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Rule by District Judge: The Challenges of Universal Injunctions
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Mr. Chairman, Ranking Member, and Members of the Committee: It is an honor to testify before you today about nationwide injunctions.

During the Obama administration, Republicans cheered when a Texas judge enjoined a rule that would have expanded overtime pay to four million workers.[1] They applauded a different Texas judge who halted a program to provide immigration relief to the undocumented parents of citizens and legal permanent residents.[2] And they celebrated when a Midwestern appeals court struck down new rules to implement the Clean Water Act.[3]

The tables turned when President Trump was elected. Democrats were ecstatic when judges in Washington, Maryland, and Hawaii barred enforcement of the Trump administration's travel bans.[4] They welcomed a ruling from a Chicago judge halting a policy to restrict funding to sanctuary cities.[5] And they praised a Pennsylvania judge who invalidated rules that would have exempted employers with religious or moral scruples from the Affordable Care Act's contraception mandate.[6]

In each of these cases, individual judges extended their rulings to cover the whole country. These "nationwide" or "universal" injunctions went much further than necessary to protect the plaintiffs from unlawful or arbitrary governmental action. Instead, these lower court judges aimed to resolve hotly contested questions of law and policy for the whole country—in effect, to legislate for the nation.

Something is very wrong with this picture. Under the Constitution, the federal courts are vested with the "judicial Power," which has traditionally been understood to limit them to resolving disputes between the parties who appear before them. In a

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[1] Nevada v. Dep't of Labor, 275 F.Supp.3d 795 (E.D. Tex. 2017).

[2] Texas v. United States, 86 F.Supp.3d 591 (S.D.Tex.2015).

[3] In re EPA, 803 F.3d 804, 807 (6th Cir. 2015).

[4] Washington v. Trump, 2017 WL 462040 (W.D. Wash. Feb 3, 2017); Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539 (D. Md. 2017); Hawai'i v. Trump, 241 F. Supp. 3d 1119 (D. Haw. 2017).

[5] City of Chicago v. Sessions, 321 F.Supp.3d 855 (N.D. Ill. 2018).

[6] Pennsylvania v. Trump, 281 F.Supp.3d 553 (E.D. Penn. 2017).

quiet shift over the last 60 years, however, federal judges have gradually assumed the power to enter nationwide injunctions against federal statutes and regulations. The trend has accelerated dramatically over the past two administrations as claims of executive overreach have proliferated.

The Supreme Court has never expressly ruled on the legality of nationwide injunctions, though it soon may.[7] My hope is that the Court will put an end to nationwide injunctions. They enable opportunistic behavior by politically motivated litigants and judges, short-circuit a process in which multiple judges address hard legal questions, and inhibit the federal government's ability to do its work. By inflating the judicial role, they also reinforce the sense that we ought to look to the courts for salvation from our political problems—a view that is difficult to square with basic principles of democratic self-governance.

I do not see this as a partisan issue: nationwide injunctions are equal opportunity offenders, thwarting both Republican and Democratic initiatives alike. As a Democrat, however, I want to acknowledge that my views are controversial among some left-leaning lawyers who are appalled at serious civil rights violations perpetrated by the Trump administration. They rightly note that ending nationwide injunctions will inhibit the federal courts' ability to provide swift and complete relief to individuals who are unable to bring or join a federal lawsuit. That is a real loss, and one worth acknowledging.

But the proper rule for the federal courts shouldn't depend on whether you agree or disagree with the politics of the sitting president. In my view, the long-run, systemic harms of nationwide injunctions will come to eclipse any fleeting victories.

1. **Opportunistic Litigation.**

By amplifying the power of a single federal judge, nationwide injunctions increase the temptation for litigants to behave opportunistically. Plaintiffs who know that victory may yield the suspension of a detested law or policy will have especially large incentives to select the most advantageous forum in which to press their suits. Naturally, that will be a forum in which the plaintiffs believe the sitting judges share with them a common ideology or worldview. It's no coincidence that the latest challenge to the constitutionality of the Affordable Care Act was filed in Fort Worth, Texas, or that many of the highest-profile challenges to President Trump's policies have been brought in California.

Judges are not immune to the polarization that afflicts the American political culture. They may err, as all of us err, in judging correctly in cases that engage their

[7] Trump v. Pennsylvania, No. 19-454, 2020 WL 254168 (cert granted Jan. 17, 2020) (granting cert on the appropriateness of a nationwide injunction).

core political beliefs. And because courts apply a highly malleable standard in deciding whether to impose nationwide relief, the risk is greatest in precisely those cases that get the partisan blood boiling. For judges with political differences with the sitting administration, the question of whether to enter a nationwide injunction often seems to reduce down to: *How bad is this law or policy? And how illegal is it?*

It is telling that Republican presidents appointed *every single judge* who either entered or affirmed national injunctions against the Obama administration for its blanket deferral of immigration enforcement,[8] its disclosure rules for government contractors,[9] its new protections for transgender people,[10] its brief moratorium on offshore oil drilling,[11] and its revision of Clean Water Act rules.[12] By the same token, Democratic presidents appointed *nearly every judge* who entered or affirmed national injunctions against the Trump administration for its travel bans,[13] its public charge rule,[14] its exemptions from the contraception mandate,[15] its changes to asylum policy,[16] its abortion-related rules under Title X,[17] and its elimination of the Deferred Action for Childhood Arrivals program.[18] The pattern could not be starker.

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[8] Texas v. United States, 86 F.Supp.3d 591, 677 (S.D.Tex.2015) (Judge Hanen), *aff'd* Texas v. United States, 809 F.3d 134 (5th Cir. 2015) (Judges Smith & Elrod).

[9] Assoc. Builders & Contractors of Se. Texas v. Rung, No. 1:16-CV-425, 2016 WL 8188655 (E.D. Tex. Oct. 24, 2016) (Judge Crone).

[10] Franciscan Alliance, Inc. v. Burwell, 227 F. Supp. 3d 660, 695 (N.D. Tex. 2016) (Judge O'Connor); Texas v. United States, 201 F. Supp. 3d 810 (N.D. Tex. 2016) (Judge O'Connor).

[11] Hornbeck Offshore Servs., L.L.C. v. Salazar, 696 F. Supp. 2d 627 (E.D. La. 2010) (Judge Feldman).

[12] In re EPA, 803 F.3d 804 (6th Cir. 2015) (Judges McKeague & Griffin).

[13] Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539 (D. Md. 2017) (Judge Chuang); Hawai'i v. Trump, 241 F. Supp. 3d 1119 (D. Haw. 2017) (Judge Watson), *aff'd* Hawaii v. Trump, 859 F.3d 741 (9th Cir. 2017) (Judges Hawkins, Gould, and Paez); Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017) (Judges Canby & Friedland). Judge Clifton was part of the panel that affirmed a national injunction entered by Judge Robart; both were appointed by President George W. Bush. Washington v. Trump, 2017 WL 462040 (W.D. Wash. Feb 3, 2017) (Judge Robart); Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017).

[14] New York v. Dep't of Homeland Sec., 408 F. Supp. 3d 334 (S.D.N.Y. 2019) (Judge Daniels); Casa De Maryland, Inc. v. Trump, 414 F. Supp. 3d 760 (D. Md. 2019) (Judge Grimm).

[15] Pennsylvania v. Trump, 281 F. Supp. 3d 553 (E.D. Pa. 2017) (Judge Beetlestone), *aff'd* 930 F.3d 543 (3d Cir. 2019) (Judges Shwartz, McKee, and Fuentes); California v. HHS, 281 F. Supp. 3d 806 (N.D. Cal. 2017) (Judge Gilliam).

[16] E. Bay Sanctuary Covenant v. Barr, 385 F. Supp. 3d 922 (N.D. Cal. 2019) (Judge Tigar).

[17] Washington v. Azar, 376 F. Supp. 3d 1119 (E.D. Wash. 2019) (Judge Bastian); Oregon v. Azar, 389 F. Supp. 3d 898 (D. Or. 2019) (Judge McShane).

[18] Batalla Vidal v. Nielsen, 279 F.Supp.3d 401 (E.D.N.Y. 2018) (Judge Garaufis); Regents of University of California v. Dep't of Homeland Sec., 279 F.Supp.3d 1011 (N.D. Cal. 2018) (Judge Alsup), affirmed in 908 F.3d 476 (9th Cir. 2018) (Judges Wardlaw, Nguyen, and Owens).

The courts don't have a sound legal justification for arrogating this quasi-legislative authority power to themselves. Nationwide injunctions can't be squared with the rule that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs."[19] And it is a mistake to read the Administrative Procedure Act, which authorizes courts to "set aside" defective or unlawful agency action, to empower judges to award relief to individuals who are strangers to court proceedings. Far from working a dramatic change to the courts' equity practice, the 1946 law was "a general restatement of the principles of judicial review embodied in many statutes and judicial decisions."[20]

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[19] Califano v. Yamasaki, 442 U.S. 682, 702 (1979).

[20] Attorney General's Manual on the Administrative Procedure Act, at 93 (1947). At the time of the APA's adoption, courts routinely "set aside" defective court judgments, agency orders, or legal transactions. *See, e.g.*, Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 245 (1944) (describing "the historic power of equity to set aside fraudulently begotten judgments"). Given the expectation that agencies would conduct most of their business through adjudication, "set aside" was a natural phrase for Congress to use. *See* Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960's and 1970's*, 53 Admin. L. Rev. 1139, 1145 (2001) ("Before the 1960s agencies acted mainly through case-by-case adjudications.").

Congress did not, however, use "set aside" to signal a departure from the normal rule that such relief would run only to the "person" who is "entitled to judicial review." *See* APA §10(a) Pub. L. 79-404, 60 Stat. 237, 243 (1946) (now codified at 5 U.S.C. §702). Indeed, the APA was not even "intended to provide for judicial review in the abstract of all rules," Attorney General's Manual, at 102, much less to arm the courts with the authority to enjoin agency rules as to non-parties. That's why, for example, the federal government may continue selectively applying agency rules that the courts of appeals have held invalid. *See* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679 (1989).

Confirming the point, the Attorney General's influential 1947 manual on the APA and a Senate committee report both explained that Congress had "preserved the rules developed by the courts" in several cases, including *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940). Attorney General's Report, at 96 (1947); S. Rep. 79-752, at 230 (1945). In *Perkins*, the Court vacated an injunction that would have prevented the Secretary of Labor (among other officials) from enforcing nationwide a rule governing the minimum wage in steel contracts with the government. The Court minced no words in disapproving of the injunction's extension "to bidders throughout the Nation who were not parties to any proceeding, who were not before the court and who had sought no relief." *Perkins*, 310 U.S. at 123.

The APA's limited remit was no accident. Congress had provided for preenforcement review in the 1940 Walter-Logan Bill, a predecessor to the APA. *See* H.R. 76-6324, §3 (stating that a defective rule challenged by "a person substantially interested" in its effects "shall not have any force or effect"). Even then, however, Walter-Logan was explicit that the courts "shall have no power in the proceedings *except to render a declaratory judgment*." H.R. 76-6324, §3 (emphasis added). And President Roosevelt *still* vetoed the law for "throw[ing] overboard the most time-honored and universally accepted of all principles governing judicial review in the federal courts: the principle that those courts sit only to decide actual litigations and not to weigh abstract legal questions." Message from the President of the United States, H.R. Doc. 76-986 (1940).

Congress could have built on Walter-Logan in crafting the APA. It conspicuously chose not to. The lesson from the APA's text and drafting history is thus unmistakable: in an appropriate case, unlawful or defective agency action—whether an order or a rule—was to be "set aside" *as to the parties*, nothing

2. Ending Productive Disagreement.

Federal judges often disagree with one another. That's healthy. No single judge will get it right all the time, so it's better to give many different judges a chance to wrestle with a hard legal question. If conflict persists, the Supreme Court can intervene—and its judgment will have nationwide effect, as a matter both of precedent and of comity between the branches. By the time it acts, however, its decision will be informed by the views of smart judges across the country.

Nationwide injunctions short-circuit that process. Instead of allowing many judges to reach independent judgments, they attempt to resolve the question for all courts. And they usually do so in a preliminary posture, without the opportunity for development of a full record or even careful briefing. The government has little choice but to appeal all the way up, and may have to seek emergency stays from the courts of appeals and the Supreme Court. (Indeed, the Supreme Court has already stayed two nationwide injunctions so far this term.[21]) The end result is rushed and under-informed litigation.

The availability of nationwide relief also encourages litigants to bypass the usual rules governing aggregate litigation. Under Rule 23(b)(2) of the Federal Rules of Civil Procedure, a plaintiff class can secure injunctive relief when "the party opposing the class has acted or refused to act on grounds that apply generally to the class." But certifying a class under Rule 23(b)(2) is both challenging and risky. It is challenging because the plaintiffs' claims must "depend upon a common contention" that is "of such a nature that it is capable of class-wide resolution."[22] It is risky because absent class members will be bound by an adverse judgment if the plaintiff class loses.

Why bother with class certification if nationwide injunctions are routinely available? If she wins, a lone plaintiff can secure a judgment that applies to everyone—including to people who may have very different views about the wisdom of legality of the challenged law or policy. If she loses, no one else is bound by that judgment, leaving other plaintiffs free to bring separate suits. Plaintiffs have to win just once; the government must win every time. Such a rule "substantially thwart[s]

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more. At a minimum, Congress never spoke with the requisite clarity to alter the traditional equity practice of the federal courts. *See* Hecht v. Bowles, 321 U.S. 321, 329 (1944).

[21] Barr v. E. Bay Sanctuary Covenant, 140 S. Ct. 3 (2019); Dep't of Homeland Sec. v. New York, 140 S. Ct. 599 (Jan. 27, 2020).

[22] Wal-Mart v. Dukes, 131 S.Ct. 2541, 2551 (2011).

the development of important questions of law by freezing the first final decision rendered on a particular legal issue."[23]

The concern is not hypothetical. In 2017, a California judge entered a nationwide injunction to prevent the Trump administration from enforcing its new rules on the contraception mandate.[24] Later that year, a Pennsylvania judge followed suit in a second case brought by different states,[25] even as a Massachusetts judge dismissed a third case on standing grounds.[26] Though the Ninth Circuit narrowed the California judge's injunction on appeal,[27] its ruling made no difference once the Third Circuit affirmed the Pennsylvania injunction in 2019.[28] And so a single injunction, sustained on appeal, resolved in one stroke a case that had divided multiple judges across the country.

Federal judges' appetite for nationwide relief also raises an acute risk of dueling injunctions. In the renewed litigation over the constitutionality of the ACA, for example, the plaintiff states asked a Texas judge to enter an injunction that would prohibit enforcement of the law anywhere in the country.[29] The Maryland attorney general then filed a lawsuit asking a Maryland judge to compel the Trump administration to continue enforcing the law.[30] Neither judge has yet entered injunctive relief, but the risk is real that the executive branch could be ordered both to stop executing and to keep executing the law across the entire country.

3. Inhibiting Effective Governance.

Of gravest concern, nationwide injunctions throw government policy into turmoil, risking the health and safety of the American people, harming the environment, and interfering with the smooth operation of essential government programs. Seemingly any controversial policy is nowadays met with a pell-mell of lawsuits, and nationwide injunctions blink on and off as district courts rule on motions for preliminary relief, the administration amends or changes its policy, and appeals courts hear expedited appeals and requests for stays.

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[23] United States v. Mendoza, 464 U.S. 154, 160 (1984).

[24] California v. HHS, 281 F. Supp. 3d 806 (N.D. Cal. 2017).

[25] Pennsylvania v. Trump, 281 F.Supp.3d 553 (E.D. Penn. 2017).

[26] Massachusetts v. HHS, 301 F.Supp.3d 248 (D. Mass. 2018), *rev'd* Massachusetts v. HHS, 923 F.3d 209 (2019).

[27] California v. HHS, 911 F.3d 558 (9th Cir. 2018).

[28] Pennsylvania v. Trump, 930 F.3d 543 (3d Cir. 2019).

[29] Texas v. United States, 340 F.Supp.3d 579 (N.D. Tex. 2018).

[30] Maryland v. United States, 360 F.Supp.3d 288 (D. Md. 2019).

For one demoralizing example: in 2015, in response to Supreme Court decisions rebuking Environmental Protection A and the Army Corps of Engineers for reading the Clean Water Act too expansively, the agencies narrowed their definition of a key statutory term, "waters of the United States." Eighteen states immediately challenged the rule and the Sixth Circuit—in a preliminary posture and over a dissent—stayed the rule nationwide.[31] More than two years later, the Supreme Court held that the appeals court lacked jurisdiction to hear the case in the first place.[32]

In the meantime, President Trump was sworn in. His administration promptly suspended the Obama-era rule to make way for its rescission.[33] In 2018, however, two judges—one in South Carolina and the other in Washington—entered new nationwide injunctions against the suspension order.[34] The Obama-era rule thus sprang back into force. So too, however, did a prior injunction entered by a North Dakota judge prohibiting enforcement of that Obama-era rule in thirteen states. Judges in Texas and Georgia swiftly enjoined the rule in an additional fifteen.[35] As a result of the competing injunctions, roughly half the states in 2019 were subject to the Obama-era rule and the other half to older rules of dubious legality.

A new Trump administration rule redefining "waters of the United States" has just taken effect.[36] That rule too will be challenged, and another nationwide injunction may be coming down the pike. If so, neither the Obama administration nor the Trump administration may ever actually be able to put into effect rules to address the Supreme Court's concerns.

This is no way to run a government. And it is not an isolated example. In 2015, the Bureau of Land Management issued rules for the roughly 3,000 wells drilled on federal lands each year.[37] The rules were the culmination of a protracted five-year process involving two proposed rules, dozens of meetings with stakeholders and public officials, and a review of more than 1.5 million written comments.[38] None of

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[31] In re EPA, 803 F.3d 804 (6th Cir. 2015).

[32] Nat'l Ass'n of Mfrs. v. Dep't of Def., 138 S. Ct. 617 (2018).

[33] Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200 (Feb. 6, 2018).

[34] S.C. Coastal Conservation League v. Pruitt, 318 F. Supp. 3d 959 (D.S.C. 2018); Puget Soundkeeper Alliance v. Wheeler, No. C15-1342-JCC, 2018 WL 6169196 (W.D. Wash. Nov. 26, 2018).

[35] Georgia v. Pruitt, 326 F. Supp. 3d 1356 (S.D. Ga. 2018); Texas v. EPA, No. 3:15-CV-00162, 2018 WL 4518230, at *1 (S.D. Tex. Sept. 12, 2018).

[36] 84 Fed. Reg. 56,626 (Oct. 22, 2019).

[37] Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 80 Fed. Reg. 16,128 (Mar. 26, 2015).

[38] Id. at 16,128.

this mattered, however, to the Wyoming judge who enjoined the rule.[39] Though the government appealed, the Department of the Interior under newly elected President Trump moved to rescind the new rules and the Tenth Circuit declined to act while the rescission was in the works.[40] It took until 2017 to finalize the rescission.[41] The upshot is that a rule meant to protect the environment from the ravages of fracking was suspended for two full years because of a single judge's injunction.

Much the same thing happened to the Obama administration's efforts to protect transgender people. In 2016, the Departments of Justice and Education issued guidance advising Title IX schools to allow students to use the bathrooms of their gender identity.[42] And the Department of Health and Human Services issued a rule that prohibited insurance companies and health-care providers from discriminating against pregnant and transgender patients.[43] A hand-picked Texas judge entered nationwide injunctions against both policies.[44] (In late 2018, the same judge also declared the entire Affordable Care Act invalid.)

Though the federal government can appeal nationwide injunctions, it sometimes doesn't. Indeed, once a rule has been enjoined, a change in administration provides an opportune moment to drop an appeal that might lead to the reinstatement of a rule that the new administration dislikes. That's what happened to both the fracking and transgender rules, as well as to Obama-era rules governing overtime pay[45] and dialysis patients.[46] We're certain to see the same pattern if a Democrat wins the presidential election later this year. In effect, new administrations can exploit national injunctions to spike agency rules without adhering to the notice-and-comment processes that normally attend agency rulemaking.

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[39] Wyoming v. U.S. Dep't of Interior, 2016 WL 3509415 (D. Wyo. 2016), vacated as moot in Wyoming v. Zinke, 871 F.3d 1133 (10th Cir. 2017).

[40] Wyoming v. Zinke, 871 F.3d 1133 (10th Cir. 2017).

[41] Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Rescission of a 2015 Rule, 82 Fed. Reg. 34,464 (July 25, 2017) (codified at 43 C.F.R. 3160)

[42] Department of Justice & Department of Education, Dear Colleague Letter on Transgender Students, May 13, 2016.

[43] 45 C.F.R. § 92.4 (2019).

[44] Texas v. United States, 201 F. Supp. 3d 810 (N.D. Tex. 2016); Franciscan Alliance, Inc. v. Burwell, 227 F. Supp. 3d 660, 695 (N.D. Tex. 2016).

[45] Nevada v. U.S. Dep't of Labor, 218 F. Supp. 3d 520 (2016) (issuing nationwide injunction). Compare Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32,391, 32,393 (29 C.F.R. 541) (May 23, 2016), with Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 84 Fed. Reg. 51,230, 51,231–32 (29 C.F.R. 541) (Sept. 23, 2019).

[46] Dialysis Patient Citizens v. Burwell, No. 4:17-CV-16, 2017 WL 365271 (E.D. Tex. Jan. 25, 2017).

Even when the federal government wins on appeal, the damage may have already been done. Markets can respond poorly to the uncertainty that national injunctions engender about the status of a given law or policy.[47] And sometimes the government must react to a rapidly evolving crisis. After the Deepwater Horizon spill in the Gulf, for example, the Obama administration issued a temporary moratorium on deep-water drilling.[48] Within weeks, however, a Louisiana district court enjoined it nationwide.[49] The injunction opened the Gulf to further drilling at a time when regulators and experts were deeply uncertain about the risk of another multi-billion dollar disaster.

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In short, nationwide injunctions fuel politically driven litigation, generate chaotic and rushed appeals, and hamper effective governance. Their elimination would doubtless upset those who've grown used to thwarting government action through the courts. But the United States is a fractious, complicated democracy, and it's disconcerting how much power we've ceded to lone, unelected judges.

Thank you again for inviting me to testify today. I would be happy to answer any questions that you may have.

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[47] *See, e.g.*, N.M. Health Connections v. U.S. Dep't of Health & Human Servs., 340 F.Supp.3d 1112 (D.N.M. 2018) (effectively enjoining the ACA risk adjustment program, which destabilized an already-jittery health insurance market), *rev'd* and remanded, 946 F.3d 1138 (10th Cir. 2019) (reversing more than a year later).

[48] Interior Issues Directive to Guide Safe, Six-Month Moratorium on Deepwater Drilling, U.S. DEP'T INTERIOR (May 30, 2010), https://www.doi.gov/news/pressreleases/Interior-Issues-Directive-to-Guide-Safe-Six-Month-Moratorium-on-Deepwater-Drilling.

[49] Hornbeck Offshore Servs., L.L.C. v. Salazar, 696 F. Supp. 2d 627 (E.D. La. 2010).