] Another remedy frequently requested is that the court issue an injunction against the relevant official(s) that enjoins them from enforcing the rule. When such an injunction protects not just the plaintiff, but those who are non-plaintiffs, too, the injunction is often referred to as a "nationwide" or "universal injunction."[5] In addition to these remedies, the plaintiff might also ask that the court

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[2] *See* 5 U.S.C. §§ 702–706.

[3] 5 U.S.C. § 706. *See* Ronald M. Levin, *Vacatur, Nationwide Injunctions, and the Evolving APA*, 98 NOTRE DAME L. REV. 1997, 1999 (2023) (describing "vacatur" as "a judicial order declaring that the rule shall no longer have legal effect").

[4] *See* Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121, 1123 (2020) (noting that the term "universal vacatur," though of recent coinage, "does crisply capture the concept of setting aside a rule not just as to the *plaintiffs*, but as to *anyone*").

[5] For more on the terminological debate, see Howard M. Wasserman, *"Nationwide" Injunctions Are Really "Universal" Injunctions and They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. 335, 349–53 (2018). For the sake of variety, we use the terms "nationwide injunction" and "universal injunction" interchangeably.

issue a preliminary injunction against the rule's enforcement, or stay the effective date of the rule,[6] pending the court's disposition of the case on the merits.

These remedial devices—the universal vacatur of a rule, the nationwide injunction against a rule's enforcement (preliminary or final), and the stay of the effective date of a rule—are formally distinct. The Administrative Procedure Act expressly refers to the court's authority to "hold unlawful and set aside" agency action and to "stay" the effective date of agency action,[7] and the APA defines "agency action" to include a rule.[8] By comparison, the remedy of an injunction is rooted in equity, and failure to comply with an injunction may be punished with contempt.[9] However, all three remedial devices have functionally similar effects, in that each remedy may bring a halt, whether temporarily or permanently, to the implementation or enforcement of a rule.[10] Also, at least in theory, a court might fashion each of these remedies to apply to everyone (universal) or only to parties.[11]

A suit seeking these remedies typically may be filed in "any court of competent jurisdiction,"[12] including a district court.[13] Because of the venue rules governing litigation against the federal government,[14] such remedies can be granted by individual district court judges scattered around the country. Some statutes, however, channel litigation to particular courts. Of particular interest to this report, the Hobbs Act provides that certain agency actions may be challenged only in the courts of appeals.[15] This channeling of cases to the courts of appeals does not necessarily resolve questions about the scope of relief, but it could be relevant to questions of statutory interpretation or agency response.

In recent years, the issuance of orders with universal effect has prompted commentary and criticism. It remains the position of DOJ, as articulated in its 2018 *Litigation Guidelines for Cases Presenting the Possibility of Nationwide*

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[6] 5 U.S.C. § 705.

[7] *See* 5 U.S.C. §§ 705–706.

[8] *See* 5 U.S.C. § 551(13) ("'agency action' includes the whole or a part of an agency rule . . . , or the equivalent or denial thereof").

[9] *See* Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 1055 (2018).

[10] Levin, *supra* note 3, at 1999 (noting that the injunction and the vacatur are "technically distinct, because an injunction binds the defendant and is enforceable through contempt, whereas a vacatur binds only the agency to which it is directed," but that "[i]n functional terms, however, a vacatur can have roughly the same effects as a nationwide injunction").

[11] *Id.*

[12] 5 U.S.C. § 703.

[13] Generally, the federal question jurisdiction statute, 28 U.S.C. § 1331, confers subject matter jurisdiction over such suits.

[14] 28 U.S.C. § 1391(e).

[15] 28 U.S.C. § 2342.

Injunctions,[16] that courts should not issue nationwide injunctions or universal vacaturs. Several scholars, too, have contended that courts lack the authority to issue such orders.[17]

First, DOJ and scholars opposing universal relief argue that the federal courts lack the authority under Article III to issue relief that extends beyond the plaintiff (or a certified class of plaintiffs) to shield non-parties. Those who espouse this view have contended that traditional equitable principles limit federal courts to providing relief only to the parties in the suit, and that Article III incorporates these limitations. It has also been argued that Article III standing doctrine means that plaintiffs have standing to seek relief only for their own injuries, and that courts may therefore not grant relief beyond that which is required to remedy the plaintiff's injury.

Second, opponents have argued that federal courts lack statutory authority to issue such orders. Courts have long read 5 U.S.C. § 706 to mean that a court may vacate a rule universally if the rule is unlawful.[18] Some scholars have, however, claimed that this language in the APA does not empower federal courts to give the remedy of universal vacatur. Most prominently, Professor John Harrison has contended that section 706 "does not address remedies at all," and instead means that courts merely are "not to follow the agency action in deciding the case."[19] According to Professor Harrison, the APA addresses remedies in section 703, which "points to the remedies law associated with the forms of proceeding for judicial review that it identifies."[20] Professor Harrison has also contended that though "[v]acatur of rules might be a justifiable innovation," it was not contemplated by the drafters of the APA.[21] Professor Bray has contended that "'set

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[16] *See* Memorandum from the Office of the Att'y Gen. to the Heads of Civil Litigating Components & U.S. Attorneys, Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions (Sept. 13, 2018) [hereinafter Litigation Guidelines], https://www.justice.gov/opa/press-release/file/1093881/download [https://perma.cc/VE7K-6LWB].

[17] *See*, *e.g.*, Aditya Bamzai, *The Path of Administrative Law Remedies*, 98 NOTRE DAME L. REV. 2037 (2023); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017); Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEO. MASON L. REV. 29 (2019); John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 37 YALE J. ON REGUL. BULL. 37 (2020); Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 ALA. L. REV. 1 (2019); Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615 (2017); Wasserman, *supra* note 5.

[18] Levin, *supra* note 3; Sohoni, *supra* note 4; Ronald M. Levin & Mila Sohoni, *Universal Remedies, Section 706, and the APA*, YALE J. ON REGUL. NOTICE & COMMENT BLOG (July 19, 2020), https://www.yalejreg.com/nc/universal-remedies-section-706-and-the-apa-by-ronald-m-levin-mila-sohoni/.

[19] John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 37 YALE J. ON REGUL. BULL. 1, 37 (2020).

[20] *Id.*

[21] John Harrison, *Vacatur of Rules Under the Administrative Procedure Act*, 40 YALE J. ON REGUL. BULL. 119, 120 (2023).

aside' was a technical term for reversing judgments," and the Congress enacting the APA did not mean that term to authorize courts to give nationwide injunctions or universal vacaturs.[22] Professor Bamzai has argued that the APA should be read in light of "the background law of judgments" and "background equitable principles" that "generally require, where possible, the tailoring of relief to the parties before the court."[23]

In response to these constitutional and statutory arguments, scholars (including one author of this report) have argued that Article III does not forbid courts from issuing injunctions that protect non-plaintiffs, including nationwide injunctions, and that the APA authorizes courts to vacate rules universally.[24]

Apart from these constitutional and statutory arguments, critics of nationwide injunctions and universal vacaturs also cite their adverse policy consequences. The chief policy problems are that universal remedies encourage forum shopping and judge shopping; they can hinder the orderly percolation of legal questions through various courts; they can cause the Supreme Court to have to decide cases in a preliminary posture on an underdeveloped record and with inadequate briefing; and they can produce confusion and policy whiplash as lower-court orders are entered and then stayed by appellate courts or the Supreme Court.[25] On the other side of the policy ledger, universal remedies promote uniformity in federal law; they shield similarly situated nonparties who may lack the wherewithal to sue and may otherwise suffer irreparable harm; they reduce duplicative and wasteful litigation; they can prevent potentially unlawful rules from becoming functionally entrenched through piecemeal implementation;[26] and they can be a "practical necessity" in a complex regulatory scheme.[27]

The Supreme Court has not given explicit guidance on universal relief. On the one hand, some justices have expressly questioned the power of federal courts

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[22] *See* Samuel Bray, *Does the APA Support National Injunctions?*, REASON: THE VOLOKH CONSPIRACY (May 8, 2018, 2:15 PM), https://reason.com/volokh/2018/05/08/does-the-apa-support-national-injunction/.

[23] Bamzai, *supra* note 17, at 2040.

[24] *See, e.g.*, Levin, *supra* note 3; Sohoni, *supra* note 4; Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920 (2020). *See also* Zachary D. Clopton, *National Injunctions and Preclusion*, 118 MICH. L. REV. 1 (2019); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018); Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56 (2017); Portia Pedro, *Toward Establishing a Pre-Extinction Definition of "Nationwide Injunctions,"* 91 U. COLO. L. REV. 847 (2020); James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of* Ex Parte Young, 72 STAN. L. REV. 1269 (2020); Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67 (2019).

[25] *See, e.g.*, Bray, *supra* note 17, at 457–64.

[26] *See, e.g.*, Frost, *supra* note 24, at 1091–1101; Sohoni, *supra* note 4, at 1184–85.

[27] Levin, *supra* note 3, at 2005; *see also* Frost, *supra* note 24, at 1098.

to issue such orders.[28] On the other hand, other justices have acknowledged the propriety of these orders, and many of the Court's decisions seem to presume their validity.[29]

Finally, it is worth pausing to briefly discuss the terminology used in this report. First, this report addresses agency "rules or rule-like action." For ease of exposition, we will refer to all actions that are rules for APA purposes as "rules" even if they are styled as "orders" by the agency or if they are referred to as "orders" in a statute (such as the Hobbs Act). We will reserve use of the term "order" for decisions by courts or the results of agency adjudication.

II. QUANTITATIVE STUDY

This Part describes the findings of our quantitative study of nationwide injunctions and universal vacatur. Our aim in performing this quantitative study was to gain a preliminary understanding of the extent to which agencies had encountered court decisions that either enjoined their rules nationwide or vacated their rules universally. To do so, we examined a subset of published court decisions addressing agency rules. We did this with several questions in mind: Have nationwide injunctions against rules or universal vacaturs of rules increased over time? Which agencies appear to be most affected by nationwide injunctions and universal vacaturs? Do agencies generally win contests over nationwide injunctions and universal vacaturs? Does the win-rate appear to be increasing or decreasing over time? Our findings in this section established a high-level understanding of how agencies interface with nationwide injunctions and universal vacaturs and they informed our selection of agencies to study through interviews.

A. NATIONWIDE INJUNCTIONS

With respect to nationwide injunctions, our findings suggested that important variations exist in the extent to which agencies were subjected to nationwide injunctions. Moreover, the rate at which these remedies issued appeared to vary depending on the administration.

1. Scope, Methodology, and Limitations

To identify relevant cases, we searched Westlaw's "ALLFEDS" database for cases that were likely to include a federal agency defending an agency rule

[28] *See* United States v. Texas, 143 S. Ct. 1964, 1976 (2023) (Gorsuch J., concurring in the judgment); Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 599–601 (2020) (Gorsuch, J., concurring in the grant of stay); Trump v. Hawaii, 138 S. Ct. 2392, 2424–29 (2018) (Thomas, J., concurring).

[29] *See* Levin, *supra* note 3, at 2005–06; Sohoni, *supra* note 4, at 1138; Mila Sohoni, *Do You C What I C?—CIC Services v. IRS and Remedies Under the APA*, YALE J. ON REGUL. NOTICE & COMMENT BLOG (June 8, 2021), https://www.yalejreg.com/nc/do-you-c-what-i-c-cic-services-v-irs-and-remedies-under-the-apa-by-mila-sohoni/.

against a suit seeking a nationwide injunction.[30] More specifically, we experimented with search strings extensively and ultimately decided to use a search that focused narrowly on federal cases that explicitly referred to "nationwide injunction" or "national injunction."[31] This search returned 667 cases. We then tasked research assistants with reviewing each case to determine if there was a federal defendant and, if there was, to document (a) the name of the agency or agencies; (b) whether a party requested a nationwide injunction; (c) if so, whether the court granted the injunction; and (d) information about the action that was sought to be enjoined. Our analysis in this section focuses only on those cases from the sample that a human coded to involve a federal defendant and in which a party sought a nationwide injunction against a rule or rule-like agency action.

We note at the outset that our search only partially recovers the cases of potential interest. Two types of limitations are important. First, we searched only for cases involving injunctive relief, even though other remedies such as stays of rules also might be of interest. Both types of remedies function in similar ways and might be experienced by agencies in roughly the same way. Yet our search will not systematically recover stays. We considered searches that would cover a greater number of related remedies but found that it was challenging to eliminate large numbers of false positives. We therefore focused instead on the core target of the research project: nationwide injunctions. One consequence of this choice, however, is that the results below should be interpreted with some caution as courts may be shifting between various related remedies over time. An increase in nationwide injunctions might, for example, be offset by a decrease in stays that courts otherwise would have granted.

Second, our search is limited to cases that explicitly use the term "nationwide injunction" or "national injunction." This approach has its limitations, especially since these terms were not common until recent years. In other words, it would be inappropriate to draw an inference about the rate of change in nationwide injunctions before the term came into popular use. That said, given the significant recent attention paid to "nationwide injunctions," we suspect that these search terms likely return most relevant cases in recent years. Moreover, for purposes of the balance of this study, a comprehensive totaling of all nationwide injunctions is not necessary. As long as these terms were not limited to cases involving certain agencies—and we know no reason that they would be—then our search method serves the purposes of informing our qualitative research.

2. Results

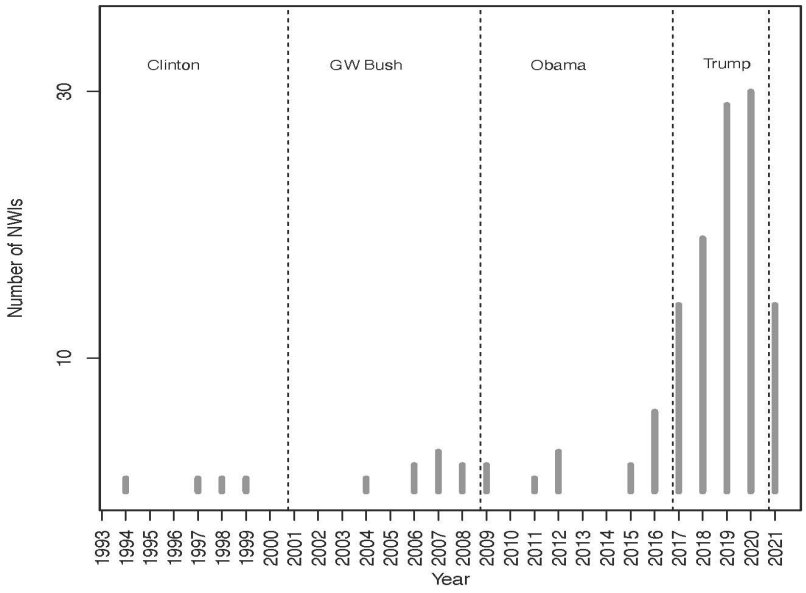
Figure 1 shows the number of cases over time in which our search revealed that a nationwide injunction or a national injunction, labelled as such, was granted against agencies. Our search included all available cases regardless of year, but the

[30] The "ALLFEDS" or "All Federal Cases" database contains "reported and unreported case law from available federal jurisdictions." The database's coverage varies by court.

[31] Our search string was: adv: TE("nationwide injunction" or "national injunction").

plot starts with the Clinton Administration as there were almost no cases against federal agencies that explicitly referred to "nationwide injunctions" or "national injunctions" prior to that administration.[32] This is consistent with the fact that those terms were not in common use before the last decade or so. By the same token, the uptick depicted below may be exaggerated by the fact that our search did not capture cases that granted nationwide or national injunctions unless they were expressly so denominated. Within this recent period, as is evident from the figure, the number of cases explicitly granting nationwide injunctions remained low until the tail end of the Obama Administration. Our count of nationwide injunctions accelerated further during the Trump Administration; nationwide injunctions likewise appear to occur frequently in the Biden Administration.[33]

Figure 1: Nationwide Injunctions Granted by Year

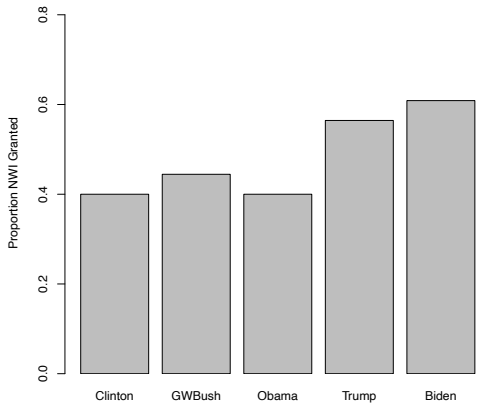


[32] We find that only about three percent of cases that explicitly referred to a "nationwide injunction" or a "national injunction" occurred before the Clinton Administration.

[33] Our reported figures include district and appellate court decisions. If we examine only district-court decisions, our figures come very close to those reported in the analysis by the Harvard Law Review. Editorial Board, *District Court Reform: Nationwide Injunctions*, 137 HARV. L. REV. 1701, 1705 (2024). They report six injunctions against G.W. Bush Administration policies, we find four issued during his presidency; they report 11 injunctions against Obama Administration policies, we find 12 issued during his presidency; they report 65 injunctions issued against Trump Administration policies, we find 64 issued during his presidency. The slight differences in counts may be due to modest differences in search terms, human evaluations, or the fact that they code injunctions based on the President who issued the enjoined policy. We code based on the President sitting at the time of the injunction.

Moreover, the *rate* at which courts granted requests to have rules enjoined nationwide appears to have increased during the Trump Administration, though less dramatically. As shown in Figure 2, presidential administrations prior to the Trump Administration had their rules enjoined nationwide at a rate that hovered around fifty percent. These administrations lost between 40 and 45 percent of cases seeking to have their rules enjoined nationwide; in other words, these administrations won about half of these challenges, and they lost about half of them, regardless of the volume of decisions.[34] This result is consistent with classic theories of strategic litigation, which posit that parties only follow through with litigation in cases over which they have substantial uncertainty about the outcome.[35] The Trump Administration, by comparison, lost about 56 percent of its challenges, a figure that is 10–15 percentage points higher than previous presidents' grant rates. Our series only partially covers the Biden Administration, but there too we observed relatively high levels of grant rates. Combined, these statistics tentatively suggest a pattern of an increasing number of requests for nationwide injunctions, along with an increasing likelihood of courts to grant such requests.[36]

Figure 2: Grant Rate of Nationwide Injunctions by Administration



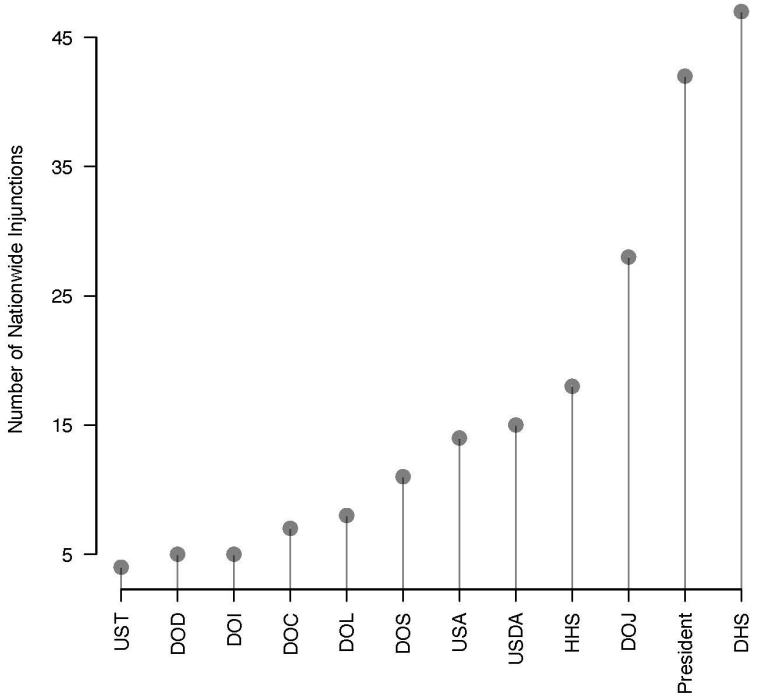
[34] We omit standard errors from this figure as the data collection effort aimed to reach the full population of decided cases.

[35] Classic theories of strategic litigation suggest the win-rate should be about 50 percent, with one side or the other settling or otherwise finding a non-litigation resolution if the litigation outcome is closer to certain. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. L. STUDS. 1 (1984).

[36] It is possible that this increase in grant rates is transitory: as litigating parties update beliefs about the likelihood of an injunction, in theory they will adjust their settlement and pre-litigation behavior.

The cases identified by our search were not evenly distributed across agencies. As suggested by Figure 3, a few agencies appear frequently in our dataset of cases that resulted in nationwide injunctions.[37] DHS and HHS stand out as especially affected by nationwide injunctions: collectively, DHS and HHS appeared as a party in roughly 45 percent of all cases involving nationwide injunctions in our dataset. DOJ also commonly appeared in cases involving nationwide injunctions, though in many cases the rules at issue were not promulgated by DOJ. DOJ serves a special role litigating on behalf of or alongside another agency, such as DHS.

Figure 3: Agencies Affected by Grants of Nationwide Injunctions

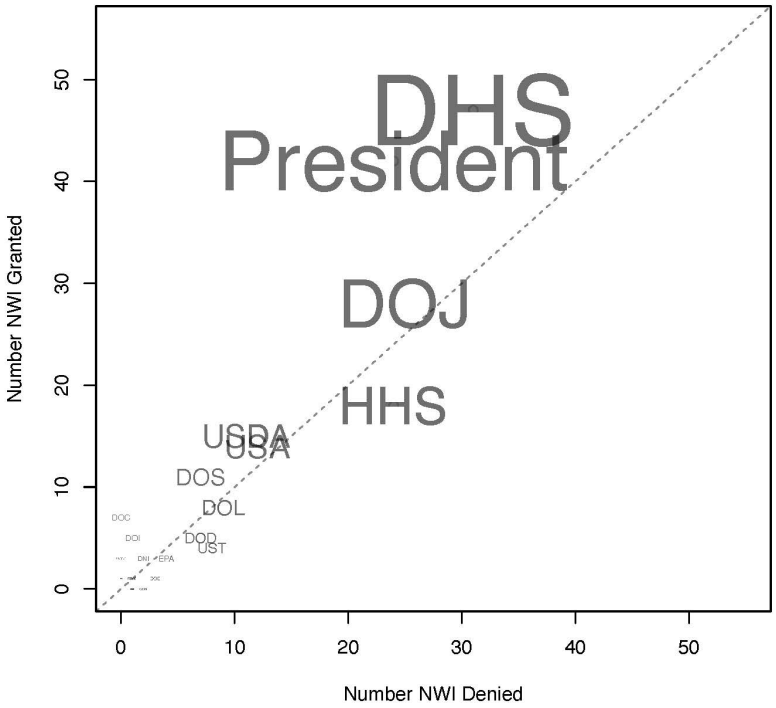


We further decomposed the win-rate by agency. Figure 4 plots the number of injunctions granted against the number of injunctions denied for each agency, where the size of the agency's name is proportional to the total number of cases in

[37] Though they are not agencies, we included the President and the United States as parties in this figure for completeness. The figure excludes any agency with three or fewer cases in our dataset.

which it appears as a party.[38] The dashed line at a 45 degree angle indicates the line of perfect correspondence, implying that the agency wins as many cases as it loses. If the agency is over the line, it implies that the agency loses more cases than it wins; if the agency is below the line, it implies that the agency wins more cases than it loses. Most agencies appear close to the line, indicating they won about half the cases seeking injunctions against their rules. The most notable exception to this pattern is DHS, which lost roughly 60 percent of its cases.

Figure 4: Injunction Grant Rate by Agency



B. UNIVERSAL VACATUR

In addition to studying nationwide injunctions, we were also interested in studying how vacatur as a remedy may affect agency operations, particularly in comparison to injunctive remedies.

[38] Because the size of the agency label is proportional to the number of observations in the data, agencies with few observations will appear in a small text size; they cluster in the lower left of the figure. The acronyms for agencies with five or fewer observations are: BOP, DOE, EEOC, FDA, FEC, FERC, HUD, ODNI, OMB, SBA, SSA, USPS, and VA.

1. Scope, Methodology, and Limitations

Again as a preliminary step in this inquiry, we conducted a similar search in Westlaw to that identified earlier, but now focused on cases involving efforts to have agency rules or regulations vacated under the APA.[39] To further narrow our sample, we limited attention to cases decided from 2012 to 2022, approximately the period of increased activity in nationwide injunctions. This produced a total of 1,486 cases. We then randomly sampled roughly 450 cases for human annotation. As before, our team read the case to ensure that it implicated a challenge to an agency rule, and then coded each of the cases in this sample along a number of dimensions including the parties involved and the outcome of the case. The analysis described in this section focuses only on those cases a human coded to involve a challenge to an agency rule seeking to have it vacated under the APA; such cases amounted to 204 of the roughly 450 cases we coded.

As above, our search only partially recovers the cases of potential interest. For one thing, our search was limited to cases that expressly mentioned the relevant section of the APA—5 U.S.C. § 706—and courts do not always spell out their reliance on that provision in those precise terms. For another, our search was confined to cases that referred to the agency action under review as a "rule" or "regulation" and that also used these terms in close proximity—in fact, within the same sentence as—the relevant remedial language ("set aside," "invalidate," "vacate," etc.). While such limitations were necessary to make it tractable to perform this quantitative study, they will predictably exclude cases in which the agency action under review or the remedy is otherwise described, for example when an independent agency styles its rule as an "order." These limitations would also predictably exclude cases in which the remedy given by the court is not spelled out in the text of the opinion but rather is included in a separate order that appears on a case's docket but is not collected by Westlaw in ALLFEDS or other searchable databases.

2. Results

Over the series of interest, roughly 58 percent of finally litigated agency rules were vacated under the APA. However, the proportion of rules vacated under the APA varied over time. Consistent with research by scholars at NYU,[40] we find that agencies fared particularly poorly under the Trump Administration.

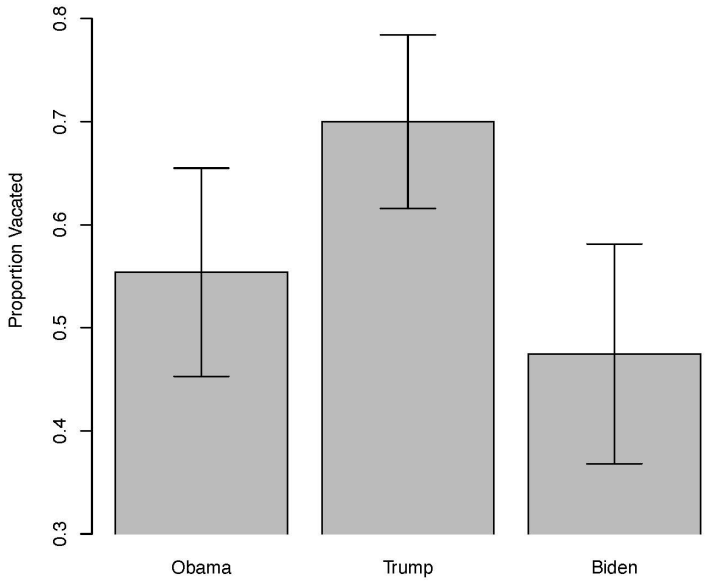
Figure 5 presents a bar plot showing the estimated proportion of APA cases in which the administration lost between 2012 and 2022, broken down by the Obama, Trump, and Biden Administrations. Each bar displays the point estimate for the proportion of rules vacated; the thin bars around the estimate show the 90

[39] Our search string was: adv: TE("5 U.S.C. 706" and (("set aside" invalidat! vacat!) /s (rule or regulation!))). We searched the ALLFEDS database. *See supra* note 30.

[40] *Roundup: Trump-Era Agency Policy in the Courts*, INSTITUTE FOR POLICY INTEGRITY, NEW YORK UNIVERSITY SCHOOL OF LAW, https://policyintegrity.org/trump-court-roundup (last updated April 25, 2022).

percent confidence intervals for our estimate.[41] Under the Obama and Biden Administrations, on the order of 50 percent of agency rules were vacated. This again is approximately the win-rate that basic theory would suggest to be the prevailing rate.[42] Under the Trump Administration, the proportion of finally litigated rules that were vacated was closer to 70 percent. The error bars around that estimate reveal that it is statistically indistinguishable from the corresponding figure from NYU's effort; their analysis likewise centers on rule and rule-like agency actions, and they found that the Trump Administration lost about 78 percent of the challenges to its rules.

Figure 5: Proportion of Litigated Rules Vacated



Many of the same agencies disproportionately affected by nationwide injunctions likewise tended to have their rules vacated under the APA. We show the number of rules vacated for each agency in our sample in Figure 6.[43] HHS and DHS, for instance, were among the most affected with respect to both types of remedies. However, we also see some differences in the affected agencies. DOI and

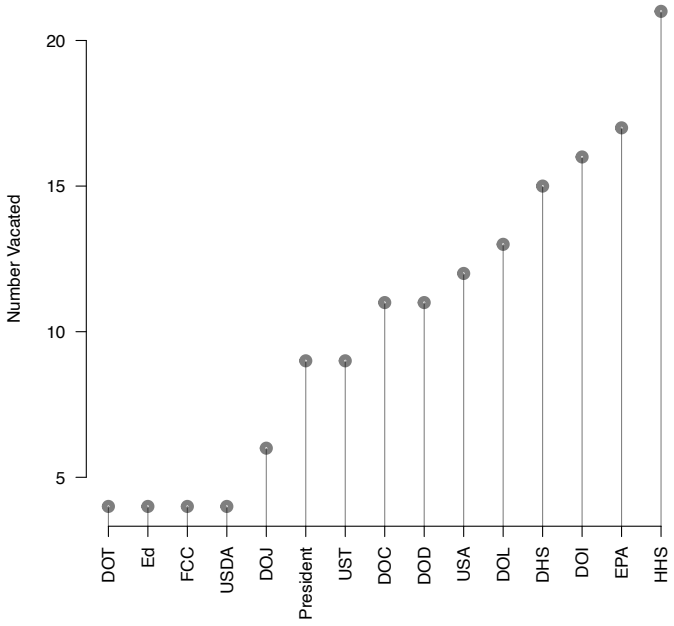
[41] Note that this analysis is based on a random sample of the population and that the figure reflects the uncertainty of our estimates through the error bars.

[42] *See supra* note 35.

[43] As before, we only show agencies that appear in the sample with some frequency; we do not include those that appear in our data three or fewer times in the figure.

EPA, for instance, show up often in our vacatur sample, but not in our nationwide injunction sample.

Figure 6: Agencies Affected by APA Vacatur



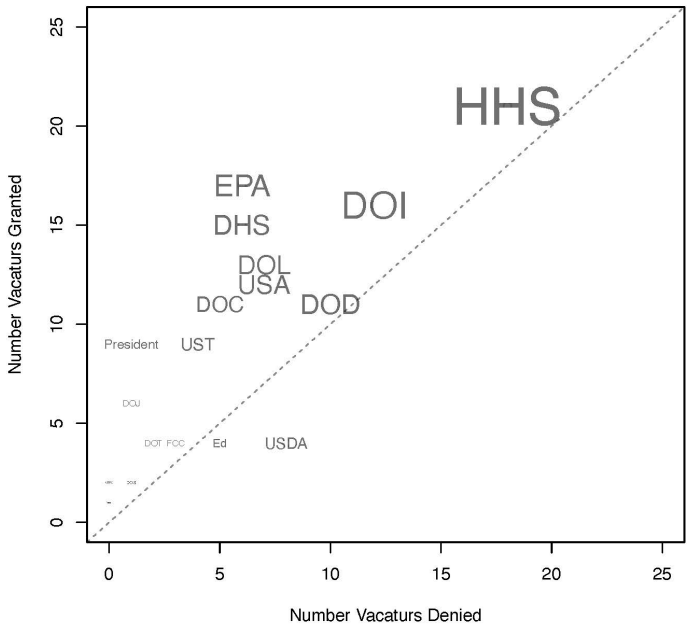
Finally, we examined the rate at which agencies won challenges to their rules under the APA. Following the exercise for nationwide injunctions, Figure 7 plots the number of wins for each agency against the number of losses for each agency; the size of the agency's name in the figure reflects the overall number of cases in which the agency appears in our sample, win or lose.[44] The dashed line at a 45-degree angle reflects the line of perfect correspondence: agencies above the line lose more cases than they win; those below the line win more than they lose; and those on the line win the same number they lose.

As is evident from Figure 7, agencies tend to cluster near the line of perfect correspondence, but many fall above the line, indicating that they lose more often than they win. Several agencies stand out as particularly likely to lose challenges: EPA and DHS, for instance, lose twice as many cases as they win in our sample. Though less common, some agencies win more often than they lose: USDA and, to

[44] The low-volume agencies appear in a small text and cluster in the lower left of the figure. The acronyms and abbreviations for the agencies with fewer than five observations in the data are: CFPB, CFTC, DOS, FEC, Fed, FERC, HUD, SEC, and VA.

a lesser extent, the Department of Education stand out in this regard. We stress, however, that we interpret this figure with caution, both due to the difficulty of isolating the cases of interest and the fact that our analysis is based on a random sample of the recovered cases.

Figure 7: Vacatur Grant Rate by Agency



III. QUALITATIVE STUDY

This Part describes the findings of our qualitative study of how agencies respond to nationwide injunctive relief; how agencies understand the scope of judgments vacating and setting aside agency rules under the APA; how agencies respond to nationwide injunctive relief in carrying out their rulemaking activities; and other implications of nationwide injunctive relief for the day-to-day administration of regulatory programs.

Part III.A begins by describing the scope, methodology, and limitations of our qualitative study.

The remainder of Part III presents our qualitative findings. To contextualize the discussion, Part III.B begins by describing the relationship between DOJ and the agencies we studied, a relationship that plays a vital role in shaping how agencies litigate cases and respond to court orders involving nationwide injunctive relief. In addition, this section summarizes agencies' perspectives on DOJ's 2018 *Litigation Guidelines for Cases Presenting the Possibility of Nationwide*

Injunctions, which describe DOJ's position on nationwide injunctions and other forms of universal relief.[45]

Part III.C sets out a composite picture of how the agencies we studied responded to and implemented orders with universal effect. This section discusses the step-by-step process that begins with the issuance of a court order or judgment, and it includes how agencies confer with DOJ about such orders; how agencies internally understand, communicate about, and react to such orders; how agencies encounter difficulties in complying with such orders; and how agencies apprise the public of such orders.

Part III.D offers a more detailed probe into how agencies understand and interpret various kinds of orders with universal effect. Such orders may differ along various formal or legal dimensions. For example, an order with universal effect might be denominated as a vacatur or as a nationwide injunction; it might be issued with or without a request for, or certification of, a nationwide class action; it might be issued by a district court, or by a court of appeals, or by a particular court of appeals (the D.C. Circuit). This section sets out how agencies regard orders that diverge along these various dimensions.

Part III.E describes what interviewees reported to us concerning the possibility that they might not fully implement a court order that by its terms has universal effect. We treated this possibility as falling within the concept of "nonacquiescence." Nonacquiescence has been defined as the selective refusal of administrative agencies to conform their operations to adverse lower court decisions,[46] and earlier scholarship has explored nonacquiescence in the context of agency adjudication. Drawing upon that concept, we sought to probe agencies on their policies on and experiences with "nonacquiescence" to lower court decisions involving rules or rule-like actions.

Part III.F turns to orders with *non-universal* effect. This section describes agencies' experiences, or lack thereof, with geographically limited or party- limited injunctions and vacatur. It also describes what agencies told us regarding the difficulty or ease with which they were able to comply with orders with non-universal effect.

Part III.G examines how interviewees perceived the recent increase in the prominence of nationwide injunctive relief to have affected their agencies' regulatory policymaking, as well as any general reflections they offered on nationwide injunctions.

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[45] Litigation Guidelines, *supra* note 16.

[46] *Cf.* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 681 & n.1 (1989) ("What is at stake in the nonacquiescence context is the effect such adverse [court] decisions have on the agency's subsequent internal proceedings in other cases.").

A. Scope, Methodology, and Limitations

1. Agencies Studied

One purpose of conducting the quantitative study described above was to inform the qualitative aspect of the project. It would be impossible to interview officials at every federal agency, so we endeavored to identify a set of agencies that might represent a range of views on nationwide injunctions. More specifically, we sought to identify a group of subjects that included both agencies that were common targets of nationwide injunctions and agencies that were infrequently the targets of such injunctions. Within these categories, we also sought to include in our project agencies that differed on other important organizational dimensions. We included DOJ and OFR for their particular roles related to nationwide relief, which we discuss further below.

With the assistance of ACUS staff, we ultimately conducted Zoom interviews with officials at 11 agencies:

- USDA
- DOC
- DOE
- EPA
- FCC
- OFR
- HHS
- HUD
- DOI
- DOJ
- IRS

Generally, the officials whom we interviewed were members of the agencies' offices of general counsel. It should be underscored that the statements of the interviewees with whom we spoke do not necessarily reflect the official position of the agencies.

We also sent a written survey to officials at a number of other agencies and sub-agencies and received responses from five of them:

- Federal Trade Commission
- General Services Administration
- Merit Systems Protection Board

- NLRB
- NRC

We requested interviews from or sent written surveys to officials at several other agencies and subagencies, but we were unable to connect with them. Five agencies declined to speak with us.

2. Methodology and Attribution

The primary method of collecting qualitative data was semi-structured interviews with officials at the agencies listed above. For each agency contacted, we allowed the agency to identify the proper interviewees, though we acknowledge that agency officials not interviewed also may have relevant knowledge.

We prepared a standard outline to be used in each interview, roughly corresponding with the structure of the balance of this part. We endeavored to, at a minimum, cover the core questions identified in the outline with each agency. To assist in generating useful feedback, we identified relevant recent cases involving the target agency fitting the archetypes of interest—for example, a purportedly nationwide injunction and a purportedly geographically limited one. We asked primarily open-ended questions and allowed the interview subjects to drive the conversation, following up where appropriate for additional detail.

Our goal in this study was to obtain as candid an account as possible of how agencies understand and respond to nationwide injunctive relief. To that end, we informed interviewees that we would treat interviews as off the record if they wished. We also made clear that interviewees had the discretion to move off or on the record for discrete parts of an interview. Throughout this report, we have complied with our interviewees' expressed wishes concerning quotation and attribution.

In addition to the interviews, as noted, we sent a written survey to a number of agencies and subagencies identified in conjunction with ACUS staff. The written survey included a small number of questions patterned on the interview outline. We include responses where relevant below. The written survey included no limitations on attribution.

3. Limitations

This study is subject to at least two significant limitations.

First, as suggested earlier, the study includes responses from only a subset of relevant officials. Time and resource constraints precluded interviews of officials at every federal agency and subagency, and some agencies—including some frequently affected by universal relief—declined to participate. And among the agencies we did interview, we interviewed only a small number of officials who were available at the time of this study. That said, our subject agencies differ on meaningful dimensions including the frequency with which they are subject to

universal relief. And we connected with what we believe to be a highly informed set of officials within our subject agencies.

Second, our study frequently relies on agency officials' recollections of particular cases and administrative episodes. Our methodology frequently involved presenting agency officials with actual cases and litigating positions with which they were already familiar to assist them in recollecting and reconstructing how their agencies responded to these cases. Moreover, as discussed, interview subjects were offered the protections of confidentiality in hopes of encouraging direct responses.

B. BACKGROUND: THE ROLE OF DOJ

By statute, DOJ conducts litigation in which the United States, its agencies, or its officers are a party.[47] Thus, as a general matter, "the lawyers in litigation against the government are from DOJ."[48] In particular, when the government is a defendant or respondent, including in challenges to regulations, DOJ "generally takes over."[49] DOJ thus plays a crucial role in shaping how agencies litigate cases, including cases in which parties seek nationwide injunctive relief or universal vacaturs, and in guiding agencies as they respond to such suits. This section describes the relationship between DOJ and the federal agencies it represents in court.

At the outset, it is worth stressing that DOJ is not a monolith. Various agencies work to differing extents with various components of DOJ. Many agencies reported working with attorneys on the Appellate Staff in the Civil Division ("Civil Appellate") on cases at issue in this report. Other agencies worked with specific components, such as the Tax Division, sometimes to varying degrees depending on the substantive issues involved in the case.

Agency interviewees uniformly described their agencies' relationship with DOJ as cooperative and positive. Generally, interviewees described the agency as acting in the role of a supportive junior counsel or a client to DOJ in the context of litigation. Agency interviewees commented that frequently agency lawyers assemble factual background information relevant to the case, prepare and give feedback on briefs, and discuss strategy with DOJ. Interviewees often suggested that agency lawyers were the subject-matter experts while DOJ lawyers were the

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[47] *See* 28 U.S.C. § 516 ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.").

[48] Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 J. CONST. LAW 558, 558 (2003). As Professors Neil Devins and Michael Herz have noted, though the "prevailing rule" is that DOJ represents agencies in court, that arrangement is not the "exclusive" pattern. *Id*. Many agencies have "at least some" independent litigating authority. *See* JENNIFER L. SELIN & DAVID E. LEWIS, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 106 n.401 (2d ed. 2018) (listing thirty examples).

[49] Devins & Herz, *supra* note 48, at 567.

litigators. Agency lawyers and DOJ also coordinate to ensure that they have a shared interpretation of any legal requirements. Officials, though, acknowledged that DOJ's and the agency's interests and objectives are not perfectly aligned in all cases.

Agencies reported that the nature and extent of the interaction may depend on the type of cases or DOJ component involved. One official suggested that as an issue became more "high profile," the extent of DOJ involvement increased. In this official's experience, whether a case is low-profile or high-profile also affected which component of DOJ handles the case. For low profile actions, there will be no engagement by Main Justice, and the U.S. Attorney's Offices will work with agency field offices to handle the litigation. For higher profile actions, the local U.S. Attorney is the main point person, but there is a lot of involvement by Main Justice. For the highest profile actions, Main Justice has heavy involvement. In some situations, the Associate Attorney General was involved, especially when resolving conflicts within DOJ.

Two types of legal decisions bear special mention. On the question of whether to appeal, agencies commented that the decision was made jointly with DOJ after considering several factors. Key among these was the relevance of adverse judicial decision to the agency's policy program. They considered whether they could "live with" the decision, in which case they might recommend to DOJ that they not appeal. This might happen, for instance, if the agency policies or priorities had changed since the rule was issued. On the other hand, as one official explained, "if it's something that's key to agency authority or involves an important aspect of the program, then we prepare an appeal recommendation."

On the question of relief, agencies reported that they again coordinate with DOJ. These arguments would be based, in part, on what the agency would want to do as it advanced its policy priorities. However, as one interviewee noted, the nature of the case matters: an agency's input on the question of relief would be less relevant when an agency is one defendant among many federal agencies.

The Litigation Guidelines—We asked all our interviewees whether their agencies had had any input into DOJ's 2018 *Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions*[50] or were aware of any conversations concerning its issuance. As described in Part I, the Litigation Guidelines define DOJ's position on nationwide injunctions and similar forms of relief.

Interviewees uniformly reported that as far as they were aware, their agencies did not have any input into the crafting of the Litigation Guidelines. Interviewees uniformly emphasized, however, that they were speaking only from their own experience and not for the agency as a whole, either at present or at earlier

[50] *See* Litigation Guidelines, *supra* note 16.

points in time. Some interviewees were not in their current roles at the time the Litigation Guidelines were issued.

Few interviewees had familiarity with the substance of the Litigation Guidelines. Of those interviewees who did, one commented that the position outlined in the Guidelines is "motivated largely by DHS and immigration law." Another would only comment on the Litigation Guidelines off the record.

As to whether the Litigation Guidelines had an ongoing effect on litigating positions, interviewees had differing responses. One official was not sure if independent agencies would be guided by the guidelines.[51] In contrast, another interviewee stated that the guidelines came up in litigation and represented the position of DOJ.

DOJ's treatment of the Litigation Guidelines merits separate attention. The 2018 memorandum garnered significant attention, but some (though not all) of the memorandum's positions appeared in earlier litigation. For example, in 2017, DOJ's brief in *Chicago v. Sessions*[52] argued that "the standing requirements of Article III preclude a court from granting relief that is not directed to remedying the injury asserted by the plaintiff," and separately that a court's equitable powers are similarly constrained;[53] similar positions on the scope of injunctive relief can be found in *Summers v. Earth Island*,[54] a 2009 case. However, it is more difficult to find positions from DOJ regarding vacatur that pre-date and are consistent with the 2018 memorandum.[55]

C. Responding to Orders With Universal Effect

None of the agency officials we interviewed or surveyed reported that they had a uniform policy or protocol on how to respond to nationwide injunctions or other forms of universal relief.

Through our interviews and surveys, we sought to create a composite picture of how agencies responded to instances in which courts issued orders with universal effect. A note on terminology is worth emphasis. This section (Part III.C) uses the term *orders with universal effect* to refer collectively to nationwide preliminary injunctions, nationwide final injunctions, universal vacaturs of rules,

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[51] *See* Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 Cal. L. Rev. 255, 258 (1994) ("Independent agencies typically have the final say in litigation until a case reaches the Supreme Court.").

[52] 888 F.3d 272 (7th Cir. 2018).

[53] Brief for Appellant at 23, City of Chicago v. Sessions, No. 17-2991, 2017 WL 5957541 (7th Cir.); *id*. at 25-26.

[54] 555 U.S. 488 (2009).

[55] *Cf*. Sohoni, *supra* note 4, at 1164 n.225 (noting that in the *Summers* litigation, "the Solicitor General advanced a somewhat similar position [as outlined in the Litigation Guidelines], but with an important difference: the Solicitor General did not contest that where 'regulations govern primary conduct and impose serious penalties for violations,' courts may review the *rules*, not merely the *application* of the rules to individual parties").

and stays of the effective dates of rules. The decision to discuss these categories together reflects the overwhelming practice of interviewees to treat all forms of universal relief as essentially interchangeable. When it is necessary to distinguish more specifically between these various forms of relief, or where an interviewee did so, the discussion below uses the appropriate term. The next section (Part III.D) explores in more depth the differences, if any, in how agencies understand these various types of relief.

The event that initiates an agency response to a court order is the receipt of notice of that order. Agency officials typically learned that a court had issued an order with universal effect from the attorneys litigating the case.[56]

When their agency receives such an order, the first step is just to pause ("pencils down," as one official put it), and the next step is to figure out how to comply and how to respond. That process of formulating a response generally includes two components. First, agencies arrive at an understanding or interpretation of the order, often in conjunction with DOJ. Second, agencies determine how to comply with the order, and they communicate with officials within the agency on how to respond to the order.

Both of these components are described below. It should be emphasized, however, that it is artificial to draw crisp divisions or boundaries between various aspects of agency response. In practice, they appear to occur both rapidly and concurrently. Moreover, the components mutually inform one another. An agency's internal interpretation of an order's scope will affect its communications with DOJ and vice versa—and both of these elements will affect how the agency communicates internally to officials within the agency on how to comply with and react to an order.

After describing these components, the remainder of this Part outlines what agencies told us concerning the difficulties they have encountered when complying with such orders. It then briefly describes what we learned concerning the use of the *Federal Register* and the CFR to apprise the public of such orders.

1. Agency Understandings of Orders with Universal Effect

When an order issues, an important—and often not straightforward—question is how to interpret the order. In particular, this study is interested in the question whether the order is understood to have "universal" effect. These conversations often take place in coordination with DOJ.

In general, DOJ and agency officials would have to agree on an interpretation of the court order, and what would or would not be consistent with that order. That assessment includes making a prediction of how the court would respond if further litigation occurred on the point. Once a permissible set of agency

[56] One exception to this typical pattern involves orders that affect many agencies. That scenario will be discussed below. *See infra* text accompanying note 64.

options is determined, then DOJ moves more to an advising role, though DOJ officials remain engaged at least as long as there is active litigation. This involvement would be collaborative, and it would address how the agency's actions might affect the litigation and vice versa. Agencies frequently stated that they would seek advice from DOJ in order to understand the scope of an order's effects and to plan how the agency should respond. For example, after the social cost of carbon decision in *Louisiana v. Biden*,[57] Interior coordinated with DOJ about compliance with the injunction, including seeking guidance from DOJ about how to handle a specific National Environmental Policy Act document that was close to completion.

Interviewees noted that increasingly questions about scope of relief are briefed explicitly. As a result, courts in these cases tend to be clearer about whether their rulings apply to everyone or just to the parties. An official suggested that this clarity was more common in decisions vacating a rule than staying its effective date.[58]

In the event that a court does not expressly say whether the relief applies to everyone, then the agency and DOJ will have to interpret the order. This is typically, though not universally, a collaborative process between the agency and DOJ.

Sometimes, though not always, DOJ will go back to court and ask for clarification. For example, one official at an executive agency explained that if an order does not explicitly say it applies nationwide,[59] the agency would discuss with DOJ what the decision means—which could include figuring it out from context or going back to the court for clarification.[60]

Most agencies interviewed suggested or implied that they presume decisions to vacate rules or stay their effective date are universal in effect. Among agencies interviewed, litigating positions suggest that the IRS was an outlier in its understanding of vacatur. It is currently engaged in litigation about the scope of vacatur in *Mann Construction v. United States*,[61] in which the Sixth Circuit set aside under the APA a 2007 notice issued by the IRS concerning abusive trust

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[57] 585 F. Supp. 3d 840, 848 (W.D. La. 2022), *vacated*, 2023 WL 2780821 (5th Cir. Apr. 5, 2023).

[58] *See, e.g.*, West Virginia v. EPA, 136 S. Ct. 1000, 1000 (2016) (mem.) (staying EPA regulations pending disposition of petitions for review); BST Holdings v. OSHA, 17 F.4th 604, 619 (5th Cir. 2021) (staying OSHA vaccine mandate pending review); Nat'l Urb. League v. Ross, 489 F. Supp. 3d 939, 950 (N.D. Cal. 2020) (staying agency decisions to shorten timelines for collecting data for 2020 census).

[59] For the purposes of this report, an executive agency is an "agency" not identified as an "independent regulatory agency" under 44 U.S.C. § 3502.

[60] For further discussion of agency efforts to seek clarification, see *infra* text accompanying notes 79–80. *See also, e.g.,* Texas v. United States, No. 7:16-cv-00054-O, 2016 WL 7852331, at *1 (N.D. Tex. Oct. 18, 2016) (responding to government's request for clarification and for narrowing of court's nationwide preliminary injunction that enjoined new federal policy concerning transgender access to bathrooms).

[61] 27 F.4th 1138 (6th Cir. 2022).

arrangements because the notice did not go through notice and comment. The IRS is litigating the scope of this set aside, arguing that it is not nationwide but limited to the circuit. Though not discussed in the interview, the IRS also has taken the position that set aside is limited to parties in *GBX v. United States*,[62] a case in the Northern District of Ohio. In earlier litigation challenging regulations, however, the IRS responded differently to a vacatur, treating it as nationwide.[63]

2. Responding to Orders with Universal Effect

Once an order is understood as having universal effect, the situation is clearer. Interviewees uniformly stressed that they were committed to obeying court orders, including nationwide injunctions. We detected no ambiguity in agencies' positions; compliance with universal orders was intended to be complete.

With respect to orders that vacated rules, several interviewees reported that they understood such an order as restoring the status quo before the rule was issued. To do so, agencies simply looked back at the state of the law before the vacated rule was adopted. One interviewee added that a vacatur might also prompt "some subsidiary questions," such as whether the agency can act based on its underlying statutory authority.

An official at an agency subject to Hobbs Act review provided additional color. The official observed that the agency will not enforce a rule that is set aside or stayed, but the agency might continue to do preparatory work in the background (presumably in the event that the decision is reversed on appeal or that a new rule is issued). The same agency interviewee also noted that the agency's position is that if a court of appeals issues a decision to set aside a rule, the order remains in effect until the mandate issues. (Under the Federal Rules of Appellate Procedure, a mandate issues seven days after the time for a petition for rehearing expires, which would be 45 days after a decision is rendered, for a total of 52 days.) In practice, however, the agency does not enforce the rule during this period. The interviewee explained that, unless some other action is taken, the agency treats a decision to vacate as staying the rule even before the mandate issues.

Internal Communications— Interviewees uniformly reported that they communicate orders with universal effect to affected officials or components within the agency immediately. They also take steps to speedily communicate guidance on how to comply with an order with universal effect to the relevant personnel.

The exact form of the communication differed slightly among agencies. The communication could be a memo to the heads of all agency bureaus and offices, a "quick listserv-like option," or high-level advice given to affected officials.

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[62] No. 1:22-cv-401, 2022 WL 16923886 (N.D. Ohio Nov. 14, 2022).

[63] *See* Requirements Related to Surprise Billing, 87 Fed. Reg. 52,618, 52,625 (Aug. 26, 2022) (amending interim final rules to remove language vacated by the district court for the Eastern District of Texas); *see also* LifeNet, Inc. v. U.S. Dep't of Health & Hum. Servs., 617 F. Supp. 3d 547 (E.D. Tex. 2022).

Lawyers within an agency's office of general counsel naturally play the key role in swiftly disseminating information concerning compliance, though the exact division of labor differed by agency.

Agency interviewees explained that to comply with an order with universal effect, agencies have to identify the relevant personnel within the agency to apprise. The topics at issue in the decision, and the internal organization of the agency, would influence which agency personnel would be notified. No agency interviewee suggested any difficulties with identifying the appropriate recipients of internal communications.

An illustrative vignette brings together these various themes. When the relevant vacatur issued, lawyers in the agency's general counsel's office worked with DOJ to figure out what the decision meant and then the agency instructed the field operations on how to comply. An interviewee explained that a memorandum or bulletin went out to the field, probably after discussions with DOJ. The notice would have explained what was ordered and how it affected how the affected program should be administered. Specifically, the notice would have gone to a subagency that would have then sent it onwards to the regional offices in the field, which were working with the states that administered the affected program.

Affirmative Responses—In addition to complying with a court decision, agencies also may take affirmative steps in response to an injunction or vacatur. In other words, sometimes an agency responds to orders with universal effect by attempting to fix the problem identified by the court's decision.

Multiple agencies explained that when a rule was subject to universal relief, the agency would consider whether they could "fix" the rule and reissue it. Agencies would look at the vulnerabilities of its rule that were articulated by the court and consider whether changes could be made.

Interviewees at one agency explained that "the process for deciding how to respond involved looking at what the judge said and asking if the department can still do the rule." An interviewee commented that there is a desire to get rules out and save what can be saved after adverse decisions, for example by limiting a rule's coverage. On one occasion, a court order that vacated a portion of a rule caused the agency to substitute an interpretive rule—"and then we got sued on that." The agency currently has eight rules that rely on that interpretation, making it important to have that resolved.

Multiple Agencies Affected—In some cases, an order with universal effect affects multiple agencies simultaneously. In this scenario, information about the order and concerning compliance with the order seems to be disseminated in a more centralized way, usually in coordination with DOJ.

One example was the case involving the social cost of carbon. Following a district court's issuance of an injunction against the use of an Interagency Working

Group's estimates of the social cost of carbon,[64] interviewees explained that DOJ convened a large conference call with all affected agencies, the White House Counsel's Office, and the Office of Management and Budget (OMB). The purpose of the call was to provide an assessment of that decision and what it required of agencies.

A second example is the case that resulted in an injunction against the executive order requiring government employees to be vaccinated against COVID-19.[65] That executive order applied across the executive branch. OMB had issued guidance on how agencies should implement the executive order. Subsequently, affected agencies received guidance from OMB on how to comply with the injunction against the executive order. This information was then communicated within the affected agencies as described above.

A third example involved litigation concerning the executive order forbidding diversity training in agencies or by government contractors. Agencies had begun to implement that executive order by putting language into contracts prohibiting diversity training by government contractors. In December 2020, much of that order was enjoined nationwide.[66] Interviewees explained that following the injunction, DOJ issued guidance to affected agencies to instruct them on how to ensure compliance with the injunction.

3. Difficulties with Compliance

Agencies reported that orders with universal effect vary in how difficult they are to comply with.

With respect to vacatur, several agency interviewees noted that such orders often do not present compliance difficulties. An interviewee at an executive agency noted that vacatur leaves open the possibility of attempting to achieve the same goal through a different rule, though this would create a period during which the policy could not be applied. An interviewee at one executive agency acknowledged that some agency officials may not be disappointed by a vacatur, which might make it easier for the agency to change policy than if the agency had to amend the rule directly. Sometimes, the agency thinks about remedies as an opportunity to try again. Indeed, sometimes a vacatur might align with an agency's changed position, in that it is no longer committed to the particular rule at issue.

With respect to stays of rules, an official at an agency subject to Hobbs Act review noted that "there are sometimes questions about the scope of the stay, how it affects implementation of other parts of the order that may be distinct from the part that was challenged." Beyond such questions, however, the interviewee said,

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[64] Louisiana v. Biden, 585 F. Supp. 3d 840, 848 (W.D. La. 2022), *vacated*, 2023 WL 2780821 (5th Cir. Apr. 5, 2023).

[65] Feds for Med. Freedom v. Biden, 581 F. Supp. 3d 826, 830 (S.D. Tex. 2022).

[66] Santa Cruz Lesbian and Gay Cmty. Ctr. v. Trump, 508 F. Supp. 3d 521 (N.D. Cal. 2020).

the agency has not faced any practical difficulties with compliance with stays, in part because it is a fairly centralized agency.

With respect to a stay of an agency action that itself had universal effect, and after our interviews with agencies had been completed, government court filings described a vivid instance of difficulty in compliance. A federal district court in Texas, citing 5 U.S.C. § 705, "stayed" the FDA's 2000 approval of mifepristone as well as subsequent FDA actions that expanded that medication's approved conditions of use in 2016, 2019, and 2021.[67] The Fifth Circuit stayed the district court's order regarding the 2000 approval but allowed the balance of the order to go into effect.[68] The government sought an emergency stay of the orders from the Supreme Court,[69] in support of which it attached a declaration of Dr. Janet Woodcock, the Principal Deputy Director of the FDA.[70] That declaration described "the practical consequences and disruption" that would be created by the orders.[71] Among other effects, the declaration stated the FDA would need to revise the labeling and prescribing information for Mifeprex and alter prescriber agreement forms, and that the FDA potentially would be required to re-certify all current prescribers of the drugs.[72] In addition, the orders would mean that all extant doses of the drug "immediately would become misbranded" and the generic version would have to be approved again by the agency with a new and heavier dosing regimen than the agency believed necessary.[73] The declaration estimated that "this process would take months, at minimum, due to the logistics of effectuating such changes."[74] The declaration also noted that the orders, unless stayed, would "create significant chaos for patients, providers, and the health care delivery system" and cause "substantial uncertainty as to the legal status" of existing doses of the drug.[75] The Supreme Court granted an emergency stay pending certiorari and then granted certiorari, which extends the stay until the Court's judgment.[76]

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[67] All. for Hippocratic Med. v. FDA, 2023 WL 2825871 (N.D. Tex. Apr. 7, 2023).

[68] All. for Hippocratic Med. v. FDA, 2023 WL 2913725 (5th Cir. 2023).

[69] See Application to Stay, FDA v. All. for Hippocratic Med., U.S. No. 22A902, April 14, 2023, https://www.supremecourt.gov/DocketPDF/22/22A902/263491/20230414103258942_Alliance%20for%20Hippocratic%20Med%20%20application.pdf.

[70] *Id*. at 110a.

[71] *Id*. at 113a.

[72] *Id*. at 113a-114a.

[73] *Id*. at 115a.

[74] *Id*. at 116a. Moreover, the declaration noted, "if a later court order reinstates" the 2023 conditions, "the sponsor and FDA would need to start this process over again . . . .". *Id*.

[75] *Id*.

[76] Danco Laby's v. All. for Hippocratic Med., 143 S. Ct. 1075 (2023). Justice Thomas would have denied the stay, and Justice Alito dissented. *See id*. Subsequently, the Fifth Circuit vacated the district court's stay of the 2000 approval and the 2019 approval of the generic version of the drug, but otherwise left the district court's order in place. All. for Hippocratic Med. v. FDA, 78 F.4th 210, 256 (5th Cir. 2023). The Supreme Court granted certiorari, after consolidating both of these cases, on December 13, 2023.

With respect to nationwide injunctions, several agency interviewees noted that such orders did not always pose problems for compliance. An interviewee commented that an injunction against a rule simply means that the rule may not be enforced. Another interviewee commented that a nationwide injunction might be less complex than narrower relief, especially when the underlying agency action is nationwide. One official gave examples of nationwide injunctions targeting specific agency actions, where compliance was straightforward because they could simply tell the relevant subagency to not take the enjoined action. Moreover, had the injunction not been nationwide, it would have been logistically difficult and would have created litigation risk because the agency would be treating different states differently.

One relevant factor is how many officials or staff at the agency are affected by an injunction. An interviewee observed that compliance with some injunctions requires participation of just a few people, while others can involve many more.

Several agency interviewees flagged difficulties that can be created by ambiguity in the wording of orders and conversely emphasized the need for clarity in such orders (regardless of whether they were nationwide in scope). Interviewees thought clarity was important both to ensure that an agency knows it is compelled to follow the injunction and so the agency does not accidentally violate its terms. An interviewee commented that "on the whole" the agency "prefer[s] clarity": "I'm more focused on the clarity of the decision than the nature [of the court order]. I don't want to get sued again. From an agency perspective, this is a practical question." The lack of clarity, especially in high profile cases, might lead agencies to seek DOJ review of subsequent rulemaking, in a departure from the usual practice.

To give an example, consider a challenge involving the 2020 census brought in a district court in California against Commerce and the Census Bureau. The injunction ordered the agencies not to stop their field operations as early as the deadlines they had announced.[77] The Census Bureau then announced a new end date, which it presumably thought was consistent with the prior decision. The court then clarified that the court's earlier injunction had the effect of enjoining the agencies to continue field operations for the full, initially planned time.[78]

An official at HHS was especially pointed about the "chilling effect" created by nationwide injunctions. The interviewee commented that the lack of clarity in the scope of orders meant that, even if officials were aiming to comply in good faith with the order, they worried that they would be held in contempt. For instance, if an order provided that a particular guidance document could not be "enforced nationally," could the agency enforce a legislative rule that touched on similar points to the guidance? Another complication arises from orders that speak to

[77] *See* Nat'l Urb. League v. Ross, 491 F. Supp. 3d 572, 574-75 (N.D. Cal. 2020) (describing the procedural history).

[78] *Id*. at 576, 583.

particular "interpretations" (rather than particular agency actions). For those orders, officials will need to determine how a given interpretation manifests in various downstream agency rules or other actions, which may be a challenging task that itself requires contestable interpretive judgments.

The official suggested that these difficult questions of compliance proliferate because judges often are not aware of the full scope of agency activity and therefore are not aware of the full effect of injunctive relief. This is especially true at the preliminary-injunction stage when there is not likely to be briefing on remedies. In the face of a broad or unclear injunction, the agency is worried about an aggressive plaintiff who wants to stretch the language of the injunction broadly, combined with a judge who incrementally increases the effective scope of the order. The same interviewee further indicated that vacatur under the APA did not present analogous complications: if the court set aside the rule, the rule was simply set aside, and no ambiguity as to scope existed.

In response to perceived ambiguity, agencies will sometimes go back to the court to get clarification on how to respond to an order with universal effect. Several interviewees noted this possibility.

An interviewee at Agriculture elaborated on an instance in which the agency sought clarification of an order with universal effect.[79] The injunction concerning Agriculture's disadvantaged groups loan payment program caused the agency and DOJ to return to court "to gain clarity" on whether certain activities were within the scope of the injunction or not. The agency and DOJ decided that there were aspects of agency activity not covered by the injunction, in particular the sending out of notices and the collecting of information. Then, the government asked the court if those activities were permitted. The plaintiffs objected, but the court ultimately clarified that its injunction barred Agriculture from making loan payments, but it did not block Agriculture from sending out notices or from performing preparatory work.[80] The agency thus interpreted the injunction as a "stop payment" order, and so began to send out notices and "rack and stack" information on borrowers. An Agriculture interviewee commented that "this was not that complicated to do."

***The Social Cost of Carbon*—**One particular injunction—the injunction concerning the social cost of carbon—deserves special attention. Our interviews revealed that this order presented special compliance difficulties across multiple agencies. At issue in this litigation were the estimates of the social cost of carbon produced by an Interagency Working Group in response to an executive order issued by President Biden.[81] These estimates would inform the regulatory analyses and rulemaking efforts of a wide range of agencies. A collection of states sought to

[79] *See* Miller v. Vilsack, 2021 WL 11115227 (N.D. Tex. Oct. 18, 2021).

[80] *Id*. at 2 ("The preparatory work that Defendant describes—sending notice letters to potentially eligible borrowers—does not violate the Court's preliminary injunction.").

[81] Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 20, 2021).

enjoin agencies from "adopting, employing, treating as binding, or relying on" these estimates on the grounds that they violated the APA and the Constitution.[82] A Louisiana district court granted a preliminary injunction,[83] forcing agencies to grapple with what compliance with the order would mean for current rulemaking efforts.[84]

The social cost of carbon injunction affected multiple agencies. At one agency, for instance, the social cost of carbon injunction affected four ongoing rulemaking efforts. More generally, compliance was not straightforward. It was not clear, for instance, whether the order affected agencies' ability to use the social cost figures in scientific, policy, or laboratory work. The order affected agencies' direct legal work, that is, but it was not clear that it reached into agencies' legal-adjacent research activity. Officials at more than one agency indicated that they adopted a conservative posture and treated the order as affecting a wide range of agency activities, such that its effects rippled out from its core. One agency official said that they adopted this precautionary posture out of fear that the court would interpret the order permissively in this high-profile case and hold the agency in contempt.

Two agencies commented on the unusual nature of the social cost of carbon injunction. One interviewee noted that the order was atypical in that it "implicated work that was ongoing." This injunction also appeared unusual in that the agency felt it necessary to carefully document its compliance, perhaps due to the high profile of the order. Officials at another agency noted the broadness of the order. This led the general counsel's office at the agency to adopt different communication techniques, essentially relying on the protocols designed to solicit views on amicus briefs, including using a senior counsel mailing list to ask if any of the client agencies had an interest in these questions. They also reached out to all regulatory staff to ask if they had operations implicated. In practice, the effects on the agency were limited because the decision was vacated not long after it issued.

***Conflicting Injunctions*—**Agency interviewees generally reported that their agency had not been the subject of truly conflicting injunctions (that is, a pair of injunctions that say, respectively, "do X" and "do not do X"). If that were to occur, one interviewee noted, DOJ would probably ask courts to lift one or the other obligation.

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[82] Louisiana v. Biden, 585 F. Supp. 3d 840 (W.D. La. 2022), *vacated*, 2023 WL 2780821 (5th Cir. Apr. 5, 2023).

[83] *Id*.

[84] The episode provides a helpful window into problems of compliance with injunctions, but the order created few long-term complications because it was stayed by a Fifth Circuit panel less than a month after the district court issued it. Louisiana v. Biden, No. 22-30087, 2022 WL 866282 (5th Cir. Mar. 16, 2022). The Fifth Circuit subsequently vacated the injunction. Louisiana v. Biden, 2023 WL 2780821 (5th Cir. Apr. 5, 2023).

Another interviewee commented that the multicircuit lottery should obviate the possibility of conflicting injunctions.[85] Occasionally, the interviewee noted, litigants will seek to avoid the multicircuit lottery and split review into multiple courts. That official's agency, however, takes the position that its rules may only be reviewed by one court.

Officials at two other agencies reported close calls with conflicting orders that ultimately did not materialize. An interviewee commented they came close to being subjected to conflicting injunctions, but the official could not recall a time that they had received directly conflicting orders from different courts. At least one interviewee noted, too, that they thought it likely that conflicting injunctions would become more of an issue going forward as injunctions become a conventional tool in the administrative litigation arsenal.

Though agencies reported no truly conflicting injunctions, some interviewees noted instances in which orders from two different courts caused, or had the potential to cause, special issues for their agency. For instance, at least one participant reported courts in different circuits interpreting a regulatory provision differently, requiring the agency to design a state-by-state implementation program. Such arrangements, though cumbersome, were technically feasible, and the agency in question is currently seeking to revise the relevant regulation so as to produce a nationwide standard.

Perhaps the closest instance to a truly conflicting set of orders was described by interviewees at Interior. In one case, the court issued an injunction against an executive order that froze new oil and gas leases. The injunction enjoined this "pause" on new leases, subject in effect to the completion of certain environmental analyses. As the Bureau of Land Management was engaging in these analyses, a different court issued an injunction against the use of social cost of carbon. An interviewee described this as a "classic pickle," with two injunctions "at loggerheads." As matters unfolded, however, Interior was rescued from this dilemma when the social cost of carbon injunction was swiftly stayed. In the short period of time when both injunctions were in effect, Interior interviewees reported that they coordinated with OMB, which was the "fulcrum for the agencies" affected by the social cost of carbon injunction.

4. Apprising the Public

During our interviews, as opportunities arose, we explored how orders with universal effect sometimes generated issues concerning the *Federal Register* and the *Code of Federal Regulations*. Presumably agencies communicate with the public in many other ways, such as press releases, but those were not the subjects of our interviews.

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[85] *See* 28 U.S.C. § 2112. This statute provides that multiple petitions for review of the same agency action will be consolidated before a single court of appeals, which is selected by lottery among the courts of appeals in which petitions were filed.

In one example, an agency faced a challenging situation when a rule was sent to OFR for publication before any injunction had issued but was published *after* a court had issued an injunction against enforcement of the rule. After the plaintiffs brought the issue to the judge, the agency had to issue an explanation. On another occasion, a rule had been sent for publication to OFR just hours before a district court issued an order implicating aspects of the rule; in that instance, the agency was able to call OFR and pull back the rule.

Two agencies remarked on the process of removing rules from the CFR when they had been vacated.[86] The agency explained that when a rule is vacated, the agency has to decide when to remove the rule from the CFR. In one case involving the vacatur of a rule, the agency removed the rule from the CFR fairly quickly. Other times, they explained, they "issue a housekeeping order to clean up the CFR."

At another agency, officials explained that the "default" after a rule is vacated is that the agency acknowledges the decision by issuing a direct final rule with good cause. That said, they sometimes find long-vacated rules in the CFR. The agency also sometimes uses devices other than a direct final rule to revise regulations, including a new rule, promulgated through notice-and-comment rulemaking; a new interim final rule, issued without pre-promulgation notice and comment and effective immediately; or withdrawing the rule and pursuing a different course.[87] The decision will be based on a conversation with the programmatic unit about resources, timing, etc.

An interviewee at OFR provided perspective into the nuts and bolts of how the public may, or may not, be apprised of orders with universal effect.[88] As the interviewee explained, OFR "can only touch" the CFR if there is an underlying

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[86] The CFR is published in print in April annually. This is the only official version of the CFR. The online version is updated dynamically; it is technically unofficial, though both officials and the public often rely on it.

[87] Generally, an agency must use notice-and-comment rulemaking to amend or revoke a rule that was itself promulgated using notice-and-comment rulemaking. If, however, an agency determines that good cause exists, *see* 5 U.S.C. § 553(b)(B), it may issue a rule without notice and comment. Agencies often rely on the good-cause exception when promulgating "interim final rules" and "direct final rules." *See* Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 704 (1999) ("Interim-final rules are rules adopted by federal agencies that become effective without prior notice and public comment and that invite post-effective public comment. . . . Often, but not always, the agency relies on the APA provision excusing prior notice and comment on the basis that there is good cause to believe that such procedures would be impracticable or contrary to the public's interest."); Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1, 2 (1995) (noting that direct final rulemaking involves publication of a rule believed to be noncontroversial, with the understanding that it will be withdrawn if even a single material adverse comment is received).

[88] *See* Levin, *supra* note 3, at 2016 ("[W]hen a final court judgment orders vacatur of a rule, the agency is supposed to instruct the [OFR] to remove the provision from the [CFR]."); *id*. at 2016–17 & n.95 (explaining that OFR interprets the applicable statute to mean that "each agency has a duty to request updates [to the CFR] so as to ensure that the regulations in the CFR are, in fact, in effect as of the quarterly revision date specified in the volume").

Federal Register document that specifies exactly how the CFR is to be amended. Consequently, if a court issues an injunction, OFR takes no action without the agency. If the agency chooses to announce that due to the nationwide injunction it will not enforce a rule, or will treat a rule as stayed, the document would be published in the Rules and Regulations section of the *Federal Register*. However, absent instructions on how to amend the CFR, such a notice would not have any effect on the CFR. The interviewee also noted that if an agency chose to "formally stay" a regulation as a result of an injunction, the agency would publish a final rule that would stay the affected regulation.[89] In that circumstance, OFR would include an editorial note in the CFR (including the online version of the CFR) stating which provisions were stayed and any applicable end date of the stay.

With respect to vacatur, if a district court or a court of appeals vacates a regulation and the agency is still appealing, then the agency can choose to leave the regulation in the CFR. The OFR interviewee observed that many agencies will not remove regulations until the judicial process is final, in part because it is costly to publish anything in the *Federal Register*. The OFR interviewee emphasized that regardless, it is the agency that must explain to the OFR what changes should be made to the CFR.[90] OFR itself does not generally initiate changes.[91] Sometimes, this means that something clearly not in effect remains in the CFR for a long time. The interviewee gave the example of a regulation related to the Panama Canal Commission that remained in the CFR for decades after the Commission ceased to exist.

The OFR interviewee could not recall seeing any examples of an agency publishing a "party-specific vacatur" in the OFR. The interviewee explained that if OFR had received such a notice, it would be published in the Notices section of the Federal Register rather than in the Rules and Regulations section, because it would be a document of particular applicability, not an action of general applicability.[92]

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[89] The Federal Register Document Drafting Handbook directs that an agency may publish a "stay" in the Federal Register "to place a hold on a CFR unit temporarily or indefinitely. We [the OFR] do not remove or otherwise amend the content that is stayed, but we do add an Editorial Note and we freeze the text. During the stay, the CFR unit is not legally effective and is not enforceable." OFF. OF THE FED. REG., NAT'L ARCHIVES & RECS. ADMIN., DOCUMENT DRAFTING HANDBOOK 3–43 (rev. 2023), https://www.archives.gov/files/federal-register/write/handbook/ddh.pdf.

[90] The OFR interviewee also commented that the only special feature of vacatur is that when a rule is vacated, the OFR will allow the agency to put "bad" or "incorrect" language back into the CFR, such as when the pre-existing rule contained a typographical error.

[91] The OFR interviewee noted that the Federal Register Act, 44 U.S.C. § 1510, requires that the CFR be as current as possible and to reflect the regulations in effect, but that "unfortunately we have no authority to make agencies do anything." The interviewee noted that "[w]e might push back a little—we don't want to get sued or censured—so we might take steps in the background."

[92] *See* 1 C.F.R. § 5.9 (explaining how documents published in the *Federal Register* are categorized).

D. POTENTIALLY RELEVANT DISTINCTIONS

As noted at the outset, orders with universal effect may differ in numerous formal or legal respects. Such an order may be a nationwide preliminary injunction, a nationwide final injunction, a universal vacatur of a rule, or a stay of the effective date of the rule. It might be issued with or without a request for, or certification of, a nationwide class action. It might be issued by a district court, or by a court of appeals, or by a particular court of appeals (the D.C. Circuit). This section (Part III.D) describes how agencies regard orders that differ along these various dimensions.

1. Different Types of Relief

As noted above, as a legal matter, injunctions and vacaturs and stays are different. The APA expressly refers to set asides and stays. By comparison, the remedy of an injunction is rooted in equity. Failure to comply may be punished with contempt.[93]

The great majority of agency interviewees reported that the agency saw no differences between an order that vacated a rule and an order that issued a nationwide injunction against a rule's enforcement. Agencies reported that "generally it makes no difference," that there was "no functional difference," that both remedies have the "same effect," and that the difference was "irrelevant."

Only one agency interviewee emphasized that there was an overarching difference between a nationwide injunction and vacatur. While both remedies required the agency to figure out a new path, only the injunction required the agency to think about contempt.[94]

Finally, where addressed, none of the agencies suggested that whether an injunction was preliminary or permanent would affect the agency response.

2. Class Actions

With respect to compliance, agencies did not regard class certification as making a difference. One example comes from the Department of Energy and its response to the social cost of carbon injunction. The suit was not styled or certified as a class action, and interviewees at Energy stated that their response would not have been different if the suit had been a nationwide class action. The presence or absence of a class action was "irrelevant." An interviewee at Agriculture stated the agency has on occasion responded to such suits by settling out individual plaintiffs or by revising its own regulation. The interviewee added that class certification

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[93] 5 U.S.C. §§ 705, 706.

[94] For an in-depth examination of contempt proceedings involving the federal government, see Parrillo, *supra* note 9. In *National Urban League v. Ross*, 491 F. Supp. 3d 572, 584 (N.D. Cal. 2020), the court noted several violations by government defendants of its earlier injunction and warned that "[t]he [c]ourt will subject Defendants to sanctions or contempt proceedings if Defendants violate the Injunction Order again."

might be viewed as an indicator of the scope of the case, which might inform the agency's reaction.

3. Type of Court

The great majority of agency interviewees reported that their agency perceived no significant differences between a remedy issued by a district court versus a court of appeals. Likewise, a great majority of agency interviewees reported that their agency perceived no significant difference depending on which court issued the order with universal effect, including no difference between orders issued by the D.C. Circuit as opposed to other circuits. In short, agency interviewees indicated that their responses do not differ based on the court issuing the decision, and that their focus is trained on evaluating the decision's substance and their options for appeal. For example, an interviewee said that the agency would respond to "any district the same," and that "specific circuits do not matter. They have equal authority." An interviewee at another agency stated that the type of court was less important to the agency than the substance of the decision, at least with respect to the decision about appeal.

Though agencies universally reported that, as a formal matter, the identity of the issuing court did not matter, two agencies noted the special place of the D.C. Circuit. An Energy interviewee stated that a D.C. Circuit decision might enter the agency's calculation of litigation risk because it is an "important authority." Similarly, officials at another agency commented that a D.C. Circuit decision may be treated differently because it is thought to have more expertise.

Officials at one agency noted that the D.C. Circuit's special jurisdictional ambit may matter in certain cases. The interviewee noted that certain agency actions can only be reviewed in the D.C. Circuit. If the D.C. Circuit has exclusive review, that court can conclusively vacate a rule. If, however, the agency could be sued in any circuit, then the agency can "consider options" if a circuit rules against them. This official added that he had not participated in discussions where the agency had given special weight to the D.C. Circuit.

E. NONACQUIESCENCE

Most of this report addressed how agencies interpret and implement universal orders—that is, orders that on their own terms affect agency operations universally. Alternatively, it is imaginable that agencies could choose not to implement such orders—an agency theoretically could elect to ignore the order altogether; to implement it only within the district or circuit in which it was issued; or to implement it only with respect to the parties involved in the case that produced the universal order. In our interviews with agencies, we referred to these possibilities as "nonacquiescence," drawing upon a concept more fully explored in

the context of administrative adjudication.[95] Because this study focuses on agency rules and rule-like instruments, we centered the discussion with agencies on nonacquiescence to court decisions involving rules or rule-like actions.

As above, we queried agencies about their particular experiences with nonacquiescence. In our interviews and surveys, respondents uniformly reported that they had no general guidance on nonacquiescence. A few agencies commented that nonacquiescence would be considered on a case-by-case basis. Some agency interviewees also described to us more specifically their thoughts on, or experience with, nonacquiescence.

In our interviews and surveys, most agency interviewees reported that they could not think of examples in which the agency had continued to apply a rule after a court had vacated the rule. Indeed, most agencies were emphatic on this point. To give an example, an Energy interviewee said that their agency "never" engaged in nonacquiescence. An official at an agency subject to Hobbs Act review stated that "I don't think the Hobbs Act permits nonacquiescence." An Interior interviewee could not think of an instance in which the agency had continued to apply a rule despite it being set aside. The interviewee also commented that "a district court decision vacating a rule has the same effect as a nationwide injunction, so it's difficult for us to say we're following that rule. It's one rule. It's on the books. It's in the CFR . . . . It would be very difficult for us to say we are going to follow the rule outside of the district but not follow it within the district."

In response to a written survey, the NLRB noted that in several cases in which the plaintiffs were nationwide entities such as the Chamber of Commerce and the AFL-CIO, the Board did not seek to implement vacated provisions until their legal status was definitively settled. They went on to observe that the agency remained free to make a different litigation judgment in future cases brought by nationwide plaintiffs.[96] An official at another agency indicated that compliance with nationwide injunctions is a far more central topic today than the scope of acquiescence to precedent.

Like other agencies, interviewees at the IRS could not think of an example of nonacquiescence to a vacatur. But interviewees affirmatively took the opportunity to describe the agency's position with respect to a case in which a court decided an issue adversely to the IRS in the context of a suit concerning the tax liability of an individual taxpayer. In the context of a case involving an individual

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[95] *See* Estreicher & Revesz, *supra* note 46, at 681 & n.1, 688 n.35, 747 n.317 (defining and describing nonacquiescence to adverse rulings by lower courts in the context of cases involving agency adjudications).

[96] Am. Hosp. Ass'n v. NLRB, 718 F. Supp. 704 (N.D. Ill. 1989), *rev'd*, 899 F.2d 651 (7th Cir. 1990), *aff'd*, 498 U.S. 1022 (1991); United States v. NLRB, 879 F. Supp. 2d 18 (D.D.C. 2012); Chamber of Commerce of the United States v. NLRB, 856 F. Supp. 2d 778 (D.S.C. 2012), *aff'd*, 721 F.3d 152 (4th Cir. 2013); Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947 (D.C. Cir. 2013); AFL-CIO v. NLRB, 471 F. Supp. 3d 228 (D.D.C. 2020), *rev'd*, 57 F.4th 1023 (2023).

taxpayer, an IRS interviewee said that the agency might not apply a single district court decision nationwide. A court of appeals decision may be followed more widely. An IRS interviewee added, however, that the agency might not follow a court of appeals decision outside of that circuit until multiple circuits reached the same conclusion. Another IRS interviewee explained that when the IRS disagrees with a decision, it may issue a public document—an action on decision—which explains that the IRS disagrees with the decision, the decision is limited to its facts and the plaintiff, and the agency does not expect to follow it in other cases. That document is published in the Internal Revenue Bulletin.[97] Similarly, NRC's survey response noted that the agency has "in at least one instance declined to apply the holding of a court of appeals to licenses granted outside the circuit in which the holding was issued."[98]

Officials at one agency identified one case in which the agency's rule was vacated by one court of appeals, and the agency decided to acquiesce to that decision only within the circuit and to continue to apply the rule outside of that circuit.

F. Responding to Orders with Non-Universal Effect

The focus of this study was on orders with universal effect. However, in the course of our interviews, we also sought to elicit information on agencies' experience with orders that had geographically limited or party-limited effects.

This information is important in its own right, but it also informs agency responses to universal relief. As described above, agencies often must interpret ambiguous orders—in other words, they must decide whether to treat an order as universal or not. How agencies respond to nonuniversal orders informs that calculation. In addition, any discussion of the "difficulties" of complying with universal orders should be considered in comparison to the "difficulties" of complying with nonuniversal orders. Indeed, as will be described below, some agencies will choose to respond to nonuniversal orders by treating them as if they were universal.

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[97] IRM 36.3.1 (Mar. 14, 2013), https://www.irs.gov/irm/part36/irm_36-003-001.

[98] NRC's survey response explained further: "Specifically, the Ninth Circuit held in *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006), that the agency was required to conduct, as part of its licensing of a spent nuclear fuel storage facility, an analysis of the environmental impacts of a terrorist attack. The agency complied with the court's decision and performed the analysis that the court held was warranted. However, it subsequently announced, in a publicly issued adjudicatory decision, that it did not believe that the case had been properly decided and that it would not adhere to the decision with respect to facilities located outside of the Ninth Circuit. *See* Amergen Energy Company, CLI-07-08, 2007 WL 595084 (Feb. 26, 2008). At least one other court has endorsed NRC's position, *see New Jersey Dept. of Env. Protection v. NRC*, 561 F.3d 132 (3rd Cir. 2009), and the agency has adhered to its position ever since. When it has prepared Generic Environmental Impact Statements, which cover facilities that may be located in any area within the United States, it has included an analysis of the impacts of terrorism."

1. Experience with Non-Universal Relief

***Non-Universal Injunctions*—**An alternative to a universal injunction against a rule would be a nonuniversal injunction. Several agency interviewees expressed unfamiliarity with injunctions that were geographically limited in scope or that protected only the parties.

An interviewee at one agency could imagine such cases but could not think of any cases involving their agency. The interviewee was not aware of any cases in which their agency argued for party-limited relief, other than with respect to state plaintiffs. An interviewee at another executive agency felt confident that courts had issued party-specific injunctions but could not think of an example. An Agriculture interviewee commented that if a court issued a geographically limited injunction, the agency would consult with DOJ to determine what the decision meant and whether the ruling could be applied in a jurisdictionally limited way.

Some agency interviewees had encountered injunctions that were geographically limited (rather than either nationwide or purely plaintiff-protective in scope). One example involved litigation concerning the nationwide eviction moratorium. The district court for the Western District of Tennessee enjoined that moratorium only in the Western District of Tennessee.[99] Such an order, relevant officials reported, would be followed where it applied, but that there was an obligation to follow the existing law for everyone else.

Other examples arose during our interviews. In the cases involving the healthcare-worker vaccine rule issued by the Centers for Medicare and Medicaid Services, the district court issued a nationwide injunction, and the Fifth Circuit narrowed it;[100] after that, the agency continued to apply the rule where the injunction did not apply. In another example, SBA was administering the Paycheck Protection Act, and it issued regulations regarding whether strip clubs could get loans. Those regulations were enjoined, but the injunctions were limited in scope to the plaintiffs and intervenors,[101] so SBA continued to apply the regulations elsewhere.

***Non-Universal Vacaturs*—**Likewise, an alternative to a "universal vacatur" would be one limited to parties or regions. Agency interviewees uniformly expressed unfamiliarity with orders that set aside a rule as only to the plaintiffs or orders that set aside rules in a geographically limited way. They also expressed uncertainty and confusion when asked how they would respond to a geographically limited or party-limited vacatur.

For example, interviewees at one agency could not think of an example of a vacatur that was limited to the parties or limited to a particular district. An

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[99] Tiger Lily v. U.S. Dep't of Hous. & Urb. Dev., 525 F. Supp. 3d 850, 864 (W.D. Tenn. 2021).

[100] Louisiana v. Becerra, 20 F.4th 260 (5th Cir. 2021).

[101] DV Diamond Club of Flint, LLC v. U.S. Small Bus. Admin., 459 F. Supp. 3d 943, 965 (E.D. Mich. 2020).

interviewee at Energy, when asked how the agency would respond to a decision that set aside a rule as to the plaintiffs, said they had never thought about it and that compliance would be challenging. The interviewee added that such an order would implicate competition issues and policy issues, among others. Similarly, an Interior interviewee was asked how the agency would respond to an order that set aside a rule only in a single district. The interviewee responded that such an order would be "very unusual and difficult," and that an order that set aside a rule only as to the plaintiffs would be "very difficult" as well. An Interior interviewee commented that the agency might ask that a court just vacate certain provisions of a rule, and that sometimes that happens.

Non-Universal Stays—Finally, with respect to stays, an official at an agency subject to Hobbs Act review commented that he was not aware of any instances in which a court has stayed an order only to specific parties or geographic regions. The interviewee suggested that such a decision would be inconsistent with how agency policy works. To the agency, a stay extended as far as the arguments extended; the interviewee felt that the term "universal stay" is redundant.

2. Difficulties with Compliance

Though largely hypothetical, several interviewees reported that orders with nonuniversal effect could cause difficulties in implementation. For example, one interviewee commented that, practically speaking, a nationwide injunction might be less complex than a remedy that applies only in a circuit or to particular parties. The interviewee added that it can be more complex and more costly to treat different regions differently. Similarly, an interviewee at another agency commented that it can be easier to implement an injunction nationwide than it is to implement it on a geographically limited basis. A regime in which courts set aside rules as to the parties would create a "patchwork" of regulations, creating regulatory and compliance challenges for both the public and the agency. Another interviewee remarked that the agency is invested in regulatory supremacy and national uniformity, and nonuniversal relief frustrates that. The interviewee explained that their agency's rules are not easily limited to parties, and doing so would create practical difficulties and regulatory uncertainty. Likewise, officials at another agency observed that nonuniversal relief requires the agency to consider geography. Officials from Interior characterized this type of relief as "very difficult."

In contrast, an official at HHS explained that a plaintiff-specific injunction may or may not be easier to implement. Party specific injunctions, the interviewee said, have the virtue of clearly only applying to specific parties, and those parties will inform the agency if they are out of compliance. A geographically limited injunction may be more complicated, but it allows the agency to advance the goals of the program; that said, for certain programs that cut across state lines, a geographically limited injunction might still result in stopping the whole program.

This official went on to identify a slightly different distinction among various forms of relief: that the key division is between state or nationwide

injunctions and individual or party-limited injunctions. Regarding the former, the official said that either a state-wide or nationwide injunction was substantial enough that it would affect agency policymaking.

One Agriculture interviewee described a plaintiff-specific injunction in a case in which the agency lacked the discretion to apply the order more broadly. In the case under discussion, he explained, the agency was implementing a statutory command and the agency had to implement that statute until the court ordered it to stop. The interviewee stated that the agency "had to follow the terms set out in the statute," which meant that the agency could not stop implementing the statute as to anyone not covered by the court order. The interviewee explained that sometimes limiting relief puts the agency in a tough position, but if the agency lacks legal authority to do something broader, it can't: "The government operates in law, not in equity."

G. Broader Effects of and Reflections On Nationwide Injunctions

Apart from their direct consequences in particular cases, the uptick in nationwide injunctions might conceivably have broader effects on agency activity—for example, they might deter agencies from performing rulemaking and encourage a move to adjudication. We sought to ascertain from agency interviewees whether the increased frequency of nationwide injunctions was having any impact either on their agency's rulemaking or on its processes and programs more generally. We also sought to elicit thoughts from interviewees about their agencies' potential susceptibility to nationwide injunctions and reflections on how agencies felt about the uptick in nationwide injunctions in general.

1. Broader Effects of Nationwide Injunctions

The majority of our interviews with agencies revealed that interviewees generally did not perceive the rise in nationwide injunctions to have affected how their agency functioned. Rather, the majority of agency interviewees who had thoughts on this topic emphasized that they were sensitive to litigation risk generally, not to nationwide injunctions as a remedy in particular. As one interviewee put it, "We don't plan on losing. The driver of our regulatory activity is not the possibility of an injunction." In the same vein, an interviewee at Interior commented, "Our interest when we lose is in the structure of the remedy in the sense that we only want to have vacated what we need to have vacated." Agencies did emphasize, though, that increased litigation risk led them to be more careful, to dot their i's and cross their t's.

At an agency subject to Hobbs Act review, interviewees reported that the nationwide injunction issue has not affected the agency: "If the Hobbs Act review process is 'like' a nationwide injunction, then we live in a world of nationwide injunctions." An interviewee elaborated that being subject to review via the Hobbs Act does not seem to affect rulemaking. The interviewee added, "We're an agency that issues nationwide rules. That's our purpose, that's what we need to do. In any

case, I haven't seen any discussion of doing X or Y because of nationwide injunctions."

One official stood out in emphasizing the internal agency consequences of the uptick in nationwide injunctions and other changes to the legal landscape. This executive agency official indicated that their agency thinks about the rise of broad-gauged remedies all the time when assessing policy. This official also connected the trends in remedies to the more permissive recent understanding of final agency action. Not only do the remedies reach further, but more agency "actions" may be subject to judicial review. Combined, the official believed that agencies face more, and more consequential, judicial scrutiny today than in the past.

In terms of the specific effects of these developments on agency operations, this same official did not provide a particular example—but noted that agencies might be inclined to pursue enforcement actions or adjudications rather than rulemakings. Interviewees at another agency also noted with interest that some agencies have been putting severability clauses into their regulations.[102] However, the use of such clauses is not necessarily a response to nationwide injunctions, but instead a hedge against litigation risk more generally.

2. Susceptibility to Universal Relief

As demonstrated in Part II of this Report, not all agencies have had the same experience with nationwide injunctions and other universal relief. Some are frequent targets; others have little or no experience with them.

Interviewed agencies were asked to reflect on their exposure and potential explanations for it. Responses to this inquiry were rare, though a few comments are worth reporting.

First, at least two agencies suggested that the subject matter of their work made them less susceptible to nationwide relief. Energy described most of their rulemaking as occupying a "niche world" not likely to draw substantial attention. An interviewee at another agency explained that the agency's mandate results in less overall rulemaking than other agencies—with more work being done through other tools less likely to be the subject of nationwide relief.

Second, certain statutory features might affect the rates of nationwide injunctions. An interviewee at another agency explained that the background law ensures that most litigation arises from enforcement and adjudication, rather than rulemaking, and those forms of agency action would not be the subject of nationwide relief. Relatedly, court jurisdiction might be circumscribed such that nationwide relief is less likely. Further, although no agency official said so explicitly, it is at least possible that channeling statutes or other statutory requirements might make certain agencies more or less susceptible to nationwide

[102] *See* Admin. Conf. of the U.S., Recommendation 2018-2, *Severability in Agency Rulemaking*, 83 Fed. Reg. 30,685 (June 29, 2018).

injunctions and universal vacatur. To the extent rules must be reviewed in a single circuit, for instance, that circuit's order is often effectively nationwide in scope—there may be little need for explicitly nationwide relief in such contexts.

Finally, some agency officials suggested that rigorous internal processes at the agency might make them less likely to be the subject of a nationwide injunction. An interviewee at one agency said, in particular, that lengthy comment periods and the participation of all relevant parties made this type of relief less likely. An interviewee at Interior suggested that the types of internal responses described in the previous Part have made the agency even more resilient to nationwide injunctions. An interviewee at another agency also thought that the quality of the agency's work product led to fewer nationwide injunctions, though they acknowledged that it is hard to pass neutral judgment on one's own work.

3. General Thoughts

Interviewees reported a spectrum of general thoughts on nationwide injunctions and other forms of universal relief.

Generally, the thoughts were not positive. Agency officials did not like nationwide relief because it interfered with agency programs and priorities, though again this observation seemed to apply whether relief was universal or more targeted, and they tended not to report problems in complying with universal orders. Agencies also bristled at the general notion of courts making policy when the agencies have the subject-matter expertise. And they worried about chilling effects on future action. That said, officials acknowledged that one's view of universal relief often turned on one's substantive view of the underlying agency action.

Two slightly less negative reactions were offered by officials at two agencies. An Agriculture interviewee commented that he thinks of these forms of relief "sometimes as tools," because the agency might use universal relief as an opportunity to try a different approach. An interviewee at an agency subject to Hobbs Act review said that percolation has value, but there is an advantage to getting a single clear decision and moving on, rather than continuing to relitigate the same issue. The interviewee noted, however, that the agency engages in a substantial administrative process before issuing rules, including a lengthy and robust comment period. This internal review may be a substitute for the "percolation" that can occur via litigation in multiple courts.

CONCLUSION

Nationwide injunctions have come into prominence only during roughly the last decade. We sought to interview a range of agencies, some more and some less affected by these injunctions. Though we were not able to secure interviews with every agency we engaged, the picture that emerges from our interviews is one of agency officials pursuing their statutory objectives within the bounds of what they see to be the best interpretation of adverse court orders. Agencies tended to consult with DOJ on how to interpret the orders, communicated their understood meaning

to clients without delay, and generally reported few if any administrative difficulties in complying with the orders that stemmed from the scope of relief—even if they disagreed with or planned to appeal them. Non-compliance with adverse orders, either through evasion or administrative complication, appears rare.

The non-findings from this analysis, indeed, may merit more attention than the findings. Not only do we find few efforts to evade orders or problems with compliance, but distinctions that bear weight in legal and academic discourse appear to matter little to the agency officials implementing statutes. Academic observers give much attention, for instance, to the distinction between a universal vacatur under the APA and a nationwide injunction. Legal differences exist between these two remedies, but to agency officials implementing statutes they both communicate the same message: you cannot implement the rule as written. Regardless of the form of remedy, that message is taken on board by agency officials and they appear to do their best to comply with it.

Because nationwide injunctions have entangled significant regulatory programs in recent history, we thought we might hear reports from agency officials of regulatory strategies designed to limit risks associated with the remedy. A shift to policymaking through adjudication, for instance, might limit the plausible impact of nationwide injunctions. We found little evidence of such adaptations in our interviews. Officials, instead, tended to report that they always try to make their rules as resistant to legal challenge as possible. Likewise, officials at agencies not often affected by nationwide injunctions reported awareness of the rise of that remedy, but they did not appear concerned by the possibility of nationwide injunctions affecting their operations.

These findings and non-findings can only be regarded as preliminary and tentative. Our evidence is primarily interview-based in nature. We could not interview officials at every agency we wanted to, and we met with only a small number of officials at the agencies we did cover. Moreover, as noted earlier, the remedy is relatively new in widespread application, if not in concept, and agency procedures and practices may adapt if nationwide injunctions continue their rise. That adaptation, if it happens, may happen steadily over time, or instead suddenly as agencies learn from each other or by the influence of central administration.

Looking forward, further study from ACUS may be warranted in at least two respects. First, though agency officials did not report special challenges with respect to universal relief, they routinely raised concerns with court decisions that were unclear or ambiguous in their scope. But what makes an order unclear or ambiguous? Future studies might inquire into specific examples of difficult-to-implement decisions to identify patterns—and to propose steps to mitigate the lack of clarity. Experimental methods also might be employed to test different types of orders to determine which ones generate the most consistent understandings. Second, agencies whose rules were subject to channeling statutes evinced a noteworthy level of comfort and familiarity with universal relief. Could such channeling statutes be fruitfully expanded to encompass challenges to rulemaking

by additional agencies?[103] Additional work on either or both subjects might usefully inform future reform efforts addressed to universal remedies against administrative agencies.

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[103] For example, in addition to the benefits of what may in effect be nationwide relief, by their own terms channeling statutes limit opportunities for forum shopping. *See generally* David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1 (1975).