



NOTE

The Courts of Appeals' Unlawful Injunctions

Cristian Pleters*

Abstract. In the last six years, the courts of appeals have issued in the first instance a spate of procedurally unusual, politically charged preliminary injunctions. Like “universal” district court injunctions, these appellate injunctions—which this Note calls preliminary injunctions pending appeal (PIPAs) and appellate temporary restraining orders (appellate TROs)—are premised on shaky statutory authority. And like “universal” injunctions, PIPAs and appellate TROs accelerate and degrade judicial output. This Note describes their history, statutory basis, and practical effects.

The courts of appeals lack clear statutory authority to issue these orders. The All Writs Act—which the courts of appeals generally rely on to issue these injunctions—only allows courts to issue ancillary orders that protect their jurisdiction. Yet PIPAs and appellate TROs often conclusively resolve time-sensitive disputes, thereby destroying jurisdiction. Furthermore, the All Writs Act precludes courts from issuing orders that enlarge their jurisdiction. But because the courts of appeals issue PIPAs and appellate TROs using the same standard as district courts—and typically without affording the district courts due deference—PIPAs and appellate TROs arguably expand the courts of appeals’ jurisdiction, in further violation of the All Writs Act.

Moreover, aside from lacking legal authorization, PIPAs and appellate TROs have created serious procedural and substantive problems for courts and litigants. These orders have yielded uncertainty about parties’ legal obligations by enabling litigants to quickly ricochet cases through the district courts, courts of appeals, and the Supreme Court before any merits ruling. Furthermore, these orders have helped collapse preliminary relief into expedited merits relief by effectively abrogating the requirement that movants show a risk of concrete, irreparable harm. Finally, these orders risk exacerbating the perception that courts act politically, because these orders often lack reasoning, apply inconsistent legal standards, and encourage forum shopping.

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PIPAs and appellate TROs are premised on flimsy legal authority, and they pose significant threats to the quality and legitimacy of the federal courts' output—including for many of the reasons that the Supreme Court recently identified in *Trump v. CASA*. This Note therefore urges the Supreme Court to clarify that these appellate injunctions are unlawful. Without such guidance, PIPAs and appellate TROs will continue to unsettle the federal courts and fray the public's trust in the judiciary.

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Introduction

If powerful, novel injunctions are all “nuclear weapon[s] of the law,” as the Supreme Court recently restated,¹ then the Eighth Circuit’s sweeping, Biden-era student debt relief injunctions were akin to equitable hydrogen bombs. In October 2022, the Eighth Circuit universally halted the Biden Administration’s first attempt at student debt relief in an unreasoned, unsigned, one-sentence order.² Three weeks later, the court extended that injunction in an unsigned order that again evaded the merits of the plaintiffs’ claims.³ Those merits remained unaddressed—and the Biden Administration’s landmark policy remained enjoined without any explanation—until several months later, when the Supreme Court entertained a procedurally awkward petition for certiorari before judgment.⁴ The Eighth Circuit repeated this process less than two years later when it issued another couplet of unsigned orders that blocked the Biden Administration’s renewed attempt at student debt relief.⁵

The Eighth Circuit’s injunctions are remarkable not only for their vastness and hollowness but also, more fundamentally, for their existence in the first place. Congress designed the courts of appeals like sieves, intended to catch and correct errors in the district courts’ judgments—not to issue judgments in the first instance like the Eighth Circuit’s.⁶ When the courts of appeals acquire jurisdiction over district court judgments, they may generally only affirm, reverse, modify, or vacate those judgments and remand the underlying cases back to district court.⁷ And the courts of appeals have even narrower authority over district courts’ preliminary injunction decisions: They may only reverse those rulings for “abuse of discretion.”⁸ Yet none of the Eighth Circuit’s student

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1. See *Trump v. CASA, Inc.*, 145 S. Ct. 2540, 2559 n.16 (2025) (quoting *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 332 (1999)).
 2. See *Nebraska v. Biden*, No. 22-3179 (8th Cir. Oct. 21, 2022) (order granting emergency motion for administrative stay) [hereinafter *Nebraska v. Biden Emergency Admin. Stay*].
 3. See *Nebraska v. Biden*, 52 F.4th 1044, 1046-48 (8th Cir. 2022) (per curiam).
 4. See generally *Biden v. Nebraska*, 143 S. Ct. 2355, 2365 (2023).
 5. See *Missouri v. Biden*, Nos. 24-2332 & 24-2351, 2024 WL 3462265, at *1 (8th Cir. July 18, 2024) (order granting emergency motion for administrative stay) [hereinafter *Missouri v. Biden Emergency Admin. Stay*]; *Missouri v. Biden*, 112 F.4th 531, 538 (8th Cir. 2024) (per curiam).
 6. See Joan Steinman, *Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts' Resolving Issues in the First Instance*, 87 NOTRE DAME L. REV. 1521, 1522 (2012) (“We generally expect courts of appeals to affirm, reverse, or vacate the judgment of lower courts or other tribunals, but not to act as a court of first instance in finding facts, stating the law, or exercising other judicial functions.”).
 7. *Id.*; 28 U.S.C. § 2106.
 8. See *Ashcroft v. ACLU*, 542 U.S. 656, 664 (2004) (“This Court, like other appellate courts, has always applied the abuse of discretion standard on review of a preliminary injunction.” (quoting *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 336 (1985) (O'Connor, J., concurring))).

debt relief injunctions even purported to affect the relevant, functionally reversed portions of the underlying district court judgments, which were the basis for the court's jurisdiction and which normally would have been the lodestar for its analysis.⁹

The Eighth Circuit's injunctions are not unique. Over the past six years, in a stream of politically incendiary appeals,¹⁰ the courts of appeals have abruptly begun issuing in the first instance "preliminary injunctions pending appeal" (PIPAs) and "administrative stays"—more appropriately termed "appellate temporary restraining orders" (appellate TROs).¹¹ These peculiar orders do not, on their face, modify any district court order, yet they functionally reverse district courts' preceding denials of preliminary relief without any deference and often without any meaningful reference to the appealed judgment at all.¹² In short, these orders, which are tantamount to *de novo* review, abrogate the "abuse of discretion" standard of review for preliminary injunctions and permit the courts of appeals to masquerade as trial courts.

PIPAs and appellate TROs are unlawful exercises of judicial power. As *Trump v. CASA* reaffirmed, the federal courts may not issue injunctions without clear statutory authority.¹³ The Judiciary Act of 1789, which created the district courts, grants *those* courts the power to issue injunctions that shield movants from harm.¹⁴ But the Conformity Act of 1872, which enumerates the dispositions that the courts of appeals may issue, confers no such power and instead tightly restricts courts of appeals to reviewing and remanding the

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9. Although the Eighth Circuit's second injunction in *Missouri v. Biden* expressed agreement with certain portions of the district court's underlying judgment, the Eighth Circuit did not discuss the portions of the district court judgment that it implicitly overruled. *Contrast* *Missouri v. Biden*, 738 F. Supp. 3d 1113, 1153-55 (E.D. Mo. 2024) (holding that "[p]laintiffs have only alleged impending harm from the Final Rule's loan forgiveness provisions" and "have not stated a cognizable injury related to the other provisions of the SAVE program"), *aff'd sub nom.*, *Missouri v. Trump*, 128 F.4th 979 (8th Cir. 2025), *with Missouri v. Biden*, 112 F.4th at 538 (discussing "irreparable harm" very briefly and without reference to the district court's reasoning and then enjoining the entire policy).
 10. The courts of appeals have issued PIPAs and appellate TROs in a swath of high-profile cases concerning, among other things, student debt relief, Title IX gender protections, COVID-19 vaccine mandates and closures, administrative agency head removal, and the Trump Administration's assertions of executive privilege. *See infra* notes 74-79.
 11. Many of the appellate TROs discussed in this Note are labeled "administrative stays" by the courts of appeals. This Note rejects that label as applied to any "stay" that is directed at a private party because a "stay" traditionally only "stays" a lower-court ruling. *See Hor v. Gonzales*, 400 F.3d 482, 484 (7th Cir. 2005) (distinguishing between "stays" and "injunctions" and noting that "[o]ur legal vocabulary contains distinct words for distinctive judicial actions").
 12. *See, e.g., Nebraska v. Biden Emergency Admin. Stay*, *supra* note 2; *Missouri v. Biden Emergency Admin. Stay*, *supra* note 5, at *1.
 13. 145 S. Ct. 2540, 2551 (2025).
 14. *See infra* notes 96-97 and accompanying text.

district courts' work.¹⁵ The only statute that authorizes the courts of appeals to directly issue injunctions is the All Writs Act, yet the All Writs Act only authorizes injunctions "in aid of" courts' jurisdictions.¹⁶ Contrary to this requirement, PIPAs and appellate TROs are designed to protect litigants' private interests. And because PIPAs and appellate TROs allow the courts of appeals to avoid deferential review of district courts' denials of identical motions for preliminary relief, they necessarily *expand* the courts of appeals' jurisdiction in further violation of the All Writs Act.

If "new, potent" injunctions are indeed "nuclear weapon[s] of the law" that "pose[] new, potent risks," as *CASA* warned,¹⁷ then these tools threaten to corrode judicial integrity. First, PIPAs and appellate TROs effectively abrogate the "abuse of discretion" standard of review, upending appellate procedure and delegitimizing the district courts by obliterating the finality of their preliminary relief decisions. Second, because the courts of appeals primarily review legal rather than factual questions, their PIPAs largely dissolve preliminary relief into legal abstraction untethered to the factual, non-merits requirements for preliminary relief. Likewise, and more concerning, appellate TROs, which typically contain no reasoning, degrade preliminary relief into a standardless, outwardly political exercise. Finally, the Supreme Court has not articulated a uniform standard for PIPAs or appellate TROs, much less affirmed their underlying legality. The courts of appeals have adopted conflicting standards for issuing this relief, which has in turn encouraged forum shopping and litigation gamesmanship.

Prior scholarship has analyzed how the courts of appeals have issued stays that pause district courts' grants of preliminary relief.¹⁸ And other articles have analyzed the legality and impact of universal injunctions.¹⁹ But no scholarship appears to have yet described how the courts of appeals increasingly deploy

15. See *infra* text accompanying notes 22-26.

16. See *infra* Part II.B.

17. 145 S. Ct. at 2559 n.16 (quoting *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 332 (1999)).

18. See generally, e.g., Rachel Bayefsky, *Administrative Stays: Power and Procedure*, 97 NOTRE DAME L. REV. 1941 (2022) (describing administrative stays of lower-court decisions); Thomas Koenig, Note, *Halting Administrative Action in the Supreme Court*, 137 HARV. L. REV. 2016 (2024) (same).

19. See generally, e.g., Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017) (describing the district courts' practice of issuing "universal" or "nationwide" injunctions); Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum-Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEO. MASON L. REV. 29 (2019) (same); Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095 (2017); Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920 (2020) (same); Christopher D. Moore, Essay, *So-Called "Administrative Stays" In Trump 2.0*, 104 TEX. L. REV. ONLINE 1, 12-27 (2025) (arguing that many recent "administrative stays" are really injunctions in disguise).

injunctive relief *in the first instance*—nor even offered definitions for these orders. As this Note explains, these orders exceed the courts of appeals' narrow appellate authority and tarnish the federal judiciary's legitimacy and output.

This Note proceeds in three Parts. Part I details the origins, features, and history of PIPAs and appellate TROs. Part II explores how these orders exceed the courts of appeals' narrow statutory authority to issue injunctions “in aid of” their appellate jurisdiction. Part III argues that PIPAs and appellate TROs have upended the federal courts' structure and output by destroying the finality of district court decisions, accelerating the transformation of preliminary relief into an almost purely law-bound remedy, and encouraging forum shopping. This Note concludes by calling on the Supreme Court to address the legality of the courts of appeals' injunctive orders.

I. The Mechanics and History of PIPAs and Appellate TROs

The courts of appeals are creatures of statute, and they possess narrow statutory authority to review district court judgments. When the courts of appeals perform this function, they apply various standards of review that pay the district courts varying levels of deference. Specifically, the courts of appeals may only reverse denials of preliminary injunctions for abuse of discretion. But PIPAs and appellate TROs surreptitiously evade this requirement by functionally reversing district court orders under the guise of new, standalone orders. By evading the “abuse of discretion” standard of review, PIPAs and appellate TROs siphon power away from the district courts. This trend is very recent and highly politicized: The courts of appeals only began regularly granting PIPAs and appellate TROs in the 2020s, and they have done so most frequently in controversial, high-profile disputes over state and federal policy.

A. The Mechanics of PIPAs and Appellate TROs

The courts of appeals only have the power that Congress grants them.²⁰ A single federal statute, the Judiciary Act of 1891, grants them “appellate jurisdiction” over certain district court judgments.²¹ The Conformity Act of

20. See *Greenlaw v. United States*, 554 U.S. 237, 257 (2008) (Alito, J., dissenting) (“The jurisdiction of the courts of appeals is fixed by Congress.” (citing *Bowles v. Russell*, 551 U.S. 205, 212 (2007); and *Ankenbrandt v. Richards*, 504 U.S. 689, 698 (1992))); see also U.S. CONST. art. III, § 1 (contemplating, but not requiring, the existence of inferior courts); *In re McBryde*, 117 F.3d 208, 220 (5th Cir. 1997) (“We have only the jurisdiction that Congress grants us by statute.”); *United States v. Pelayo-Bautista*, 907 F.2d 99, 102 (9th Cir. 1990) (recognizing that it is a “constitutional principle that [circuit courts] can only exercise our judicial power when authorized by Congress.”).

21. See Judiciary Act of 1891, ch. 517, § 2, 26 Stat. 826, 826 (codified as amended in scattered sections of 28 U.S.C.) Although a previous “circuit court” system allowed those courts to

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1872, codified at 28 U.S.C. § 2106, describes how courts sitting in appellate jurisdiction may dispose of such appeals.²² The Supreme Court has characterized Section 2106 as “the statute defining [the courts of appeals’] appellate power.”²³ Section 2106 provides that the courts of appeals:

may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.²⁴

The “appellate power” that Section 2106 grants to the courts of appeal is thus entirely derivative of district courts’ judgments.²⁵ As then-Justice William Rehnquist observed, Section 2106 “does not grant the courts of appeals authority to constitute themselves as trial courts.”²⁶

The courts of appeals apply various standards of review depending on an underlying judgment’s nature.²⁷ They generally apply a *de novo* standard when

hear suits “in equity,” Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78, those now-defunct circuit courts are distinct from the contemporary *courts of appeals*. The circuit courts were consolidated with the district courts in 1911. *See* Act of Mar. 3, 1911, ch. 231, § 289, 36 Stat. 1087, 1167 (codified in scattered sections of 28 U.S.C.).

22. *See* Conformity Act of 1872, ch. 255, § 2, 17 Stat. 196, 197 (codified as amended at 28 U.S.C. § 2106); *see also* *United Parcel Serv., Inc. v. USPS*, 615 F.2d 102, 107 (3d Cir. 1980) (“When an appeal is taken from an order made appealable by statute, we have all the powers with respect to that order listed in 28 U.S.C. § 2106.”).
23. *Bryan v. United States*, 338 U.S. 552, 559 (1950). Additionally, although a “confusing welter of literally hundreds of statutes provide for review of various acts of independent administrative agencies or officials in the executive branch,” these administrative review cases do not give rise to PIPAs or appellate TROs. 15A WRIGHT & MILLER’S FEDERAL PRACTICE & PROCEDURE § 3901 (3d ed. 2022).
24. 28 U.S.C. § 2106.
25. *See* *United States v. Henry*, 709 F.2d 298, 305 (5th Cir. 1983) (“Section 2106, by its express terms, applies only to judgments and orders of a district court that have already been ‘lawfully brought before the [appellate court] for review.’” (emphasis omitted) (footnote omitted) (quoting 28 U.S.C. § 2106)).
26. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 36 (1983) (Rehnquist, J., dissenting); *see id.* at 18 (majority opinion) (recognizing that, “[a]s Justice Rehnquist stressed, . . . extraordinary writs [pursuant to the All Writs Act] are used in aid of appellate jurisdiction only to confine an inferior court to a lawful exercise of its prescribed authority”); *see also* *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 396 (1821) (holding that the Supreme Court may only exercise appellate jurisdiction as “[a] supervising Court, whose peculiar province it is to correct the errors of an inferior Court”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174-76 (1803) (“It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted . . .”).
27. *See* Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 239 (2009) (“In contrast to the trial court’s expertise as first-hand observer, fact finder, and litigation manager, the appellate court is primarily interested in reviewing the trial court’s decisions and ascertaining whether the law has been correctly applied.” (footnote omitted)).

they review purely legal questions.²⁸ This standard requires them to perform an independent review of the law without deference to district courts' reasoning.²⁹ Conversely, the courts of appeals generally apply an "abuse of discretion" standard when they review issues that require discretionary judgment.³⁰ "Abuse of discretion" review generally requires the courts of appeals to defer to lower courts' reasonable judgment.³¹ Because district courts exercise discretion when evaluating motions for preliminary injunctions, the courts of appeals review the decision to grant or deny a preliminary injunction for abuse of discretion.³²

PIPAs and appellate TROs subvert the statutory framework governing appellate review because they look like innocuous procedural orders but act like reversals on the merits. Consider the similarities between PIPAs and appellate TROs and their district-court cousins, preliminary injunctions and TROs. Courts of appeals issue PIPAs, like district courts issue preliminary injunctions, to shield litigants from irreparable harm on a temporary basis, usually until a three-judge panel rules on the merits of their appeal.³³ Courts of appeals likewise issue PIPAs using the same test that district courts use to issue preliminary injunctions.³⁴ This test weighs whether the movant will experience irreparable harm absent relief and whether they will succeed on the

28. *Id.* at 246.

29. *Id.*

30. *See, e.g., Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014) ("[D]ecisions on matters of discretion are reviewable for abuse of discretion." (internal quotation marks omitted) (quoting *Pierce v. Underwood*, 487 U.S. 552, 558 (1988))).

31. *See, e.g., Gall v. United States*, 552 U.S. 38, 59-60 (2007) ("On abuse-of-discretion review, the Court of Appeals should have given due deference to the District Court's reasoned and reasonable decision . . .").

32. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) ("The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion.")

33. *See, e.g., Sexton v. Comm'r of Soc. Sec.*, No. 23-5981, 2024 WL 1994918, at *5 (6th Cir.) ("This Court has the power to grant an injunction pending appeal to prevent irreparable harm to the party requesting such relief during the pendency of the appeal." (quoting *Overstreet v. Lexington-Fayette Urb. Cnty. Gov't*, 305 F.3d 566, 572 (6th Cir. 2002))), *cert. denied sub. nom., Sexton v. O'Malley*, 145 S. Ct. 316 (2024) (mem.); *Wise v. Circosta*, 978 F.3d 93, 111 (4th Cir. 2020) (en banc) (Wilkinson, J., dissenting) (arguing that "an injunction pending appeal is necessary to preserve the status quo" and "can 'alleviate . . . ongoing harm.'") (quoting *John Doe Co. v. CFPB*, 849 F.3d 1129, 1137 (D.C. Cir. 2017) (per curiam) (Kavanaugh, J., dissenting))).

34. *See, e.g., Doe v. S.D. Unified Sch. Dist.*, 19 F.4th 1173, 1176 (9th Cir. 2021) ("To determine whether to grant an injunction pending appeal, this court applies the test for preliminary injunctions."); *Ohio v. Becerra*, No. 21-4235, 2022 WL 413680, at *2 (6th Cir. 2022) ("In determining whether to grant an injunction pending appeal, this court conducts the same general analysis it would in considering an appeal from a preliminary injunction."); *Nebraska v. Biden*, 52 F.4th 1044, 1046 (8th Cir. 2022) (per curiam) ("In ruling on a request for an injunction pending appeal, the court must engage in the same inquiry as when it reviews the grant or denial of a preliminary injunction." (quoting *Walker v. Lockhart*, 678 F.2d 68, 70 (8th Cir. 1982))).

merits of their case, as well as the balance of the equities and the public interest in granting them relief.³⁵ Similarly, courts of appeals grant appellate TROs, like district courts issue traditional TROs, on short notice and typically until a forthcoming decision on a PIPA.³⁶ Courts of appeals typically issue appellate TROs, like district courts issue traditional TROs, without providing any reasoning.³⁷ And movants uniformly request appellate TROs to avert imminent irreparable harm, as they do with TROs at the district court level.³⁸

The courts of appeals often label their appellate TROs “administrative stays,” but this label is misleading. A “stay” traditionally pauses a lower-court decision, rather than granting relief that a lower court has withheld. Although the courts of appeals typically style appellate TROs as “administrative stays,” this Note uses the term “appellate TRO” to draw this distinction. While “stays” pausing lower court decisions may be controversial from a policy perspective, they are jurisdictionally defensible exercises of the courts of appeals’ inherent supervisory power.³⁹ The courts of appeals have likely evaded scrutiny for issuing appellate TROs, in part, by labeling these orders “stays.”⁴⁰

Because PIPAs and appellate TROs almost inevitably follow a district court’s denial of motions for a preliminary injunction and/or a TRO⁴¹—a denial that is

35. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (describing the test for preliminary injunctions).

36. *See, e.g., Missouri v. Biden Emergency Admin. Stay*, *supra* note 5, at *1 (granting an appellate TRO “until this Court rules on the appellants’ motion for an injunction pending appeal”); *Texas v. Dep’t of Homeland Sec.*, No. 23-50869 (5th Cir. Dec. 4, 2023) (order granting motion for a temporary administrative stay) [hereinafter *Texas v. Dep’t of Homeland Sec. Temp. Admin. Stay*].

37. *See generally, e.g., Missouri v. Biden Emergency Admin. Stay*, *supra* note 5, at *1 (containing no reasoning); *Texas v. Dep’t of Homeland Sec. Temp. Admin. Stay*, *supra* note 36 (same).

38. *Cf. FED. R. CIV. P. 65(b)(1)(A)* (requiring an injunction or TRO movant to assert “immediate and irreparable injury”). *See generally, e.g., Emergency Motion for Administrative Stay Pending Ruling on Motion for Injunction Pending Appeal at 5, Missouri v. Biden*, 2024 WL 3462265 (Nos. 24-2332 & 24-2351), ECF No. 15 (requesting an appellate TRO to avert the “irreversible impact” of a federal policy (quoting *Nebraska v. Biden*, 52 F.4th 1044, 1047 (8th Cir. 2022) (per curiam))); Plaintiff’s Opposed Emergency Motion for an Injunction Pending Appeal and for a Temporary Administrative Appeal at 20, *Texas v. Dep’t of Homeland Sec.*, 88 F.4th 1127 (5th Cir. 2023) (No. 23-50869), ECF No. 19 (requesting an appellate TRO to avert irreparable harm caused by federal action).

39. *See infra* note 185.

40. *See Nken v. Holder*, 556 U.S. 418, 429 (2009) (“A stay ‘simply suspend[s] judicial alteration of the status quo,’ while injunctive relief ‘grants judicial intervention that has been withheld by lower courts.’” (alteration in original) (quoting *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm’n*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers))).

41. Consider the Eighth Circuit’s orders in *Nebraska v. Biden*. *Contrast Nebraska v. Biden*, 636 F. Supp. 3d 991, 996, 1002 (E.D. Mo. 2022) (declining to grant a motion for a preliminary

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generally unreviewable⁴²—and because they typically grant the same relief that a district court previously withheld, they are functionally equivalent to *reversal* of a district court's denial of a TRO and/or a preliminary injunction.⁴³

This circumvention matters. When a court of appeals grants a PIPA or appellate TRO, it is not affirming or reversing a lower court judgment but instead issuing relief anew—without any clear obligation to defer to the district court's reasoning under the “abuse of discretion” standard.⁴⁴ Entertaining PIPAs and appellate TROs is instead akin to conducting a *de novo* review of district courts' denials of preliminary injunctions and TROs. And appellate TROs empower the courts of appeals to effectively reverse district courts' denials of TROs, which are typically unreviewable.⁴⁵ PIPAs and appellate TROs thus usurp power from the district courts.⁴⁶

While PIPAs might seem distinguishable from preliminary injunctions because they expire at the end of an appeal rather than at final judgment, that distinction is largely immaterial. As Parts II and III explain in greater depth, because PIPAs grant the same relief as preliminary injunctions and often dispose

injunction on jurisdictional grounds), *with Nebraska v. Biden Emergency Admin. Stay*, *supra* note 2 (granting an appellate TRO), and 52 F.4th 1044, 1048 (8th Cir. 2022) (per curiam) (granting PIPA). The Eighth Circuit repeated this sequence in *Missouri v. Biden. Compare Missouri v. Biden*, 738 F. Supp. 3d 1113, 1156 (E.D. Mo. 2024) (granting in part and denying in part a motion for a preliminary injunction), *with Missouri v. Biden Emergency Admin. Stay*, *supra* note 5, at *1 (granting an appellate TRO), and 112 F.4th 531, 538 (8th Cir. 2024) (per curiam) (granting a PIPA).

42. See 16 WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 3922.1 (3d ed. 2012) (“The general rule is that orders granting, refusing, modifying, or dissolving temporary restraining orders are not appealable under § 1292(a)(1) as orders respecting injunctions.”); *cf.* Tyler B. Lindley, Morgan Bronson & Wesley White, *Appealing Temporary Restraining Orders*, 77 FLA. L. REV. 973, 975 (2025) (recounting, but also doubting, the “established” and “unquestioned” proposition that temporary restraining orders “are ordinarily not appealable” (quoting *Off. of Pers. Mgmt. v. Am. Fed’n of Gov’t Emps.*, 473 U.S. 1301, 1303-04 (1985) (Burger, C.J., in chambers))).

43. See *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1228 (11th Cir. 2005) (per curiam) (“Plaintiffs have also moved this Court . . . for emergency injunctive relief pending appeal, asking us to order the same temporary or preliminary relief that we have concluded the district court did not abuse its discretion in denying.”); *United States v. Int’l Longshoremen’s Ass’n*, Loc. 418, No. 71-1783, 1971 WL 2992, at *4 (7th Cir. 1971) (“[I]t would be inappropriate to grant emergency relief which would be tantamount to a reversal of the District Court on the merits.”); Loc. 180 of Int’l Union, United Auto. Aircraft & Agric. Workers of Am. v. J. I. Case Co., 281 F.2d 773, 775 (7th Cir. 1960) (“[I]f I were to authorize and order the issuance of a temporary injunction, it would in effect be reversing the action of the District Court.”).

44. See *Schindler*, 403 F.3d at 1228 (concluding that plaintiffs sought the “same temporary or preliminary relief that [the panel] concluded the district court did not abuse its discretion in denying”).

45. See *supra* note 42.

46. See Peters, *supra* note 27, at 238 (“Standards of review balance the power among the courts . . .”).

of entire litigations in favor of movants, and because they otherwise presage, if not control, subsequent decisions on the merits of an appeal of a preliminary injunction denial, their presumably shorter duration does not meaningfully distinguish them from preliminary injunctions.⁴⁷

B. The History and Evolution of Appellate Injunctions

For the first seven decades of their existence—from 1891 through the 1960s—the courts of appeals rarely published opinions that considered, much less granted, direct motions for injunctions. But beginning in the 1960s, the courts of appeals began to more frequently publish opinions that considered granting injunctions, which they began styling as “preliminary injunctions pending appeal.”⁴⁸ Still, PIPAs remained relatively obscure for decades. In 2020, courts of appeals throughout the country rapidly began issuing PIPAs and, for the first time, appellate TROs in a slew of politically contentious cases.

1. 1891 through 2020

The Judiciary Act of 1891 created the courts of appeals⁴⁹ to “relieve[]” the Supreme Court of its role to “oversee[] most judgments of the district courts.”⁵⁰ From 1891 through the 1960s, the courts of appeals apparently did not grant direct motions for injunctions.⁵¹ For example, in an 1897 case, the Ninth Circuit denied a motion for an injunction, tersely stating, “We can issue no injunction from this court, and can only act on the lower court by a mandate. Our jurisdiction is appellate. The motion will be denied.”⁵² The courts of appeals began more frequently publishing opinions that considered motions for injunctions in the 1960s, coincident with a general increase in their caseloads.⁵³

47. See *infra* notes 177-81 and accompanying text.

48. See *infra* note 55 and accompanying text.

49. Judiciary Act of 1891, § 2, ch. 517, 26 Stat. 826 (codified as amended in scattered sections of 28 U.S.C.).

50. Raymond Lohier, Lecture, *The Court of Appeals as the Middle Child*, 85 FORDHAM L. REV. 945, 947-48 (2016).

51. See Elizabeth Lee Thompson, *Procedural Innovation, the Rule of Law, and Civil Rights Justice*, 14 U.C. IRVINE L. REV. 1164, 1185-92 (2024) (describing how the Fifth Circuit’s grants of injunctions in the 1960s were unprecedented and “altered ‘the internal working structure’ of the federal court system” (quoting JACK BASS, UNLIKELY HEROES 218 (1981))).

52. *N. Bloomfield Gravel Mining Co. v. United States*, 83 F. 2, 2 (9th Cir. 1897); see also *Indus. & Mining Guar. Co. v. Elec. Supply Co.*, 58 F. 732, 746 (6th Cir. 1893) (Taft, J., concurring) (“We have only jurisdiction on this appeal to reverse the order of injunction. . . . [Other matters] remain within the cognizance of the [trial] court until a final decree is entered and appealed from.”).

53. See WILLIAM F. SHUGHART II & GÖKHAN R. KARAHAN, A STUDY OF THE DETERMINANTS OF CASE GROWTH IN U.S. FEDERAL DISTRICT COURTS 35 (2003) (describing “the explosion in
footnote continued on next page”).

Most of these decisions denied litigants' motions. For example, in the 1960 case *Local 180 of International Union v. J.I. Case Co.*, Judge F. Ryan Duffy of the Seventh Circuit described the jurisdictional problems that these motions raised:

The emergency motion asks that I, upon behalf of the Court, issue a temporary injunction which will continue in full force and effect until such time as a division or panel of this Court determines whether the District Court abused its discretion in denying the motion for the issuance of a similar if not identical injunction. This is not a situation where we endeavor to maintain the status quo. In the instant case, if I were to authorize and order the issuance of a temporary injunction, it would in effect be reversing the action of the District Court.⁵⁴

The Fifth Circuit broke ground by issuing several 1960s-era injunctions—which litigants and the court by then had styled as “injunctions pending appeal”—to expeditiously circumvent recalcitrant district courts that refused to enforce sweeping civil rights legislation and judicial precedent.⁵⁵ Notably, plaintiff-appellants repeatedly asked courts of appeals to enjoin government actors from violating the Supreme Court's landmark *Brown v. Board of Education* ruling outlawing racial segregation in public educational institutions.⁵⁶ For example, in 1963, the Fifth Circuit considered a “Motion for Injunction” that sought to enjoin the University of Mississippi from denying a black man admission because of his race.⁵⁷ The court in *Greene v. Fair* denied the plaintiff's motion, reasoning that he failed to show “that there [was] great likelihood, approaching near certainty, that he [would] prevail” on the merits of his claim.⁵⁸

In other cases, the Fifth Circuit granted relief by issuing injunctions that ordered district courts to issue their own injunctions. Just months after the *Greene* decision, the court published an opinion concerning a Georgia school

the caseload of the U.S. federal district courts that commenced in 1960”); Peter S. Menell & Ryan Vacca, *Revisiting and Confronting the Federal Judiciary Capacity “Crisis”: Charting a Path for Federal Judiciary Reform*, 108 CALIF. L. REV. 789, 813 (2020) (“By the late 1960s, practitioners, scholars, and jurists were sounding alarm bells about the federal judiciary's capacity to address the rising tide of cases and rapid expansion of federal law.”); see also *infra* notes 54-68 and accompanying text (discussing some of these cases).

54. 281 F.2d 773, 775 (7th Cir. 1960) (Duffy, J., in chambers) (footnote omitted).

55. See Thompson, *supra* note 51, at 1190; Jerome I. Chapman, *Expediting Equitable Relief in the Courts of Appeals*, 53 CORN. L. REV. 12, 12 (1967) (“Among the sterling accomplishments of the Fifth Circuit Court of Appeals under the leadership of Chief Judge Tuttle, one of the finest has been the development of techniques for expediting effective appellate relief in exigent circumstances.”).

56. See, e.g., *Greene v. Fair*, 314 F.2d 200, 201 (5th Cir. 1963) (per curiam); *Stell v. Savannah-Chatham Cnty. Bd. of Educ.*, 318 F.2d 425, 426-27 (5th Cir. 1963); *Armstrong v. Bd. of Educ. of Birmingham*, 323 F.2d 333, 338 (5th Cir. 1963); *Woods v. Wright*, 334 F.2d 369, 373 (5th Cir. 1964) (recounting that an “[a]pplication was then made to the Chief Judge of this Court for an injunction pending appeal” and that “[t]he injunction was granted”).

57. *Greene*, 314 F.2d at 201.

58. *Id.* at 202.

system that refused to desegregate.⁵⁹ Although the court determined that it had the power to grant an injunction, it concluded that it was “clearly more desirable for injunctive relief to be granted at the level of the trial court rather than by an appellate court if the same necessary results can be accomplished.”⁶⁰ Consequently, the court issued an injunction ordering the district court to issue *its own injunction* requiring the school district to desegregate.⁶¹ Later that year, the Fifth Circuit issued a similar meta-injunction in an appeal that challenged school segregation in Birmingham, Alabama.⁶²

Just one year later, Judge J. Skelly Wright of the D.C. Circuit issued a watershed injunction in *Application of President & Directors of Georgetown College, Inc.* that cleared the way for direct appellate relief.⁶³ In district court, a hospital unsuccessfully sought an injunction that would have permitted it to administer a blood transfusion to a woman who had refused one on account of her Jehovah’s Witness faith.⁶⁴ On appeal, Judge Wright issued an order permitting the transfusion. Judge Wright traced his power to issue the order to the All Writs Act, which he argued empowers federal courts to issue “all writs necessary or appropriate in aid of their respective jurisdictions,” and, specifically, to “grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.”⁶⁵ Judge Wright reasoned that his “order” was necessary “to preserve the life of the patient,” which “was necessary if the cause were not to be mooted by the death of the patient.”⁶⁶ Of course, the injunction also mooted the case by saving the patient’s life.

59. *Stell*, 318 F.2d at 425.

60. *Id.* at 427-28.

61. *Id.* at 428 (“We think it appropriate, therefore, to frame an injunction and direct by mandate that this injunction be made the order of the District Court.”).

62. *See Armstrong v. Bd. of Educ. of Birmingham*, 323 F.2d 333, 338 (5th Cir. 1963) (requiring “that the District Court for the Northern District of Alabama enter . . . judgment and order” that Birmingham schools must desegregate).

63. *See* 331 F.2d 1000 (D.C. Cir. 1964) (Wright, J., in chambers); *see also* Note, *The All Writs Statute and the Injunctive Power of a Single Appellate Judge*, 64 MICH. L. REV. 324, 330, 334-35 (1965) (analyzing *Georgetown College* in the broader context of whether “an individual judge of a court of appeals should have the power to issue a temporary restraining order”); Recent Case, *Application of President & Directors of Georgetown College, Inc.*, D.C. Cir. 1964, 77 HARV. L. REV. 1539, 1544 (1964) (“Even though the order given under the particular facts in [*Georgetown College*] was perhaps appropriate, the procedure followed creates dangers which should counsel a court . . . to look further into the substantive problems presented.”); Doris R. Bray, Note, *Procedural Rules—Emergency—Judge’s Discretion*, 43 N.C. L. REV. 450, 450 (1965) (describing how the *Georgetown College* order “tests the powers of a judge to violate usual procedural rules in an emergency situation”).

64. *Georgetown College*, 331 F.2d at 1001-02.

65. *Id.* at 1004-05 (first quoting 28 U.S.C. § 1651; and then quoting FED. R. CIV. P. 62(g) (2007)).

66. *Id.* at 1003.

After *Georgetown College*, courts of appeals began more often entertaining, and occasionally granting, motions for direct relief. Take just the Fifth Circuit, as an example. In 1969, the Fifth Circuit granted an injunction pending appeal preventing a conscientious objector from being deployed to Vietnam.⁶⁷ And in 1970, the Fifth Circuit granted “the rather drastic relief” of “an injunction pending appeal” in a case where a college instructor requested reinstatement after he was terminated in alleged violation of his First Amendment right to free speech.⁶⁸ Still, courts of appeals usually declined to issue PIPAs, typically because appellants failed to meet the stringent (though as Part II explains, inapposite) burden of showing that they were almost certainly entitled to relief.⁶⁹ Courts of appeals continued sporadically entertaining but largely declining these motions through the late 2010s.⁷⁰

2. The 2020s

In 2020, the courts of appeals suddenly and frequently began issuing PIPAs and, for the first time, appellate TROs in politically controversial appeals. Most circuits have adopted this practice: The Second, Fourth, Fifth, Sixth, Eighth, Ninth, Eleventh, and D.C. Circuits have each repeatedly issued either appellate TROs and/or PIPAs since 2020.⁷¹ The First Circuit has granted at least one PIPA and considered several more.⁷² Only the Third, Seventh, Tenth, and Federal

67. *McKenzie v. Schuppener*, 415 F.2d 1056, 1058 (5th Cir. 1969).

68. *Raine v. Jackson State Coll.*, 481 F.2d 347, 348, 351 (5th Cir. 1973).

69. *See, e.g.*, *Benoit v. Gardner*, 345 F.2d 792, 793 (1st Cir. 1965) (per curiam) (denying a motion for a preliminary injunction); *Ogden v. Dep't of Transp.*, 430 F.2d 660, 661-62 (6th Cir. 1970) (same); *Acree v. Cnty. Bd. of Educ.*, 399 F.2d 151, 152 (5th Cir. 1968) (per curiam) (same); *see also infra* Part II (describing how the proper test for appellate injunctive relief considers whether a court's jurisdiction is threatened, not whether a movant is entitled to relief).

70. *See, e.g.*, *United States v. Int'l Longshoremen's Ass'n*, Loc. 418, No. 71-1783, 1971 WL 2992, at *4 (7th Cir. Nov. 5, 1971) (“[I]t would be inappropriate to grant emergency relief which would be tantamount to a reversal of the District Court on the merits.”); *Uniroyal, Inc. v. Marshall*, No. 79-1702, 1979 WL 15403, at *1 (D.C. Cir. July 26, 1979) (per curiam) (denying an injunction pending appeal); *FTC v. Foster*, No. 07-2131, 2007 WL 3023158, at *2 (10th Cir. May 31, 2007) (per curiam) (same); *Hernandez v. Abbott*, 733 F. App'x 212, 213 (5th Cir. 2018) (per curiam) (same). *But see* *Annex Med., Inc. v. Sebelius*, No. 13-1118, 2013 WL 1276025, at *1, *3 (8th Cir. Feb. 1, 2013) (granting a “preliminary injunction pending appeal against enforcement of certain mandatory coverage provisions of the Patient Protection and Affordable Care Act of 2010.”).

71. *See infra* notes 74-79 (collecting cases).

72. *See* *Sierra Club v. U.S. Army Corps of Eng'rs*, No. 20-2195 (1st Cir. Jan. 15, 2021) (order granting PIPA) (halting the permitting approval of an energy project); *see, e.g.*, *McBreairty v. Brewer Sch. Dep't*, No. 24-1337, 2024 WL 4526250, at *1 (1st Cir. May 16, 2024) (denying an “emergency motion for injunction pending appeal” (capitalization altered)); *Together Emps. v. Mass Gen. Brigham Inc.*, 19 F.4th 1, 8 (1st Cir. 2021) (denying an injunction pending appeal); *Calvary Chapel of Bangor v. Mills*, No. 20-1507, 2020 WL 3067488, at *1 (1st Cir. June 2, 2020) (same).

Circuits have thus far resisted issuing PIPAs and appellate TROs, typically after concluding that movants failed to make strong enough showings of success on the merits.⁷³

No single case, event, or issue seems to have provoked the deluge of PIPAs and appellate TROs. Courts have issued appellate TROs⁷⁴ and PIPAs in politically salient cases involving state elections,⁷⁵ public health regulations,⁷⁶ the constitutionality of federal agency structures,⁷⁷ the free exercise of

73. *See, e.g.*, *West v. Pa. Dep't of State*, No. 24-2913, 2024 WL 4631685, at *1 (3d Cir. Oct. 30, 2024) (per curiam) (denying a PIPA); *Protect Our Parks, Inc. v. Buttigieg*, 10 F.4th 758, 761, 765 (7th Cir. 2021) (per curiam) (same); *Leachco, Inc. v. Consumer Prod. Safety Comm'n*, No. 22-7060, 2023 WL 5747726, at *1 (10th Cir. Jan. 30, 2023) (same); *Chamberlain v. United States*, 655 F. App'x 822, 825 (Fed. Cir. 2016) (per curiam) (same).

74. *See, e.g.*, *Bragg v. Pomerantz*, Nos. 23-615 & 23-616, 2023 WL 3015207, at *1 (2d Cir. Apr. 19, 2023) (Robinson, J., in chambers) (issuing an “administrative stay of the return date” of a subpoena issued by the House Judiciary Committee commanding the appearance of Mark Pomerantz); *United States v. Eaton Corp.*, No. 24-3732, 2024 WL 4513277, at *1 (6th Cir. Sept. 3, 2024) (per curiam) (issuing an appellate TRO preventing the IRS from executing an administrative summons); *Nebraska v. Biden Emergency Admin. Stay*, *supra* note 2 (enjoining the Biden Administration’s student loan cancellation program); *Missouri v. Biden Emergency Admin. Stay*, *supra* note 5 (prohibiting the Biden Administration from implementing a rule); *Trump v. Thompson*, No. 21-5254, 2021 WL 5239098, at *1 (D.C. Cir. Nov. 11, 2021) (per curiam) (issuing an “administrative injunction” preventing the Archivist of the United States from producing certain materials to a congressional committee after President Donald J. Trump invoked executive privilege).

75. *See, e.g.*, *Boone Cnty. Republican Party Exec. Comm. v. Wallace*, 116 F.4th 586, 590, 599 (6th Cir. 2024) (issuing a preliminary injunction preventing the Kentucky Registry of Election Finance from enforcing an advisory opinion prohibiting certain campaign activity in support of a state constitutional amendment), *vacated*, 132 F.4th 406, 431 (6th Cir. 2025); *Fischer v. Thomas*, 52 F.4th 303, 306, 313 (6th Cir. 2022) (per curiam) (issuing a preliminary injunction allowing two judicial candidates for Kentucky state appellate courts to identify their partisan membership).

76. *See, e.g.*, *Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep't*, 984 F.3d 477, 479, 482 (6th Cir. 2020) (granting a “motion for an injunction pending appeal” preventing a county health department from enforcing a resolution prohibiting students from attending a Christian school system in person during the COVID-19 pandemic); *First Pentecostal Church of Holly Springs v. City of Holly Springs*, 959 F.3d 669, 670 (5th Cir. 2020) (per curiam) (granting an “emergency motion for injunction pending appeal” enjoining a municipality from enforcing certain COVID-19 regulations); *Doe v. S.D. Unified Sch. Dist.*, No. 21-56259, 2021 WL 5600620, at *1 (9th Cir. Nov. 28, 2021) (granting a PIPA preventing a school district from requiring pregnant students to receive the COVID-19 vaccine).

77. *See, e.g.*, *Alpine Secs. Corp. v. Fin. Indus. Regul. Auth.*, No. 23-5129, 2023 WL 4703307, at *1, *4 (D.C. Cir. July 5, 2023) (per curiam) (granting an “emergency motion for injunction pending appeal” blocking FINRA from expelling a broker because the structure of FINRA may be unconstitutional), *order dissolved*, 121 F.4th 1314 (D.C. Cir. 2024), *cert. denied*, 145 S. Ct. 2751 (2025); *Space Expl. Techs., Corp. v. NLRB*, 129 F.4th 906, 908-09 (5th Cir. 2025) (recounting the court’s grant of a PIPA in a case challenging the constitutional structure of the NLRB); *Open Tech. Fund v. Pack*, No. 20-5195 (D.C. Cir.

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religion,⁷⁸ and more.⁷⁹ Because PIPAs and appellate TROs often halt the enforcement of controversial state or federal law or policy, they resemble the district courts' universal preliminary injunctions, which proliferated during the late 2010s.⁸⁰

Again, the Eighth Circuit's PIPAs and appellate TROs that repeatedly halted the Biden Administration's student debt relief policy are illustrative. In 2022, the court granted an unreasoned, unsigned appellate TRO that barred the Secretary of Education from discharging billions of dollars of student loan debt in *Nebraska v. Biden*.⁸¹ A three-judge panel subsequently granted a PIPA to the same effect.⁸² The Eighth Circuit granted both orders even though a district court in the Eastern District of Missouri had not only denied the movants' motions for

July 21, 2020) (order granting PIPA) (enjoining the government "from taking any action to remove or replace any officers or directors of the Open Technology Fund").

78. *See, e.g., Youth 71Five Ministries v. Williams*, No. 24-4101, 2024 WL 3749842, at *1, *5 (9th Cir. Aug. 8, 2024) (granting a PIPA preventing the State of Oregon from excluding a Christian organization from receiving public funding); *Fellowship of Christian Athletes v. S.J. Unified Sch. Dist. Bd. of Educ.*, 64 F.4th 1024, 1025 (9th Cir. 2023) (en banc) (granting an injunction pending appeal requiring a school district and high school to recognize a chapter of the Fellowship of Christian Athletes).
79. *See, e.g., Grimmert v. Freeman*, No. 22-1844, 2022 WL 3696689, at *1-2 (4th Cir. Aug. 25, 2022) (per curiam) (issuing a preliminary injunction preventing a North Carolina district attorney from prosecuting the state attorney general under a criminal libel statute); *Alabama v. U.S. Sec'y of Educ.*, No. 24-12444, 2024 WL 3981994, at *1, *9 (11th Cir. Aug. 22, 2024) (per curiam) (issuing a PIPA preventing the Department of Education from enforcing a new rule that interpreted Title IX as prohibiting discrimination on the basis of gender identity); *Shen v. Comm'r, Fla. Dep't of Agric. & Consumer Servs.*, No. 23-12737, 2024 WL 6899210, at *1-2 (11th Cir. Feb. 1, 2024) (per curiam) (Abudu, J., concurring) (describing the Court's preliminary injunction preventing the state of Florida from enforcing a law preventing certain Chinese nationals from purchasing real property in the state); *Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC*, 103 F.4th 765, 770, 771 & n.1 (11th Cir. 2024) (recounting that the court granted an "injunction pending appeal" preventing a venture capital fund from selecting the winner of a "[g]rant [c]ontest" that was limited to Black women); *TGP Comm'ns, LLC v. Sellers*, No. 22-16826, 2022 WL 17484331, at *1, *4 n.2 (9th Cir. Dec. 5, 2022) (granting a PIPA ordering Maricopa County, Arizona election officials to grant press credentials to an individual who allegedly lacked "journalistic ethics"); *Vitolo v. Guzman*, 999 F.3d 353, 366 (6th Cir. 2021) (granting a PIPA enjoining the government from awarding certain funding on the basis of race).
80. JOANNA R. LAMPE, CONG. RSCH. SERV., LSB10664, NATIONWIDE INJUNCTIONS: RECENT LEGAL DEVELOPMENTS 1-2 (2021).
81. *See Nebraska v. Biden Emergency Admin. Stay*, *supra* note 2; *see also* Associated Press, *A Federal Appeals Court Has Temporarily Blocked Biden's Student Loan Forgiveness Plan*, NPR (updated Oct. 22, 2022, 1:10 AM ET), <https://perma.cc/95SX-BHUP> (describing the court's order).
82. *Nebraska v. Biden*, 52 F.4th 1044, 1045, 1048 (8th Cir. 2022) (per curiam).

the same relief, but also had dismissed their case altogether for lack of subject matter jurisdiction.⁸³

Two years later, the Eighth Circuit in *Missouri v. Biden* granted an appellate TRO preventing the Secretary of Education from enforcing a similar policy that would have reduced the monthly payments of millions of student loan borrowers and prospectively erased hundreds of millions of dollars of their debt.⁸⁴ The Eighth Circuit issued its appellate TRO after a district court in the Eastern District of Missouri partially denied the movants' motion,⁸⁵ which had sought nearly identical relief.⁸⁶ Then, a three-judge panel issued a PIPA on the same grounds as the appellate TRO.⁸⁷ The Eighth Circuit's orders blocked enforcement of the entire program even though two other federal courts, including a Tenth Circuit panel, had found certain parts of the program were likely permissible.⁸⁸

The Eighth Circuit's repeated unwinding of the Biden Administration's student debt relief policy illustrates how appellate TROs and PIPAs, like universal injunctions in federal district court, may unilaterally halt federal policy.⁸⁹ Even though courts in other circuits have limited the effect of their

83. *Nebraska v. Biden*, 636 F. Supp. 3d 991, 995, 1002 (E.D. Mo. 2022) (dismissing case for lack of jurisdiction and denying motion for preliminary injunction).

84. *See* Nos. 24-2332 & 24-2351, 2024 WL 3462265, at *1 (8th Cir. July 18, 2024); 112 F.4th 531, 537 (8th Cir. 2024) (per curiam) (“Here the Government asserts that it has discovered in a few provisions of the HEA the authority to forgive hundreds of millions of dollars’ worth of student loans . . .”).

85. *Missouri v. Biden*, 738 F. Supp. 3d 1113, 1156-57 (E.D. Mo. 2024), *aff’d sub nom.*, *Missouri v. Trump*, 128 F.4th 979 (8th Cir. 2025).

86. *Compare* Memorandum in Support of Plaintiffs’ Motions for a Stay or, in the Alternative, a Temporary Restraining Order and Preliminary Injunction at 50, *Missouri v. Biden*, 738 F. Supp. 3d 1113 (seeking a stay or temporary restraining order), with Emergency Motion for Injunction Pending Appeal at 28, *Missouri v. Biden*, 2024 WL 3462265 (seeking an “injunction pending appeal”).

87. *See Missouri v. Biden*, 112 F.4th at 538.

88. *Alaska v. U.S. Dep’t of Educ.*, 739 F. Supp. 3d 873, 894, 901 (D. Kan. 2024) (concluding that “plaintiffs haven’t demonstrated irreparable harm attributable to the parts of the SAVE Plan already in effect” but also granting a preliminary injunction in part); *Alaska v. U.S. Dep’t of Educ.*, No. 24-3089 (10th Cir. June 30, 2024) (order granting motion for stay pending appeal) (staying the Kansas district court’s partially granted injunction).

89. *See generally* Siddique, *supra* note 19, at 2096-97 (describing how district courts use injunctive relief to shape policy nationwide); LAMPE, *supra* note 80, at 1 (same). Although the Supreme Court recently curbed the lower courts’ injunctive power in *Trump v. CASA*, the Court indicated that lower courts may still issue injunctions that benefit nonparties if doing so is necessary to afford parties “complete relief.” *See Trump v. CASA, Inc.*, 145 S. Ct. 2540, 2557-58 (2025). The Court did not bar state plaintiffs—which would have presumably included Missouri and Nebraska in the student debt relief cases—from seeking “universal” injunctions. *See id.* at 2258 (“The complete-relief inquiry is more complicated for the state respondents . . .”); *see also* *Washington v. Trump*, 145 F.4th 1013, 1019 (9th Cir. 2025) (affirming the “grant of a preliminary injunction and [the

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PIPAs and appellate TROs to the parties before them,⁹⁰ the Eighth Circuit has declined to do so.

The Eighth Circuit's appellate TROs in particular illustrate how the courts of appeals, unlike district courts that issue universal injunctions, may rely on obscure local rules governing stays of *decision* to issue sweeping preliminary relief indiscriminately, and even anonymously. Although the *Nebraska v. Biden* and *Missouri v. Biden* appellate TROs universally enjoined enforcement of significant federal policies, both orders were unsigned.⁹¹ And it is quite possible that just one judge issued each of those orders: Eighth Circuit Local Rule 27A provides that just “one judge of the court may order a temporary stay of any proceeding pending the determination of a stay application by a three-judge panel.”⁹² Even though this rule unambiguously contemplates stays of a “proceeding” only,⁹³ the Eighth Circuit appears to have relied on this rule to premise its practice of allowing single, anonymous judges to “stay” private parties' actions through universal orders.⁹⁴

II. The Courts of Appeals' Authority to Issue PIPAs and Appellate TROs

PIPAs and appellate TROs are unlawful. Because they are standalone orders, they exceed the dispositional authority conferred by 28 U.S.C. § 2106 and must be premised on some other authority that empowers the courts of appeals to issue equitable orders in the first instance.⁹⁵ A single provision of a single federal

district court's] determination that a universal preliminary injunction is necessary to give the States complete relief on their claims” that an executive order abrogating birthright citizenship was unconstitutional).

90. See, e.g., *Alpine Secs. Corp. v. Fin. Indus. Regul. Auth.*, No. 23-5129, 2023 WL 4703307, at *1 (D.C. Cir. July 5, 2023) (per curiam); *Alabama v. U.S. Sec'y of Educ.*, No. 24-12444, 2024 WL 3981994, at *9 (11th Cir. Aug. 22, 2024) (per curiam) (enjoining the government from enforcing a Title IX rule against the state plaintiffs).

91. See *Nebraska v. Biden Emergency Admin. Stay*, *supra* note 2; *Missouri v. Biden Emergency Admin. Stay*, *supra* note 5, at *1.

92. EIGHTH CIR. R. 27A(b).

93. *Id.*

94. The Eighth Circuit—perhaps recognizing that Local Rule 27A does not authorize a single judge to “stay” a *private party's* conduct—did not cite Rule 27A (or any other authority) in either of its student debt relief administrative stays in *Nebraska v. Biden* or *Missouri v. Biden*. But a previous Eighth Circuit dissent indicates that some members of the court understand Rule 27A to be the source of their authority to grant “administrative stays” generally. See *Brady v. Nat'l Football League*, 638 F.3d 1004, 1005 (8th Cir. 2011) (granting an “administrative stay”); *id.* at 1005-06 (Bye, J., dissenting) (locating Rule 27A as the putative source for the majority's grant of its “administrative stay” and criticizing the majority for doing so absent any evident “emergency”).

95. See 28 U.S.C. § 2106 (specifying that these courts may reverse, modify, affirm, or vacate an underlying district court judgment, as well as remand back to the district court).

statute, Section 11 of the Judiciary Act of 1789, empowers the federal courts to issue equitable orders, but it did not grant circuit courts—the courts of appeals' predecessors—any power.⁹⁶ Nonetheless, Section 14 of the Judiciary Act of 1789 *did* authorize circuit courts to issue injunctions, but only “in aid of” their appellate “jurisdiction.”⁹⁷ The All Writs Act, which succeeds Section 14,⁹⁸ suggests that PIPAs and appellate TROs violate this limitation on injunctive relief by shielding litigants from harm, rather than protecting the courts of appeals' jurisdiction. And PIPAs and appellate TROs further exceed the authority of the All Writs Act by “enlarging” the courts of appeals' jurisdiction.⁹⁹

A. The Statutory Framework of the Federal Courts' Equitable Power

Equitable remedies are court-crafted orders that first developed in fourteenth- and fifteenth-century England.¹⁰⁰ Equitable remedies arose when the common-law courts of England began granting, in their discretion, flexible (that is, “equitable”) orders to resolve disputes where the ancient common law offered no solution.¹⁰¹ For example, English courts relied on equity to recognize, for the first time, fraud and duress as legal wrongs.¹⁰² Over time, equitable remedies, including injunctions, became important tools that supplemented deficiencies in the common law.¹⁰³ By the eighteenth century, equity judges (who presided over characteristically slow courts) began issuing preliminary injunctions to provide plaintiffs with interim relief pending final judgment.¹⁰⁴ Because PIPAs and TROs function as preliminary injunctions, they are equitable remedies.

Although equitable remedies arose and evolved organically in the English courts, scholars dispute what legal authority empowers the American federal courts to issue them. Some argue that federal courts derive their power to issue equitable remedies from Article III of the Constitution, which vests “the judicial

96. See Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78, *amended by* Act of Mar. 3, 1911, ch. 231, § 289, 36 Stat. 1087, 1167.

97. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82 (codified as amended at 28 U.S.C. § 1651(a)).

98. See Lonny Sheinkopf Hoffman, *Removal Jurisdiction and the All Writs Act*, 148 U. PA. L. REV. 401, 401 n.4 (1999).

99. See *infra* text accompanying note 157.

100. See William Hamilton Bryson, *Equity and Equitable Remedies*, in *ENCYCLOPEDIA OF THE AMERICAN JUDICIAL SYSTEM* 545, 545 (Robert J. Janosik ed., 1987) (describing the history and evolution of equity).

101. David W. Raack, *A History of Injunctions in England Before 1700*, 61 IND. L.J. 539, 544-45 (1986).

102. See *id.* at 563.

103. See *id.*

104. See *id.* at 554, 564; Jack Thorlin, *Constitutional Hardball and Nationwide Preliminary Injunctions*, 18 DUKE J. CONST. L. & PUB. POL'Y 1, 12-13 (2023).

power,” including for “cases . . . in equity,” in the Supreme Court and “inferior” courts.¹⁰⁵ Others trace this power to federal statutes.¹⁰⁶ And yet others argue that the federal courts possess inherent equitable powers in the vein of common law.¹⁰⁷

Nonetheless, the Supreme Court has held that federal courts derive their equitable power from a single statutory provision: Section 11 of the Judiciary Act of 1789, the statute that first established the federal court system.¹⁰⁸ In *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, the Court considered whether a district court had the authority to issue an injunction preventing a defendant from transferring or dissipating assets pending a final judgment in a civil case.¹⁰⁹ This kind of asset-freezing injunction, known as a *Mareva* injunction, had been issued in certain Commonwealth courts, including the English courts, since the 1970s, but not in American courts.¹¹⁰

Justice Antonin Scalia, writing for the majority, traced the district courts' authority to grant equitable remedies to Section 11 of the Judiciary Act of 1789, which he found conferred upon them “the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution”¹¹¹ Because *Mareva* injunctions were a novel form of equitable power—a gap-filling remedy fashioned in Commonwealth courts just decades before *Grupo Mexicano*—the Judiciary Act of 1789 did not contemplate them, and the district courts lacked authority to issue them.¹¹² Although Justice Ruth Bader Ginsburg, joined by three other Justices in dissent, argued that *Mareva* injunctions were permissible because they comported with the “principles of equity existing at the separation of this country from England,” she expressly

105. See, e.g., Owen W. Gallogly, *Equity's Constitutional Source*, 132 YALE L.J. 1213, 1221, 1225, 1266 (2023) (capitalization altered) (“[A]s originally understood, [t]he judicial Power’ in ‘Equity’ includes an inherent power to administer a system of equitable remedies” (alteration in original) (quoting U.S. CONST. art. III, §§ 1-2)).

106. See, e.g., Riley T. Keenan, *Functional Federal Equity*, 74 ALA. L. REV. 879, 903 (2023) (suggesting that “the lower courts’ equity powers lie dormant until Congress activates them, which it did in § 11 of the Judiciary Act of 1789”).

107. See, e.g., Michael T. Morley, *The Federal Equity Power*, 59 B.C. L. REV. 217, 221 (2018) (“Federal equity law should be reconceptualized as the body of principles that courts presumptively apply in the absence of contrary federal statutory requirements when deciding whether to grant equitable relief under the U.S. Constitution or a federal statute.”); John Harrison, *Federal Judicial Power and Federal Equity Without Federal Equity Powers*, 97 NOTRE DAME L. REV. 1911, 1923 (2022) (“[W]hen the Constitution was adopted . . . [e]quitable remedies principles had the same place in the legal hierarchy as the general law merchant and the law of admiralty.”).

108. See *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999); *Trump v. CASA, Inc.*, 145 S. Ct. 2540, 2551 (2025).

109. 527 U.S. at 310, 312.

110. See *id.* at 327-28.

111. *Id.* at 318.

112. *Id.* at 329.

adopted the majority's premise that "[t]he Judiciary Act of 1789 gave the lower federal courts jurisdiction over 'all suits . . . in equity'" and was thus the sole source of their equitable power.¹¹³ More recently, the Court held that federal courts may not issue universal injunctions that benefit nonparties in most instances because the English Court of Chancery never issued such universal injunctions.¹¹⁴

For today's purposes,¹¹⁵ Section 11 grants district courts original jurisdiction over suits "in equity."¹¹⁶ Section 11 excludes the Supreme Court, indicating that Congress did not intend for the Court to possess original jurisdiction over suits "in equity."¹¹⁷ Though the courts of appeals did not exist until the 1890s, Section 11's grant of equitable power does not extend to them either; they were created to "relieve[]" the Supreme Court from hearing certain cases,¹¹⁸ and their appellate "authority and practice . . . have been roughly parallel to those of [the Supreme] Court."¹¹⁹

And because Section 11 confers *original* jurisdiction over cases "in equity," it cannot confer jurisdiction on the courts of appeals, which have exclusively "*appellate*" jurisdiction. Section 11 grants the district courts "original cognizance . . . of all suits of a civil nature at common law or in equity" subject to various limitations, such as an amount in controversy.¹²⁰ But, according to the Judiciary Act of 1891, the courts of appeals only possess "appellate jurisdiction to review by appeal" certain cases.¹²¹ Therefore, Section 11 cannot possibly confer equitable power upon the courts of appeals.

B. The All Writs Act's Narrow Grant of Authority "In Aid Of" Jurisdiction

Although Section 11 of the Judiciary Act of 1789 does not grant the courts of appeals any equitable power, a different section of that statute—Section 14—

113. *See id.* at 335-36 (Ginsburg, J., concurring in part and dissenting in part) (ellipsis in original).

114. *See Trump v. CASA, Inc.*, 145 S. Ct. 2540, 2551 (2025).

115. *See supra* note 21.

116. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78, *amended by* Act of Mar. 3, 1911, ch. 231, § 289, 36 Stat. 1087, 1167.

117. *Cf. id.* (omitting such a grant); *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))).

118. Lohier, *supra* note 50, at 947-48.

119. *Bryan v. United States*, 338 U.S. 552, 555 (1950).

120. Judiciary Act of 1789 § 11, 1 Stat. at 78.

121. Judiciary Act of 1891, ch. 517, § 6, 26 Stat. 826, 828 (codified as amended in scattered sections of 28 U.S.C.).

granted them the authority to issue orders, including injunctions, “in aid of” their appellate jurisdiction.¹²² But this auxiliary injunctive power is far narrower than Section 11’s plenary grant of all the equitable powers possessed by the founding-era English Chancery Court, and Section 14 does not empower courts to shield litigants from harm.¹²³

Section 14 of the Judiciary Act of 1789 provided that “all the . . . courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, . . . and all other writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.”¹²⁴ The All Writs Act, passed in 1911, recodifies Section 14 in substantially similar language.¹²⁵ This new language, unlike Section 11, applies to “all” federal courts, including the courts of appeals.¹²⁶ Some courts of appeals have obliquely recognized that the All Writs Act is the exclusive source of their injunctive power.¹²⁷ The Supreme Court has “roughly” equated its own

122. See Judiciary Act of 1789 § 14, 1 Stat. at 81-82 (codified as amended at 28 U.S.C. § 1651).

123. See *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (holding that Section 11 of the Judiciary Act of 1789 confers the power to issue “judicial remedies which had been devised and [were] being administered by the English Court of Chancery at the time of the separation of the two countries” (quoting *Atlas Life Ins. Co. v. W. I. S., Inc.*, 306 U.S. 563, 568 (1939))); *Trump v. CASA, Inc.*, 145 S. Ct. 2540, 2551 (2025); *Graham v. Norton*, 82 U.S. 427, 429 (1872) (explaining that “[t]he fourteenth section” of the Judiciary Act of 1789 empowers courts to issue writs “necessary to the exercise of their jurisdiction” but not “as an original writ in any case”); *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1097-99 (11th Cir. 2004) (describing the difference between Section 11 and Section 14 injunctions).

124. See Judiciary Act of 1789 § 14, 1 Stat. at 81-82.

125. See 28 U.S.C. § 1651(a) (“[A]ll courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”).

126. Compare Judiciary Act of 1789 § 11, 1 Stat. at 78 (“[T]he [now-defunct] circuit courts shall have original cognizance, concurrent with the courts of the several States . . .”), with 28 U.S.C. § 1651(a) (“[A]ll courts established by Act of Congress may issue all writs necessary . . .”).

127. See *Cavel Int’l, Inc. v. Madigan*, 500 F.3d 544, 547 (7th Cir. 2007) (“We are mindful that Chief Justice Rehnquist, in a chambers opinion . . . held that the authority to grant such an injunction is conferred . . . by the All Writs Act.” (citation omitted)); *Texas v. United States*, 837 F.2d 184, 187 (5th Cir. 1988) (determining that the court lacked “authority to issue an injunction beyond that necessary to protect [its] own jurisdiction”); *Aref v. United States*, 452 F.3d 202, 205 (2d Cir. 2006) (per curiam) (determining that the court “may not issue writs except those which aid *our* jurisdiction—which is appellate in nature”); *Stell v. Savannah-Chatham Cnty. Bd. of Educ.*, 318 F.2d 425, 426 (5th Cir. 1963) (“This Court has the power to issue all writs necessary or appropriate in aid of its jurisdiction and agreeable to the usages and principles of law. An injunction pending appeal is such a writ.” (citation omitted)); *Overstreet v. Lexington-Fayette Urban Cnty. Gov’t*, 305 F.3d 566, 572 (6th Cir. 2002) (“This Court has the power to grant an injunction pending appeal to prevent irreparable harm . . . [and this] authority to grant an injunction pending appeal is a ‘necessary incident’ to the Court’s power to issue writs to

footnote continued on next page

“authority and practice” with that of the courts of appeals.¹²⁸ Several Justices have similarly recognized the All Writs Act (that is, Section 14) as the Court’s exclusive source of injunctive power.¹²⁹

An influential Eleventh Circuit case, *Klay v. United Healthgroup, Inc.*, describes how “traditional” Section 11 injunctions may vindicate litigants’ rights, whereas All Writs Act (Section 14) injunctions must protect an issuing court’s jurisdiction.¹³⁰ *Klay* explains that “‘traditional’ injunction[s] . . . may be issued as either an interim or permanent remedy for certain breaches of common law, statutory, or constitutional rights.”¹³¹ Conversely, All Writs Act injunctions must protect “some ongoing proceeding, or some past order or judgment, the integrity of which is being threatened by someone else’s action or behavior.”¹³² Unlike Section 11, which confers general equitable authority, the All Writs Act is a “codification of the federal courts’ traditional, inherent power to protect the jurisdiction they already have, derived from some other source.”¹³³ *Klay* extends an earlier case—authored by the same jurist, Judge Gerald Tjoflat—that explained that “[t]he All Writs Act . . . empowers a federal court to employ procedures necessary to promote the resolution of issues in a case properly before it. This power is limited, however, to the facilitation of the court’s effort to manage the case to judgment.”¹³⁴

Correspondingly, the Supreme Court has clarified that All Writs Act injunctions permissibly serve an issuing court’s jurisdiction by preventing an underlying case from being mooted or a court’s jurisdiction from being undermined. The Court has, for example, upheld injunctions delaying an

protect appellate jurisdiction under 28 U.S.C. § 1651 . . .” (citation omitted) (quoting *E. Greyhound Lines v. Fusco*, 310 F.2d 632, 634 (6th Cir. 1962))).

128. See *Bryan v. United States*, 338 U.S. 552, 555 (1950).

129. *Turner Broad. Sys., Inc. v. FCC*, 507 U.S. 1301, 1303 (1993) (Rehnquist, C.J., in chambers) (finding that the All Writs Act is “the *only* source of th[e] Court’s authority to issue an injunction” (emphasis added)); see *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm’n*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers) (noting that, in order to receive the substantive relief that he sought from the Court, the applicant would need an original writ of injunction pursuant to the Court’s jurisdiction under the All Writs Act).

130. See 376 F.3d 1092, 1097-99 (11th Cir. 2004); see also Samuel I. Ferenc, Note, *Clear Rights and Worthy Claimants: Judicial Intervention in Administrative Action Under the All Writs Act*, 118 COLUM. L. REV. 127, 153-54 (2018) (describing how “the *Klay* framework has been quite influential in recent scholarship concerning the [All Writs] Act”); Michael D. Sousa, *A Casus Omissus in Preventing Bankruptcy Fraud: Ordering a Search of a Debtor’s Home*, 73 OHIO ST. L.J. 93, 112-14 (2012) (citing to *Klay* to describe the scope of the All Writs Act); Jennifer X. Luo, *Decoding Pandora’s Box: All Writs Act and Separation of Powers*, 56 HARV. J. ON LEGIS. 257, 265 (2019) (same).

131. 376 F.3d at 1097 (footnote omitted).

132. *Id.* at 1100.

133. *Id.* at 1097, 1099.

134. *ITT Cmty. Dev. Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978).

irreversible merger whose consummation would preclude judicial review under the antitrust laws¹³⁵ and requiring a telephone company to provide indispensable assistance for carrying out a court-issued search warrant.¹³⁶

But PIPAs and appellate TROs do not protect—or even purport to protect—the issuing appellate courts’ jurisdiction.¹³⁷ The standard that appellate courts use to evaluate motions for PIPAs and appellate TROs does not assess the likelihood that jurisdiction over an underlying case will be impaired.¹³⁸ Instead, the classic *Winter* standard that courts of appeals apply focuses on the likelihood that a movant will experience irreparable harm, their likelihood of success on the merits, the public interest in granting them relief, and the balance of the equities.¹³⁹ As *Klay* explained, “[t]he requirements for a traditional injunction do not apply to injunctions under the All Writs Act because a court’s traditional power to protect its jurisdiction, codified by the Act, is grounded in entirely separate concerns.”¹⁴⁰ *Klay* admonished that “a district court may not evade the traditional requirements of an injunction by purporting to issue what is, in effect, a preliminary injunction under the All Writs Act.”¹⁴¹

Case law from the Supreme Court’s emergency relief docket underscores that All Writs Act injunctions are no substitute for traditional, Section 11 injunctions. Several Justices have issued in-chambers rulings emphasizing that All Writs Act orders can only be used to prevent cases from being mooted prior to judicial review and should not be issued to shield litigants from harm.

For example, in *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Commission*, Justice Scalia declined to issue an All Writs Act injunction that was unnecessary to maintain the Supreme Court’s jurisdiction.¹⁴² The movant in that case, Ohio Citizens for Responsible Energy, Inc. (OCRE), challenged the Nuclear Regulatory Commission’s (NRC) decision to allow a nuclear power plant to operate at full power.¹⁴³ The Sixth Circuit had declined OCRE’s petition to review the NRC’s denial of OCRE’s motion to reopen licensing procedures for the nuclear plant.¹⁴⁴ OCRE then sought certiorari from the Supreme Court

135. *FTC v. Dean Foods Co.*, 384 U.S. 597, 604-05 (1966).

136. *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 172, 175 (1977).

137. *Cf. Klay*, 376 F.3d at 1102 (“Indeed, in a good number of cases in which we have approved the grant of writs under the Act, it is unclear how those traditional standards [for injunctive relief] would even be applicable.”).

138. *See generally Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (describing the requirements for a preliminary injunction).

139. *See also id.*

140. 376 F.3d at 1100.

141. *Id.* at 1101 n.13.

142. *See* 479 U.S. 1312, 1313-14 (1986) (Scalia, J., in chambers).

143. *See id.* at 1312.

144. *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm’n*, 803 F.2d 258, 259-60 (6th Cir. 1986).

and separately requested that the Supreme Court immediately enjoin full-power operation of the plant until either the Sixth Circuit or Supreme Court disposed of the underlying case.¹⁴⁵ Justice Scalia denied OCRE's application for an injunction because the applicant did not argue that halting operation of the power plant was necessary for the Court to review the merits of the petitioner's case.¹⁴⁶ Justice Scalia emphasized that All Writs Act injunctions must be "necessary or appropriate in aid of [the Court's] jurisdiction[n]."¹⁴⁷

Chief Justice Rehnquist declined to issue an All Writs Act injunction in *Turner Broadcasting Systems, Inc. v. FCC* for the same reasons as Justice Scalia had in *Ohio Citizens*.¹⁴⁸ In *Turner Broadcasting*, several cable operators sought to enjoin enforcement of a law that required them to carry certain programming in alleged violation of the First Amendment.¹⁴⁹ The operators had previously failed to secure a preliminary injunction from a district court.¹⁵⁰ Like Justice Scalia in *Ohio Citizens*, Chief Justice Rehnquist denied the operators' application for an injunction because enforcement of the law "would not prevent th[e] Court's exercise of its appellate jurisdiction to decide the merits of [the] applicants' appeal."¹⁵¹ In addition, Justice Sotomayor has repeatedly reached a similar conclusion in chambers and in dissent.¹⁵²

Despite the Court's prior decisions applying All Writs Act standards to injunctions,¹⁵³ and Chief Justice Rehnquist's and Justice Scalia's nonbinding but highly persuasive decisions in *Ohio Citizens* and *Turner Broadcasting*, the Supreme Court now evaluates direct applications for injunctions using the *Winter* standard, which primarily asks whether a movant is likely to succeed on

145. See *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm'n*, 481 U.S. 1016 (1987) (denying certiorari); *Ohio Citizens*, 479 U.S. at 1312 (Scalia, J., in chambers) (declining to enjoin full-power operation of the power plant).

146. See *Ohio Citizens*, 479 U.S. at 1312 (Scalia, J., in chambers).

147. *Id.* at 1313-14 (alterations in original) (quoting 28 U.S.C. § 1651(a)).

148. See 507 U.S. 1301, 1303-04 (1993) (Rehnquist, C.J., in chambers).

149. *Id.* at 1301-02; 819 F. Supp. 32, 35-36 (D.D.C. 1993), *vacated*, 512 U.S. 622 (1994).

150. See *Time Warner Ent. Co. v. FCC*, 810 F. Supp. 1302, 1308 (D.D.C. 1992) (denying plaintiffs' motion for a preliminary injunction), *aff'd in part*, 93 F.3d 957 (D.C. Cir. 1996).

151. *Turner Broad. Sys.*, 507 U.S. at 1303 (Rehnquist, C.J., in chambers).

152. See, e.g., *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401, 1403 (2012) (Sotomayor, J., in chambers) ("[A] Circuit Justice may issue an injunction only when it is 'necessary or appropriate in aid of our jurisdiction' . . ." (quoting *Wis. Right to Life, Inc. v. FEC*, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers))); *Wheaton Coll. v. Burwell*, 573 U.S. 958, 964 (2014) (Sotomayor, J., dissenting from grant of application for injunctive relief) (observing that "[a]n injunction is appropriate only if (1) it is necessary or appropriate in aid of our jurisdiction, and (2) the legal rights at issue are indisputably clear" (alteration in original) (quoting *Turner Broad. Sys.*, 507 U.S. at 1303 (Rehnquist, C.J., in chambers))).

153. See *supra* text accompanying notes 135-36.

the merits and experience irreparable harm.¹⁵⁴ The Court's contemporary emergency docket decisions applying the *Winter* standard have drawn dissents, though dissenters have primarily focused on the Court's abandonment of a certain requirement typically associated with writs of mandamus under the All Writs Act—that it be “indisputably clear” that a movant is entitled to relief—rather than the more fundamental requirement that All Writs Act orders serve to preserve a reviewing court's jurisdiction.¹⁵⁵

C. The All Writs Act's Prohibition on “Enlarging” Jurisdiction

Even if the courts of appeals *could* issue orders to shield litigants from irreparable harm, PIPAs and appellate TROs—in their current form, at least—would still be unjustified under the All Writs Act. Orders premised on the All Writs Act must not only “aid” jurisdiction; they must also not “enlarge” jurisdiction.¹⁵⁶ Yet, contrary to this requirement, PIPAs necessarily enlarge the courts of appeals' jurisdiction by empowering courts to evade the normal statutory procedure for reviewing district court judgments—direct appeal. PIPAs further enlarge the courts of appeals' jurisdiction by empowering those courts to functionally reverse preliminary injunction denials *de novo*, rather than for “abuse of discretion.” Appellate TROs enlarge the courts of appeals' jurisdiction by functionally empowering them to review typically unreviewable TRO denials.

Courts may not rely on the All Writs Act to aggrandize their jurisdiction. The Supreme Court observed in *Clinton v. Goldsmith* that although courts may issue All Writs Act orders “in aid of” their jurisdiction, “the Act does not enlarge

154. See *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (per curiam) (applying the *Winter* test); *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (per curiam) (same).

155. See, e.g., *Chrysafis v. Marks*, 141 S. Ct. 2482, 2483 (2021) (Breyer, J., dissenting from grant of application for injunctive relief) (“[T]he legal rights at issue in this case are not ‘indisputably clear.’”); *Diocese of Brooklyn*, 141 S. Ct. at 77 (Breyer, J., dissenting) (“[W]hether, in present circumstances, [the applicants are entitled to relief] is far from clear, and, in my view, the applicants must make such a showing here to show that they are entitled to ‘the extraordinary remedy of injunction.’” (quoting *Nken v. Holder*, 556 U.S. 418, 428 (2009))); *Wheaton Coll.*, 573 U.S. at 961 (Sotomayor, J., dissenting) (“Injunctions of this nature are proper only where ‘the legal rights at issue are indisputably clear.’” (quoting *Turner Broad. Sys.*, 507 U.S. at 1303 (Rehnquist, C.J., in chambers))); see also *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) (“This power [to issue an injunction] is used where ‘the legal rights at issue are indisputably clear’ and, even then, ‘sparingly and only in the most critical and exigent circumstances.’” (quoting STEPHEN M. SHAPIRO, KENNETH GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HIMMELFARB, *SUPREME COURT PRACTICE* § 17.4 (11th ed. 2019))).

156. See *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999) (quoting 28 U.S.C. § 1651(a)).

that jurisdiction.”¹⁵⁷ Thus, although the Court of Appeals for the Armed Forces (CAAF) was “empowered to issue extraordinary writs under the Act,” the Act did not empower it to enjoin the President from dropping an airman from the Air Force rolls, since its jurisdiction was limited to “review[ing] the record in [specified] cases reviewed by’ the service courts of criminal appeals.”¹⁵⁸ The Court noted that Congress created other, more direct avenues for the aggrieved airman to challenge his dismissal. He could “present his claim to the Air Force Board of Correction for Military Records,” sue under the Administrative Procedure Act (APA), sue under the Tucker Act, or sue under the “Little Tucker Act.”¹⁵⁹ Accordingly, because “another method of review” was available, and because “[t]he All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute,” the CAAF could not rely on its All Writs Act authority to issue an injunction in the airman’s favor.¹⁶⁰

The Supreme Court has further held that courts impermissibly “enlarge” their jurisdiction when they use the All Writs Act to circumvent statutory review procedures. In *Pennsylvania Bureau of Correction v. United States Marshals Service*, the Court affirmed the Third Circuit’s reversal of a district court’s issuance of writs of habeas corpus *ad testificandum* under the All Writs Act instead of the federal statute that explicitly authorized the court to issue the writ.¹⁶¹ The *Pennsylvania Bureau* Court concluded that “[a]lthough th[e All Writs] Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate.”¹⁶² The Court in *Pennsylvania Bureau* thus held that, “[w]here a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling.”¹⁶³ As relevant to PIPAs and appellate TROs, the federal courts’ general equitable power, including their power to issue preliminary injunctions, is codified in Section 11 of the Judiciary Act of 1789.¹⁶⁴

Nor may courts substitute All Writs Act review for direct review pursuant to the final judgment rule. In *Roche v. Evaporated Milk Ass’n*, the Supreme Court reversed the Ninth Circuit’s issuance of a writ of mandamus premised on the All Writs Act, which in turn had effectively reversed a district court’s striking of

157. *Id.* (quoting 28 U.S.C. § 1651(a)).

158. *Id.* (second alteration in original) (quoting 10 U.S.C. § 867(a)(2)-(3) (1998)).

159. *Id.* at 538-40.

160. *Id.* at 537 (first quoting 19 MOORE’S FEDERAL PRACTICE § 201.40 (3d ed. 1998); and then quoting *Carlisle v. United States*, 517 U.S. 416, 429 (1996)).

161. 474 U.S. 34, 35-37, 43 (1985).

162. *Id.* at 43.

163. *Id.*

164. See Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (granting the general equitable power), amended by Act of Mar. 3, 1911, ch. 231, § 289, 36 Stat. 1087, 1167.

certain pleas in a criminal case.¹⁶⁵ The Court held that, because the original order striking pleas was eventually reviewable by the Ninth Circuit on direct appeal, the Ninth Circuit's interlocutory mandamus order was unnecessary to preserve jurisdiction and was thus improper.¹⁶⁶ In a separate case, the Court further explained that the All Writs Act "may not be used as a substitute for an authorized appeal."¹⁶⁷ The Court reasoned that "the statutory scheme permits appellate review of interlocutory orders only on appeal from the final judgment" and that the All Writs Act could not be used to subvert "legislative purpose to avoid piecemeal reviews."¹⁶⁸

PIPAs are, in the language of *Roche*, hastened "substitute[s] for the appeal procedure"¹⁶⁹ of district courts' denials of preliminary injunctions under 28 U.S.C. § 1292. And per *Goldsmith*, appellate TROs likely impermissibly "enlarge" the courts of appeals' jurisdiction by essentially permitting them to review otherwise unreviewable TRO denials.¹⁷⁰ However, it bears noting that some jurists and scholars argue that the courts of appeals have an independent basis for reviewing such denials.¹⁷¹ Still, the district courts have revealingly begun issuing "administrative stays" (the label that the courts of appeals use for appellate TROs) to immediately halt government policy and executive action in politically contentious cases, often *sua sponte*, and without applying any legal test at all,¹⁷² which underscores how identically labeled and analogously used "administrative stays" in the courts of appeals (which this Note calls appellate TROs, insofar as they do not "stay" any lower-court ruling) are likewise politically charged, powerful tools.

165. See 319 U.S. 21, 22-24, 32 (1943).

166. *Id.* at 26-27, 32.

167. *U.S. Alkali Exp. Ass'n v. United States*, 325 U.S. 196, 203 (1945).

168. *Id.*

169. 319 U.S. at 26.

170. *Clinton v. Goldsmith*, 526 U.S. 529, 534 n.5, 535 (1999) (finding that "the [All Writs] Act does not enlarge" the jurisdiction of appellate courts that are statutorily "confined . . . to the review" of certain lower court rulings); see also note 42.

171. See, e.g., *supra* note 42 (suggesting that many TROs are immediately appealable under existing precedent); *Bessent v. Dellinger*, 145 S. Ct. 515, 516 (2025) (Gorsuch, J., dissenting from an order holding the application in abeyance) (describing the "powerful reasons to look behind the [TRO] label" and construe a TRO as an appealable preliminary injunction).

172. See *Moore*, *supra* note 19, at 2-4; *Nat'l Council of Nonprofits v. Off. of Mgmt. & Budget*, 763 F. Supp. 3d 13, 17 (D.D.C. 2025) (granting an "administrative stay" enjoining the Office of Management and Budget from enforcing a policy pausing the disbursement of certain federal funds), *dissolved by Nat'l Council of Nonprofits v. Off. of Mgmt. & Budget*, 763 F. Supp. 3d 36 (D.D.C. 2025); *Order Granting Admin. Stay at 1, 3, Texas v. Dep't of Homeland Sec.*, No. 24-cv-00306 (E.D. Tex. Aug. 26, 2024) (granting an "administrative stay" blocking the Department of Homeland Security from granting certain migrants the ability to "parole in place" (quoting Implementation of Keeping Families Together, 89 Fed. Reg. 67459, 67459 (Aug. 20, 2024))).

PIPAs also necessarily “enlarge” the courts of appeals’ jurisdiction by permitting the courts of appeals to review district courts’ preliminary injunction determinations without deference. As Part I explained, because litigants almost always request preliminary injunctions in district court before requesting PIPAs on appeal, a court of appeals’ subsequent grant of a PIPA is tantamount to de novo review of the movant’s earlier, unsuccessful preliminary injunction motion.¹⁷³ Yet courts consider underlying *appeals* of district courts’ denials of preliminary injunctions, as provided for by 28 U.S.C. § 1292, for abuse of discretion.¹⁷⁴ Consequently, courts of appeals that issue PIPAs exert more power than they otherwise would have on a direct appeal of a denial of a preliminary injunction. By duplicating the work of district courts and by enabling the courts of appeals to impersonate trial courts, PIPAs undermine Congress’s policy choice to limit the courts of appeals to a supervisory role.¹⁷⁵

While PIPAs last until the resolution of an appeal, preliminary injunctions last until final judgment. But because litigants typically request PIPAs on appeal from denials of preliminary injunctions, this distinction is effectively meaningless. Barring some intervening fundamental change in a case’s relevant law or facts, a court will almost necessarily reach the same conclusion on both a PIPA and preliminary injunction motion. And, as Part III explains, PIPAs, far more than preliminary injunctions, hinge on static legal questions, rather than dynamic factual questions, making them “stickier” than preliminary injunctions.¹⁷⁶ And, finally, because litigants often request PIPAs and preliminary injunctions to avert *imminent* harm, their relatively shorter duration is often irrelevant. In fact, courts of appeals have frequently concluded that their “preliminary” grants of relief through PIPAs have mooted underlying

173. See *Ohio v. Becerra*, No. 21-4235, 2022 WL 413680, at *2 (6th Cir. Feb. 8, 2022) (“Because a motion for an injunction pending appeal does not require us to review a district court decision or order, our review is de novo.”).

174. See, e.g., *White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir. 1989) (“We will reverse the denial of a preliminary injunction only under extraordinary circumstances. ‘The decision to grant or deny a preliminary injunction . . . may be reversed on appeal only by a showing of abuse of discretion.’” (quoting *Apple Barrel Prods., Inc. v. Beard*, 730 F.2d, 384, 386 (5th Cir. 1984))).

175. Some courts have explicitly applied the same standard for both PIPAs and appeals of preliminary injunctions. See, e.g., *Nebraska v. Biden*, 52 F.4th 1044, 1046 (8th Cir. 2022) (per curiam) (“In ruling on a request for an injunction pending appeal, the court must engage in the same inquiry as when it reviews the grant or denial of a preliminary injunction.” (quoting *Walker v. Lockhart*, 678 F.2d 68, 70 (8th Cir. 1982) (per curiam))); *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1285 (9th Cir. 2020) (Fernandez, J., concurring in the result) (arguing that the law of the case doctrine bound the court to apply its previous reasoning for denying a *stay* of a preliminary injunction when it later considered the *merits* of that preliminary injunction), *amended on denial of reh’g en banc*, 993 F.3d 640 (9th Cir. 2021).

176. See *infra* notes 183-98 and accompanying text (explaining how recent PIPAs have tended to minimize or dispense with the irreparable harm requirement for preliminary relief).

appeals.¹⁷⁷ In other cases, including time-bound disputes over a school district's COVID-19 vaccination mandate,¹⁷⁸ a document subpoena from the House Judiciary Committee with a short turnaround time,¹⁷⁹ and press credentials to observe Arizona's 2022 midterm vote-counting,¹⁸⁰ courts and litigants have dismissed cases that have been obviously mooted by PIPAs. Consequently, rather than protect jurisdiction as the All Writs Act requires, PIPAs often *destroy* jurisdiction.¹⁸¹

III. The Systemic Consequences of PIPAs and Appellate TROs

PIPAs and appellate TROs are not trifling procedural quirks or academic curiosities: They have systemically degraded federal court litigation, including in many of the ways that *CASA* lamented.¹⁸² First—in terms of procedure—PIPAs and appellate TROs, in conjunction with traditional stays of decision, have transformed preliminary relief adjudication into a whirlwind back-and-forth within the federal courts that has effectively destroyed the finality of district courts' preliminary relief decisions. Second—in terms of substance—

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177. See *Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep't*, No. 20-4300, 2022 WL 2231935, at *1-2 (6th Cir. June 21, 2022) (“We have already decided [in a PIPA] all there is to decide in this appeal. . . . Hence the [identical] relief that the plaintiffs seek in this appeal would have no practical effect. . . . [Thus, w]e dismiss this appeal as moot.”); *Open Tech. Fund v. Pack*, No. 20-5195, 2021 WL 11096700, at *1 (D.C. Cir. Mar. 16, 2021) (per curiam) (dismissing an appeal as moot after earlier issuing of a PIPA); *Matsumoto v. Pua*, 775 F.2d 1393, 1395 (9th Cir. 1985) (“Because the special election is imminent, the grant or denial of an injunction pending appeal will effectively dispose of the appeal.”); see also *Fischer v. Thomas*, 78 F.4th 864, 867-869 (6th Cir. 2023) (affirming the denial of a preliminary injunction after concluding that the movants no longer faced irreparable harm).
178. See *Doe v. S.D. Unified Sch. Dist.*, No. 21-56259, 2021 WL 5600620, at *1 (9th Cir. Nov. 28, 2021) (granting a PIPA enjoining a vaccine mandate for pregnant students).
179. See *Bragg v. Pomerantz*, Nos. 23-615 & 23-616, 2023 WL 4612976, at *1 (2d Cir. Apr. 24, 2023) (dismissing an appeal); see also *Bragg v. Pomerantz*, Nos. 23-615 & 23-616, 2023 WL 3015207, at *1 (2d Cir. Apr. 19, 2023) (granting an administrative stay “enjoining enforcement of a subpoena issued . . . by the United States House of Representatives Judiciary Committee” due the following day).
180. See *TGP Commc’ns, LLC v. Sellers*, No. 22-16826, 2023 WL 3698762, at *1 (9th Cir. May 1, 2023) (dismissing an appeal); *TGP Commc’ns v. Sellers*, No. 22-16826, 2022 WL 17484331, at *1 (9th Cir. Dec. 5, 2022) (granting a PIPA requiring Maricopa County, Arizona to provide an individual with press credentials for post-election press briefings).
181. See, e.g., *supra* notes 63-66 (describing how *Georgetown College*, which presaged contemporary PIPAs, mooted the underlying dispute by granting relief).
182. See generally *Trump v. CASA, Inc.*, 145 S. Ct. 2540, 2559 (2025) (describing how universal injunctions “incentivize forum shopping, . . . are often decided in a ‘fast and furious’ process of ‘rushed, high-stakes, [and] low-information’ decisionmaking[.]” and thus “force[.] courts to resolve significant and difficult questions of law on a highly expedited basis and without full briefing” (first brackets in original) (quoting *Labrador v. Poe ex rel. Poe*, 144 S. Ct. 921, 927 (2024) (Gorsuch, J., concurring in grant of stay))).

PIPAs have accelerated the transformation of preliminary relief adjudication into law-bound preliminary *merits* adjudication. Relatedly, unreasoned and rapidly issued appellate TROs have acutely diminished the outward legitimacy of preliminary relief and merits decisions. Finally, because the Supreme Court has failed to endorse a uniform standard for PIPAs (or even address their underlying legality), litigants may freely engage in forum shopping and gamesmanship.

A. The Crumbling Finality and Relevance of District Court Judgments

PIPAs and appellate TROs impose significant procedural burdens on the federal court system. PIPAs, appellate TROs, and stays of decision override district courts' preliminary relief decisions without deference, rendering the district courts' role in preliminary relief adjudication increasingly perfunctory. PIPAs and appellate TROs, which effectively reverse *denials* of preliminary relief, are complemented by traditional stays of decision, which effectively reverse *grants* of preliminary relief. Both stays of decision and appellate TROs are often unreasoned.¹⁸³ And although stays of decision, unlike PIPAs and appellate TROs, are uncontroversially authorized by the courts of appeals' "inherent" supervisory authority over district courts, the courts of appeals have controversially permitted stays of decision to linger indefinitely, raising concern about their propriety.¹⁸⁴ Because, as the next Subpart explains, the courts of appeals generally treat PIPAs as preliminary *merits* decisions,¹⁸⁵ the courts of appeals' usurpation of the preliminary relief power from the district courts represents a remarkable arrogation of authority.

This erosion of the district courts' authority raises well-worn concerns about judicial economy and finality: By transforming district courts' preliminary relief decisions into mere preludes to rapid-fire, nondeferential

183. See *infra* note 238 and accompanying text; see also *United States v. Texas*, 144 S. Ct. 797, 800 (2024) (Sotomayor, J., dissenting from denial of applications to vacate stay) (“[T]he Court of Appeals abused its discretion by entering an unreasoned and indefinite administrative stay that altered the status quo.”).

184. See *Nken v. Holder*, 556 U.S. 418, 426 (2009) (“An appellate court’s power to hold an order in abeyance while it assesses the legality of the order has been described as ‘inherent’ . . .” (citation omitted)). But see *United States v. Texas*, 144 S. Ct. at 803 n.* (Sotomayor, J., dissenting from denial of applications to vacate stay) (“The Fifth Circuit recently has developed a troubling habit of leaving ‘administrative’ stays in place for weeks if not months.”).

185. Cf. Samuel L. Bray, *The Purpose of the Preliminary Injunction*, 78 VAND. L. REV. 809, 839-40 (2025) (describing how the preliminary injunction is “becoming a device for accelerated resolution of the merits”).

appellate review, PIPAs, appellate TROs, and stays of decision have sown chaos and uncertainty about parties' legal obligations.¹⁸⁶

Consider the Fifth Circuit's recent ping-pong game with a district court and the Supreme Court over Texas's border fencing. In October 2023, Texas sued the Department of Homeland Security for cutting down concertina wire that Texas erected on the U.S.-Mexico border to prevent migrants from entering the country.¹⁸⁷ After a district court denied Texas's motion for a preliminary injunction, a Fifth Circuit panel issued an unreasoned appellate TRO that prevented the Secretary of Homeland Security from cutting down the concertina wire.¹⁸⁸ Fifteen days later, a different Fifth Circuit panel granted a PIPA that effectively extended the court's appellate TRO.¹⁸⁹ After the United States sought review of the Fifth Circuit's order, the Supreme Court vacated the Fifth Circuit's PIPA in an unreasoned order.¹⁹⁰ After the Supreme Court's vacatur, the Fifth Circuit remanded the case back to the district court, which again denied Texas's motion for a preliminary injunction.¹⁹¹ Texas again appealed the district court's denial of a preliminary injunction to the Fifth Circuit, which reversed the district court and entered a preliminary injunction.¹⁹² This back-and-forth occurred without any court addressing the merits of Texas's claims in a final decision.

Courts may creatively deploy PIPAs, appellate TROs, and stays of decision together to overpower district courts. Consider another recent procedural saga from the Fifth Circuit. SpaceX sought a preliminary injunction that would halt the National Labor Relations Board (NLRB) from hearing a case that alleged that SpaceX illegally terminated employees.¹⁹³ SpaceX asserted that the NLRB's structure was unconstitutional because, *inter alia*, NLRB administrative law

186. See Bayefsky, *supra* note 18, at 1971 (describing how there are “efficiency costs to granting administrative stays in every case”); see also Adam S. Minsky, *In Major Order, Appeals Court Blocks Student Loan Forgiveness and Lower Payments for 8 Million Borrowers*, FORBES (updated July 18, 2024, 5:12 PM EDT), <https://perma.cc/J5PR-KWR3> (“Thursday’s appeals court ruling is just the latest in a rollercoaster of court orders related to the SAVE legal challenges. . . . [that have] threatened to throw much of the federal student loan repayment system into chaos.”).

187. See *Texas v. U.S. Dep’t of Homeland Sec.*, No. 23-cv-00055, 2023 WL 8285223, at *1 (W.D. Tex. Nov. 29, 2023), *rev’d*, 123 F.4th 186 (5th Cir. 2024).

188. *Texas v. Dep’t of Homeland Sec.* Temp. Admin. Stay, *supra* note 36.

189. *State v. U.S. Dep’t of Homeland Sec.*, 88 F.4th 1127, 1136 (5th Cir. 2023), *vacated*, 144 S. Ct. 715 (2024) (mem.), *and modified*, 123 F.4th 186 (5th Cir. 2024).

190. 144 S. Ct. at 715.

191. 123 F.4th at 192.

192. *Id.*

193. See *Space Expl. Techs., Corp. v. NLRB*, 129 F.4th 906, 908 (5th Cir. 2025) (“On January 4, SpaceX sued the NLRB in the Southern District of Texas . . . , alleging that the NLRB’s structure is unconstitutional and requesting declaratory and injunctive relief.”).

judges and board members were removable only for cause.¹⁹⁴ Almost four months after its request for a preliminary injunction, SpaceX asserted that the district court had constructively denied its motion, and appealed to the Fifth Circuit, which issued a one-sentence PIPA that halted the NLRB's proceedings.¹⁹⁵ The Fifth Circuit issued that PIPA after undoing the Texas district court's transfer of the case to the Central District of California.¹⁹⁶ The Fifth Circuit thus not only issued an unprecedented PIPA halting the NLRB's proceedings based on a purported constitutional defect in that agency's structure, but it did so *before* the district court issued any appealable ruling, and *after* liberally using a stay of decision to maintain its jurisdiction to do so.

Remarkably, after all of this procedural contortion, the Fifth Circuit panel that ultimately heard SpaceX's appeal of the district court's constructive denial of a preliminary injunction concluded that there was no such denial in the first place, since "SpaceX's sole conceivable injuries stem from participating in a teleconference in an unconstitutional administrative proceeding," which was "not sufficiently serious to warrant interlocutory appeal."¹⁹⁷ The panel accordingly dismissed the appeal—the vehicle for the PIPA, which had indefinitely halted the NLRB proceedings—for lack of subject-matter jurisdiction.¹⁹⁸

B. The Corrosion of Judicial Legitimacy

PIPAs and appellate TROs have also diminished the depth of the courts of appeals' judgments. The courts of appeals are designed to primarily consider legal rather than factual questions, and their PIPAs accordingly focus overwhelmingly on legal issues to the detriment of factual questions, including whether a movant has adequately asserted irreparable harm absent relief. And, relatedly, PIPAs and appellate TROs have eroded the legitimacy of merits decisions by, at best, prematurely manufacturing status quos and binding legal conclusions, and, at worst, abetting the perception that courts select outcomes first and then work backwards to supply congruent reasoning.

The courts of appeals lack competence to make factual determinations in the first instance. Each of the four *Winter* factors, which govern the issuance of preliminary relief, is a mixed question of law and fact, with the likelihood of

194. See Appellant's Opening Brief at 18, *Space Expl. Techs.*, 129 F.4th 906 (No. 24-40315), 2024 WL 3550219.

195. See *id.* at 63; *Space Expl. Techs. Corp. v. NLRB*, No. 24-40315 (5th Cir. Aug. 9, 2024) (order granting PIPA) [hereinafter *SpaceX Admin. Stay*].

196. *SpaceX Admin. Stay*, *supra* note 195; see *Space Expl. Techs., Corp. v. NLRB*, No. 24-cv-00001, 2024 WL 974568, at *3 (S.D. Tex. Feb. 15, 2024).

197. *Space Expl. Techs.*, 129 F.4th at 910 (quoting *EEOC v. Kerrville Bus Co.*, 925 F.2d 129, 133 (5th Cir. 1991)).

198. *Id.* at 911.

success on the merits generally hinging on legal questions and the other three factors generally hinging on factual questions.¹⁹⁹ District courts are well-equipped to make the factual findings required for preliminary relief decisions because they shepherd cases to trial and directly observe witnesses, giving them a “deep understanding of the overall factual context and procedural history of an individual case.”²⁰⁰ Conversely, the courts of appeals, which only consider the “cold, printed record” of a case,²⁰¹ are neither equipped nor generally authorized to make factual determinations in the first instance.²⁰² Accordingly, when the courts of appeals consider fact-bound issues on appeal, they must generally defer to district courts’ determinations.²⁰³

Unsurprisingly, the courts of appeals’ PIPAs have overwhelmingly construed preliminary relief adjudication as a law-bound exercise, giving short shrift to relevant factual questions, notably including whether movants have met their burden of asserting irreparable harm. For instance, in *Missouri v. Biden*, the district court enjoined enforcement of the Biden Administration’s student debt forgiveness policy but not its increase in the amount of income exempt from payment or its pause on the accrual of interest.²⁰⁴ The district court held that the plaintiffs—who conceded at oral argument that they were primarily concerned with the debt forgiveness provision—failed to show that the other provisions would irreparably harm them.²⁰⁵ Nonetheless, the Eighth Circuit issued a PIPA that enjoined enforcement of the entire program.²⁰⁶ The Eighth Circuit justified its injunction of the entire program by observing that the Biden Administration was continuing to forgive a tranche of loans by invoking a certain statutory provision that predated both the payment threshold and

199. See *Women’s Med. Ctr. of Nw. Hou. v. Bell*, 248 F.3d 411, 419 (5th Cir. 2001) (“Each of the four elements required to support a preliminary injunction, including substantial likelihood of success on the merits, presents a mixed question of fact and law.”); *Padilla v. Immigr. & Customs Enf’t*, 953 F.3d 1134, 1148 (9th Cir. 2020) (“The threat of irreparable harm to plaintiffs, the balancing of the equities, and the public interest implicated by Part A of the preliminary injunction present intensely factual questions.”), *vacated*, 141 S. Ct. 1041 (2021) (mem.).

200. *In re United States*, 138 S. Ct. 371, 375 (2017) (Breyer, J., dissenting from grant of stay).

201. See *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 337 (1967) (Black, J., dissenting).

202. See *id.* (“Appellate tribunals are not equipped to try factual issues as trial courts are.”); *Seshadri v. Kasraian*, 130 F.3d 798, 804 (7th Cir. 1997) (“It is not our competence to find facts.”).

203. See *Anderson v. Bessemer City*, 470 U.S. 564, 574-75 (1985) (“The trial judge’s major role is the determination of fact, and with experience in fulfilling that role comes expertise. . . . [Thus,] review of factual findings under the clearly erroneous standard—with its deference to the trier of fact—is the rule, not the exception.”).

204. 738 F. Supp. 3d 1113, 1155-57 (E.D. Mo. 2024), *aff’d sub nom.*, *Missouri v. Trump*, 128 F.4th 979 (8th Cir. 2025).

205. *Id.* at 1155.

206. *Missouri v. Biden*, 112 F.4th 531, 538 (8th Cir. 2024) (per curiam).

interest provisions.²⁰⁷ The Eighth Circuit drew no connection between this unrelated, older law and the previously nonenjoined payment threshold and interest accrual provisions that it then enjoined.²⁰⁸ The Eighth Circuit accordingly offered no apparent explanation for why the income exemption or interest accrual provisions were, contrary to the district court's finding (and seemingly contrary to Missouri's own admission), irreparably harmful.

The Eleventh Circuit similarly glossed over a district court's irreparable harm analysis in *Alabama v. U.S. Secretary of Education*, in which various state and private plaintiffs sought to enjoin the enforcement of a Title IX rule that expanded the definition of discrimination "on the basis of sex" to include gender identity.²⁰⁹ The district court denied the plaintiffs' motion for a preliminary injunction in a remarkably thorough opinion that spent many pages analyzing the plaintiffs' asserted irreparable harm.²¹⁰ The district court concluded that, insofar as the state plaintiffs asserted that compliance costs would impose irreparable harm, they failed to meet their burden because they "offer[ed] no evidence of what the compliance costs w[ould] be."²¹¹

The plaintiffs appealed and sought a PIPA from the Eleventh Circuit, which performed a detailed analysis of the legal merits of their claim under the APA and the U.S. Constitution.²¹² By contrast, the Eleventh Circuit relegated the remaining three fact-bound *Winter* factors to an "Other Factors" subsection.²¹³ And contrary to the district court, the Eleventh Circuit, relying on circuit precedent, found that the States' asserted compliance costs threatened irreparable harm.²¹⁴ But that circuit precedent, *Georgia v. President of the United States*, belied the Eleventh Circuit's subsequent analysis: That case recognized precedent holding that a district court did not abuse its discretion by denying preliminary relief to a state that made only "speculative" and "conclusory" assertions that a federal policy would inflict irreparable harm.²¹⁵ Despite this, the Eleventh Circuit pointed perfunctorily to declarations from the States averring that "schools faced substantial compliance costs in the form of time and

207. *See id.* at 537-38 (concluding that "the Government continues to work the same irreparable harm on MOHELA [(The Higher Education Loan Authority of the State of Missouri)] that the district court sought to enjoin").

208. *See id.*

209. *See* No. 24-12444, 2024 WL 3981994, at *2 (11th Cir. Aug. 22, 2024) (per curiam).

210. *Alabama v. Cardona*, No. 24-cv-533, 2024 WL 3607492, at *41-46 (N.D. Ala. July 30, 2024).

211. *Id.* at *46.

212. *Alabama v. U.S. Sec'y of Educ.*, 2024 WL 3981994, at *4-6.

213. *Id.* at *6-7.

214. *Id.* at *6 (citing *Georgia v. President of the U.S.*, 46 F.4th 1283, 1302 (11th Cir. 2022)).

215. *See* 46 F.4th at 1302-03.

money,”²¹⁶ without clarifying how these “amorphous” costs²¹⁷ were anything more than “speculative” or “conclusory.”²¹⁸ The Eleventh Circuit concluded that the other factors favored issuing relief and ultimately granted the plaintiffs a PIPA.²¹⁹

The Ninth Circuit similarly ignored a district court’s irreparable harm findings in *Youth 71Five Ministries v. Williams*.²²⁰ In that case, a Christian organization that declined to comply with an Oregon nondiscrimination policy sued the state for denying it funding.²²¹ A district court denied the organization’s motion for a preliminary injunction.²²² As relevant here, the district court concluded that Oregon’s denial of funding was a “discrete past harm,” rather than an ongoing or imminent irreparable injury, and that the organization failed to show that it would suffer prospective reputational harm.²²³ The organization appealed to the Ninth Circuit, which issued a PIPA ordering Oregon to provide the organization with funding.²²⁴ Like the Eleventh Circuit in *Alabama v. U.S. Secretary of Education*, the Ninth Circuit focused the bulk of its analysis on the merits of the organization’s case and relegated the remaining *Winter* factors to a laconic “remaining factors” section.²²⁵ That section only passingly referenced the record and instead largely sided with the organization on the basis of a single Supreme Court case that held that any “loss” of First Amendment freedom constituted an irreparable injury,²²⁶ even though, as the district court observed, monetary damages are typically not “irreparable,” and the organization was never awarded, and thus arguably never lost, the contested funding.²²⁷

216. *Alabama v. U.S. Sec’y of Educ.*, 2024 WL 3981994, at *6 (citing *Georgia v. President of the U.S.*, 46 F.4th at 1302).

217. *Alabama v. Cardona*, No. 24-cv-533, 2024 WL 3607492, at *46 (N.D. Ala. July 30, 2024) (determining that plaintiffs’ asserted compliance costs were “amorphous”).

218. *Georgia v. President of the U.S.*, 46 F.4th at 1302-03 (quoting *State v. Dep’t of Health & Hum. Servs.*, 19 F.4th at 1291-92) (affirming that gauging compliance costs is a “record-based” inquiry).

219. *Alabama v. U.S. Sec’y of Educ.*, 2024 WL 3981994, at *9.

220. *See* No. 24-4101, 2024 WL 3749842, at *4 (9th Cir. Aug. 8, 2024).

221. *Id.* at *1.

222. *See* *Youth 71Five Ministries v. Williams*, No. 24-cv-00399, 2024 WL 3183923, at *9 (D. Or. June 26, 2024), *aff’d in part, rev’d in part*, 160 F.4th 964 (9th Cir. 2025).

223. *See id.* at *7-8 (quoting *Cocina Cultura LLC v. Oregon*, No. 20-cv-02022, 2020 WL 7181584, at *2 (D. Or. Dec. 7, 2020)).

224. *See* *Youth 71Five Ministries*, 2024 WL 3749842, at *5.

225. *See id.* at *3-4.

226. *See id.* at *4 (quoting *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam)).

227. *See* *Youth 71Five Ministries*, 2024 WL 3183923, at *1, *7-8 (quoting *L.A. Mem’l Coliseum Comm’n v. Nat’l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980)) (describing how Oregon “terminated further progress on the grant agreements and withdrew its offer to provide funding to Plaintiff’s programs”).

The courts of appeals' effective abrogation of the irreparable harm requirement will accelerate the transformation of preliminary relief into a blunt instrument for making sweeping, abstract legal pronouncements.²²⁸ Significantly, the plaintiff states in *Nebraska v. Biden* and *Alabama v. U.S. Secretary of Education*, despite apparently suffering minimal injury, succeeded in preliminarily enjoining federal policy. State plaintiffs like Nebraska and Alabama will likely continue to request appellate TROs and PIPAs that grant universal or broad nonparty relief even after *CASA*.²²⁹ And the courts of appeals will likely indulge them because these courts are less equipped to narrowly craft equitable relief.²³⁰ The courts of appeals, after all, are habituated to Section 2106's narrow remedial scope, which permits them to, inter alia, affirm, reverse, or vacate judgments.²³¹ Even cases like *Youth 71Five Ministries* that grant relief to individual plaintiffs will compound the transformation of preliminary relief into a far-reaching, law-bound remedy, since those cases' underlying reasoning will constitute highly persuasive or even binding precedent for any cases that follow, circuit-wide.²³²

PIPAs and appellate TROs also diminish the thoroughness of subsequent *merits* opinions by binding courts on thin records and compressed schedules.²³³ Predictably, courts of appeals have clashed internally over whether their emergency relief determinations control subsequent merits outcomes.²³⁴ The

228. *Cf.* Bray, *supra* note 19, at 461 (describing how universal injunctions promote “resolution” of cases that “may be accelerated and relatively fact-free”).

229. It is at least apparent that states still have the opportunity to pursue such relief. *See supra* note 89.

230. *Cf.* *K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 915 (1st Cir. 1989) (“Decisions as to granting or withholding injunctive redress can best be made by trial courts steeped in the nuances of a case and mindful of the texture and scent of the evidence.”).

231. *See supra* text accompanying notes 20-26 (describing the courts of appeals' remedial powers).

232. *See infra* text accompanying notes 234-37 (describing how motions-panel decisions can create binding circuit-wide precedent).

233. *Cf.* *Washington v. Trump*, 858 F.3d 1168, 1185 (9th Cir. 2017) (mem.) (Bybee, J., dissenting in the denial of rehearing en banc) (“The panel addressed the government’s request for a stay under the worst conditions imaginable, including extraordinarily compressed briefing and argument schedules and the most intense public scrutiny of our court that I can remember.”).

234. *See* *Priorities USA v. Nessel*, 860 F. App’x 419, 422 (6th Cir. 2021) (“[T]here has been no change in the underlying law or fact that undermines this outcome, so our earlier decision binds us.”); *see also* *United States v. Abbott*, 92 F.4th 570, 573 n.2 (5th Cir. 2024) (per curiam) (Willett, J., concurring) (“Just to be clear, any conclusions of law made by an *en banc* court on appeal from a preliminary injunction are binding on the district court in a subsequent trial on the merits.”). *But see also* *Priorities USA*, 860 F. App’x at 425 (Cole, J., dissenting) (“In sum, the majority decides for the first time that a panel considering an appeal’s merits is bound by the holdings in its prior emergency stay order.”); *Abbott*, 92 F.4th at 575 (Douglas, J., concurring) (“Crucially, any conclusions we might reach in rehearing this case en banc would have no bearing on the merits . . .”).

Ninth Circuit, for instance, has vacillated on how it treats emergency relief opinions, first concluding that they bind merits panels, but more recently concluding that they do not.²³⁵ Yet whether an emergency relief judgment is per se binding is probably irrelevant: In either case, the judgment's underlying (and, as explained above, increasingly merits-focused) legal conclusions—unless they are narrowly stated—may still be binding under the law of the case and law of the circuit doctrines.²³⁶ And even a court's mere issuance of preliminary relief erects a hurdle that disincentivizes the court from subsequently reaching a different determination.²³⁷

Appellate TROs are especially corrosive to the legitimacy of subsequent merits judgments because courts issue them without reasoning at all—and frequently in politically controversial cases.²³⁸ Appellate TROs, in their most unflattering light, resemble hasty up-or-down merits determinations whose reasoning courts incrementally backfill over the course of litigation, first through somewhat more substantial PIPAs and eventually through fully reasoned opinions.²³⁹ Concerningly, in some cases, courts may fully escape accountability for explaining their decision to issue appellate TROs because

235. *Contrast* *Lair v. Bullock*, 798 F.3d 736, 747 (9th Cir. 2015) (“[A] motions panel’s published opinion binds future panels the same as does a merits panel’s published opinion . . .”), with *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 656 (9th Cir. 2021) (en banc) (“The published motions panel order may be binding as precedent for other panels deciding the same issue, but it is not binding here.”).

236. *See, e.g.*, *Giambalvo v. Suffolk Cnty.*, 155 F.4th 163, 177 n.4 (2d Cir. 2025) (“[E]ven in the preliminary injunction posture . . . , a well-considered conclusion of law by a panel of this Court in a published opinion, which addresses a pure issue of law that cannot be impacted by further development of the record, is binding precedent” (citation omitted)); *Malaney v. UAL Corp.*, 552 F. App’x 698, 700 (9th Cir. 2014) (“[P]urely legal conclusions we reached during review of a preliminary injunction order do constitute binding law of the case.”); *E. Bay Sanctuary Covenant*, 993 F.3d at 681-82 (Fernandez, J., concurring) (“[W]e are bound by both the law of the circuit and the law of the case.”); *id.* at 697 (VanDyke, J., dissenting) (“[A] motions panel’s published opinion is the law of the circuit—like any other published panel opinion—for all subsequent panels, even the merits panel in the same appeal.”).

237. *Cf.* *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1265 (9th Cir. 2020) (“[W]e treat the motions panel’s decision as persuasive, but not binding.”), *amended on denial of reh’g en banc*, 993 F.3d 640 (9th Cir. 2021).

238. *See generally, e.g.*, *Nebraska v. Biden Emergency Admin. Stay*, *supra* note 2 (enjoining the Biden administration from relieving student debt); *Missouri v. Biden Emergency Admin. Stay*, *supra* note 5, at *1 (same); *Bragg v. Pomerantz*, Nos. 23-615 & 23-616, 2023 WL 3015207, at *1 (2d Cir. Apr. 19, 2023) (enjoining a United States House of Representatives Judiciary Committee subpoena); *Trump v. Thompson*, No. 21-5254, 2021 WL 5239098, at *1 (D.C. Cir. Nov. 11, 2021) (per curiam) (enjoining the National Archivist from releasing records to the United States House of Representatives Select Committee to Investigate the January 6th Attack on the United States Capitol).

239. *See generally* *Cass*, *supra* note 19 (describing how nationwide injunctions generally erode the public’s confidence in the judicial system).

their appellate TROs moot underlying appeals, making it unnecessary for courts to even provide a minimal written explanation in a subsequent PIPA.²⁴⁰

The Eighth Circuit's appellate TRO and PIPA in *Nebraska v. Biden* exemplify how these orders degrade the depth and legitimacy of federal litigation. The Eighth Circuit first enjoined the Biden Administration from discharging student debt in a one-page, unreasoned, and unsigned appellate TRO.²⁴¹ Roughly three weeks later, the court granted a PIPA to the same effect.²⁴² But even though that PIPA contained some reasoning, it enunciated an incorrect gloss on the *Winter* standard for granting preliminary relief. The court perplexingly concluded that, because the “merits of the appeal . . . involve[d] [unresolved] substantial questions of law,” relief was justified—even though, per *Winter*, *likelihood* of success on the merits, rather than *uncertainty* of success on the merits, weighs in favor of issuing relief.²⁴³ The Eighth Circuit thus issued two separate orders in the *Nebraska* litigation universally enjoining a marquee federal policy without ever enunciating a plausible legal standard for doing so.

In an unusual procedural turn, the Supreme Court granted certiorari before judgment to review the Eighth Circuit's PIPA.²⁴⁴ Yet neither the Eighth Circuit's inscrutable PIPA, nor its unreasoned appellate TRO, nor the district court's dispositive order (which dismissed the case for lack of standing) reached the merits of the appellants' case. The Supreme Court instead assessed the merits of the plaintiffs' claim in the first instance, without the benefit of either the district court's or Eighth Circuit's reasoned analysis or any robust factual record.²⁴⁵ The Supreme Court did not only countenance the Eighth Circuit's legally untethered appellate TRO and PIPA by granting certiorari before judgment; like the Eighth Circuit, it also ignored the axiom that appellate courts should not resolve factual disputes in the first instance.

240. See generally, e.g., *Bragg v. Pomerantz*, 2023 WL 3015207, at *1 (issuing an “administrative stay of the return date” of a subpoena issued by the House Judiciary Committee commanding the appearance of Mark Pomerantz); *Bragg v. Pomerantz*, Nos. 23-615 & 23-616, 2023 WL 4612976, at *1 (2d Cir. Apr. 24, 2023) (dismissing an appeal that was mooted by the earlier unreasoned stay because the parties jointly moved to dismiss). Grants of certiorari can likewise forestall explanations of the reasoning behind TROs. See generally, e.g., *Nebraska v. Biden Emergency Admin. Stay*, *supra* note 2 (issuing an appellate TRO for which the Eighth Circuit never had to provide reasoning since the Supreme Court subsequently granted certiorari before judgment); *Biden v. Nebraska*, 143 S. Ct. 477, 477 (2022) (mem.) (granting certiorari before judgment).

241. See *Nebraska v. Biden Emergency Admin. Stay*, *supra* note 2.

242. See *Nebraska v. Biden*, 52 F.4th 1044, 1048 (8th Cir. 2022) (per curiam).

243. See *id.* at 1047 (quoting *Walker v. Lockhart*, 678 F.2d 68, 71 (8th Cir. 1982)); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22-23 (2008).

244. *Biden v. Nebraska*, 143 S. Ct. at 477.

245. See generally *Biden v. Nebraska*, 143 S. Ct. 2355 (2023) (deciding the merits of the plaintiffs' claim).

C. Murky Doctrine and Forum Shopping

Because the Supreme Court has not clarified the proper standard for issuing PIPAs and appellate TROs—nor even clarified whether these orders are legal in the first place—each circuit has adopted a uniquely erroneous doctrine for issuing them. And to the extent that some circuits apply internally inconsistent standards for issuing these orders, their decision to grant a PIPA or appellate TRO in the first place appears unavoidably political and outcome oriented. Yet to the extent that each circuit's individual doctrine crystallizes over time, many litigants seeking preliminary relief will flock to the most ideologically and procedurally sympathetic courts.

The Supreme Court has repeatedly declined to articulate a uniform standard for issuing PIPAs and appellate TROs. For example, after the Eighth Circuit issued its PIPA in *Nebraska v. Biden*, the government sought vacatur from the Supreme Court.²⁴⁶ But the Court instead considered the government's vacatur application jointly with the plaintiffs' direct appeal of the district court's dismissal.²⁴⁷ Unsurprisingly, the Court dismissed the government's petition for vacatur of the Eighth Circuit's PIPA as moot after directly reversing the district court's dismissal.²⁴⁸ In 2024, the government again sought vacatur of the Eighth Circuit's analogous PIPA in *Biden v. Missouri*, but the Court declined that request too, without dissent, in an unreasoned order.²⁴⁹ Finally, and most recently, although the Supreme Court vacated the Fifth Circuit's first PIPA in *State v. Department of Homeland Security*—which the Fifth Circuit variously labeled an “emergency injunction,” a “stay,” and an “injunction pending appeal”—the Court did so in an unreasoned order.²⁵⁰

The courts of appeals, lacking guidance from the Supreme Court, evaluate motions for PIPAs using various glosses of the *Winter* test. Each of these glosses requires a movant to show a varying degree of entitlement to relief. Some courts reiterate a vague platitude that PIPA movants bear a “heightened” burden of showing that they are entitled to relief.²⁵¹ Yet many courts have

246. Application to Vacate the Injunction Entered by the United States Court of Appeals for the Eighth Circuit, *Biden v. Nebraska*, 143 S. Ct. 2355 (No. 22A444), 2022 WL 17330762.

247. See *Biden v. Nebraska*, 143 S. Ct. at 477 (mem.).

248. *Biden v. Nebraska*, 143 S. Ct. at 2376.

249. 145 S. Ct. 109, 109 (2024) (“Application to vacate injunction presented to Justice Kavanaugh and by him referred to the Court denied. The Court expects that the Court of Appeals will render its decision with appropriate dispatch.”).

250. See 88 F.4th 1127, 1132, 1136 (5th Cir. 2023) (granting an order alternately characterized as a “stay” and “injunction”), vacated, 144 S. Ct. 715 (mem.), modified by 123 F.4th 186 (5th Cir. 2024).

251. See, e.g., *Agudath Israel of Am. v. Cuomo*, 980 F.3d 222, 226 (2d Cir. 2020) (per curiam) (describing “an injunction issued in the first instance by an appellate court” as requiring a “significantly higher justification than a request for a stay” (quoting *Respect Me*, footnote continued on next page

plainly concluded that the standard for a PIPA is the same as the standard for a preliminary injunction.²⁵² Occasionally, courts within the same circuit will apply different standards.²⁵³

The courts of appeals have likewise relied on various legal authorities to justify their issuance of PIPAs. Many courts cite *Winter* or cases that reiterate the *Winter* standard.²⁵⁴ Other courts perfunctorily trace their PIPA authority to Federal Rule of Appellate Procedure 8, which contemplates that parties may directly ask a court of appeals for a stay of a district court order, approval of a bond or security for a stay, or an injunction.²⁵⁵ Yet as a procedural rule, Rule 8

PAC v. McKee, 562 U.S. 996, 996 (2010) (mem.)); State v. Dep't of Health & Hum. Servs., 19 F.4th 1271, 1286 (11th Cir. 2021) ("Florida has failed to meet its extremely high burden and clearly establish its entitlement to a preliminary injunction pending appeal."); Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of Bos., 996 F.3d 37, 44 (1st Cir. 2021) ("When considering a request for injunctive relief pending appeal, we consider the same factors [as a district court], but the bar is harder to clear."); High Plains Harvest Church v. Polis, 835 F. App'x 372, 373 (10th Cir. 2020) ("Because Plaintiffs seek a type of injunction that is disfavored, we apply a heightened standard to their request for an injunction pending appeal.").

252. See, e.g., Doe v. S.D. Unified Sch. Dist., 19 F.4th 1173, 1176 (9th Cir. 2021) ("To determine whether to grant an injunction pending appeal, this court applies the test for preliminary injunctions."); Ohio v. Becerra, No. 21-4235, 2022 WL 413680, at *2 (6th Cir. Feb. 8, 2022) ("In determining whether to grant an injunction pending appeal, this court conducts the same general analysis it would in considering an appeal from a preliminary injunction."); Nebraska v. Biden, 52 F.4th 1044, 1046 (8th Cir. 2022) (per curiam) ("In ruling on a request for an injunction pending appeal, the court must engage in the same inquiry as when it reviews the grant or denial of a preliminary injunction." (quoting Walker v. Lockhart, 678 F.2d 68, 70 (8th Cir. 1982))).
253. Contrast *High Plains Harvest Church*, 835 F. App'x at 373 ("[W]e apply a heightened standard to [Plaintiffs'] request for an injunction pending appeal."), with *Leachco, Inc. v. Consumer Prod. Safety Comm'n*, No. 22-7060, 2023 WL 5747726, at *1 (10th Cir. Jan. 30, 2023) ("We evaluate a motion for an injunction pending appeal using the preliminary injunction standard."); contrast *State v. Dep't of Health & Hum. Servs.*, 19 F.4th at 1286 ("Florida has failed to meet its extremely high burden and clearly establish its entitlement to a preliminary injunction pending appeal." (emphasis added)), with *Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC*, No. 23-13138, 2023 WL 6520763, at *1 (11th Cir. Sept. 30, 2023) (per curiam) (reciting the *Winter* factors without engaging further); contrast *Doe*, 19 F.4th at 1176 ("To determine whether to grant an injunction pending appeal, this court applies the test for preliminary injunctions."), with *Makekau v. State*, 943 F.3d 1200, 1204 (9th Cir. 2019) ("[A] court may issue an injunction only where it is 'necessary or appropriate in aid' of the court's jurisdiction, and 'the legal rights at issue are indisputably clear.'" (citation omitted) (quoting *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401 (2012) (Sotomayor, J., in chambers))).
254. See, e.g., *Youth 71Five Ministries v. Williams*, No. 24-4101, 2024 WL 3749842, at *2 (9th Cir. Aug. 8, 2024) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)); *Alabama v. U.S. Sec'y of Educ.*, No. 24-12444, 2024 WL 3981994, at *3 (11th Cir. Aug. 22, 2024) (per curiam) (citing *Callahan v. U.S. Dep't of Health & Hum. Servs.*, 939 F.3d 1251, 1257 (11th Cir. 2019)).
255. See, e.g., *Boone Cnty. Republican Party Exec. Comm. v. Wallace*, 116 F.4th 586, 593, 599 (6th Cir. 2024) (granting an injunction pending appeal sought pursuant to Federal Rule

footnote continued on next page

cannot provide courts with any substantive power to issue injunctions.²⁵⁶ This accords with the Supreme Court's conclusion that Federal Rule of Civil Procedure 65, which analogously states the procedure for seeking and obtaining a preliminary injunction in district court, does not expand or modify the district courts' equitable authority.²⁵⁷ Finally, some courts, including the courts that have simultaneously characterized PIPAs as both "injunctions" and "stays," have relied on *Nken v. Holder* to issue PIPAs²⁵⁸—yet *Nken* unambiguously holds that courts have inherent power to issue *stays of decision*, and not injunctions.²⁵⁹ Meanwhile, because many appellate TROs are unreasoned, they lack citation to any authority.²⁶⁰

of Appellate Procedure 8(a)(2)), *vacated*, 132 F.4th 406 (6th Cir. 2025); *Commonwealth v. Beshear*, 981 F.3d 505, 508 (6th Cir. 2020) (“[W]e consider the Governor’s motion under Rule 8(a)(2).”); *Fellowship of Christian Athletes v. S.J. Unified Sch. Dist. Bd. of Educ.*, 64 F.4th 1024, 1025 (9th Cir. 2023) (en banc) (“This injunction pending appeal is issued pursuant to Fed. R. App. P. 8”); *Mock v. Garland*, No. 23-10319 (5th Cir. May 23, 2023) (order granting PIPA) (citing to Rule 8).

256. *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 556 n.26 (1974) (“The Enabling Act empowering the Supreme Court to promulgate rules of procedure commands that [s]uch rules shall not abridge, enlarge or modify any substantive right.” (alteration in original) (quoting 28 U.S.C. § 2072)); *Cavel Int’l, Inc. v. Madigan*, 500 F.3d 544, 547 (7th Cir. 2007) (“We are mindful that Chief Justice Rehnquist, in a chambers opinion . . . , held that the authority to grant such an injunction is conferred not by Rule 8 but by the All Writs Act” (citation omitted)); *Thomas v. Bryant*, 938 F.3d 134, 189 (5th Cir. 2019) (Willett, J., dissenting) (“Appellate Rule 8 does not expressly confer power; it regulates a power conferred somewhere else.”), *rev’d on reh’g en banc sub nom.*, *Thomas v. Reeves*, 961 F.3d 800 (5th Cir. 2020) (per curiam).
257. *See Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318-19 (1999) (“[T]he substantive prerequisites for obtaining an equitable remedy as well as the general availability of injunctive relief are not altered by [Rule 65] and depend on traditional principles of equity jurisdiction.” (alterations in original) (quoting 11A WRIGHT & MILLER’S FEDERAL PRACTICE & PROCEDURE § 2941 (2d ed. 1995))).
258. *See State v. Dep’t of Homeland Sec.*, 88 F.4th 1127, 1133 (5th Cir. 2023) (reciting the *Nken* test for granting a “stay”), *vacated*, 144 S. Ct. 715 (mem.), *modified*, 123 F.4th 186 (5th Cir. 2024). *But see id.* at 1136 (“Because Texas has carried its burden under the *Nken* factors, we grant its request for an injunction pending appeal.” (capitalization altered)); *Mock v. Garland*, No. 23-10319 (5th Cir. May 23, 2023) (order granting PIPA) (citing to *Nken* to justify granting the PIPA); *Roberts v. Neace*, 958 F.3d 409, 413, 416 (6th Cir. 2020) (per curiam) (citing to *Nken* and issuing an order described as both a “stay pending appeal” and an “injunction pending appeal”); *Grimmett v. Freeman*, No. 22-1844, 2022 WL 3696689, at *1 (4th Cir. Aug. 25, 2022) (per curiam) (referencing the *Nken* standard).
259. *See* 556 U.S. 418, 429 (2009) (“A stay ‘simply suspend[s] judicial alteration of the status quo,’ while injunctive relief ‘grants judicial intervention that has been withheld by lower courts.’” (alteration in original) (quoting *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm’n*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers))).
260. *See generally, e.g., Nebraska v. Biden Emergency Admin. Stay*, *supra* note 2; *Missouri v. Biden Emergency Admin. Stay*, *supra* note 5, at *1.

Insofar as litigants may continue forum shopping for injunctive relief after *CASA*,²⁶¹ the lack of doctrinal clarity surrounding PIPAs will encourage litigants to treat forum shopping as a two-tiered strategic gambit. To maximize their odds of securing relief, litigants will file suit in the most favorable districts within the most favorable circuits. For example, after the Eighth Circuit issued its unprecedented, sweeping appellate TRO and PIPA in *Nebraska v. Biden*, litigants again filed suit in *Missouri v. Biden*, which challenged the Biden Administration's second student debt relief policy, in the *same* district court (and, accordingly, again in the Eighth Circuit).²⁶² Although there was a strong "hook" for filing both cases in the Eastern District of Missouri—federal student loan servicer MOHELA is a Missouri-owned corporation—the plaintiffs were a geographically diverse group of states that could have filed suit elsewhere.²⁶³ Indeed, the only case that the *Missouri v. Biden* appellate TRO motion cited was *Nebraska v. Biden*, and appellants beseeched the court to "grant an immediate administrative stay" just as it did "last time" in that case.²⁶⁴

Conclusion

If *CASA* teaches us anything, it is that injunctive power must be grounded in statutory authority and judicial modesty. Yet the courts of appeals have strayed from both of these precepts. By issuing PIPAs and appellate TROs, they have arrogated to themselves a power that Congress never conferred: the power to issue de novo injunctions untethered to district court judgments, findings, or discretion. These orders have allowed the courts of appeals to function as trial courts in high-stakes, politically charged cases. They have thus upended the tripartite division of labor within the federal courts.

The consequences are profound. As the Court in *CASA* warned, "new, potent remed[ies]"—perhaps including PIPAs and appellate TROs—"pose[] new, potent

261. See Mila Sohoni, *Trump v. CASA and the Future of the Universal Injunction*, SCOTUSBLOG, (July 2, 2025, 1:51 PM), <https://perma.cc/SK2P-F74R> (predicting that "litigants will have an incentive to forum shop for a court that will find that a universal remedy is necessary to give complete relief to the plaintiffs and/or for a court that will likely certify a nationwide class or vacate a rule").

262. See generally *Missouri v. Biden*, 738 F. Supp. 3d 1113, 1123, 1129 (E.D. Mo. June 24, 2024), *aff'd sub nom.*, *Missouri v. Trump*, 128 F.4th 979 (8th Cir. 2025).

263. Cf. Complaint at 27, *Missouri v. Biden*, 738 F. Supp. 3d 1113 (No. 24-cv-00520), ECF No. 1 ("The Higher Education Loan Authority of the State of Missouri ('MOHELA') is 'a public instrumentality and body corporate' of the State of Missouri that performs 'an essential public function' by providing residents access to student loans." (quoting MO. REV. STAT. § 173.360)); see *id.* at 1, 27 (listing plaintiffs in caption and discussing MOHELA).

264. See Emergency Motion for Administrative Stay Pending Ruling on Motion for Injunction Pending Appeal at 4, 6, *Missouri v. Trump*, 128 F.4th 979 (8th Cir. 2025) (Nos. 24-2332 & 24-2351), 2024 WL 3462265, ECF No. 15.

risks.”²⁶⁵ When the courts of appeals wield injunctive power without deference, factual grounding, procedural transparency, or even bare jurisdiction, they not only encroach on the district courts, but they also undermine the credibility of the entire judiciary.

The Supreme Court must clearly delineate the limits of appellate injunctive authority and reaffirm that the power to enjoin—especially in the first instance—belongs to the trial courts unless Congress provides otherwise. Until then, PIPAs and appellate TROs will continue to threaten structural and jurisprudential harm.

265. See *Trump v. CASA, Inc.*, 145 S. Ct. 2540, 2559 n.16 (2025).