NO. 17-3219

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

COLONEL BILL BRYANT, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE ARKANSAS STATE POLICE — APPELLANT

V.

MICHAEL ANDREW RODGERS AND GLYNN DILBECK — APPELLEES

On Interlocutory Appeal from the United States District Court for the Eastern District of Arkansas, Case No. 4:17-cv-00501-BRW
The Honorable Billy Roy Wilson, Presiding Judge

APPELLEES' RESPONSE TO APPELLANT'S PETITION FOR REHEARING EN BANC

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INTRODUCTION

Having lost its appeal of the preliminary injunction on the merits, the Director of the Arkansas State Police now complains about the scope of the preliminary injunction granted by the District Court. His principal complaint raises the specter of universal or nationwide injunctions—though universal or nationwide injunctions were not issued in this case. He then complains about the scope of the injunction granted because it prohibits enforcement in Arkansas of a facially invalid and unconstitutional provision of the Arkansas Anti-Loitering Statute. Rehearing en banc—or by the panel under Eighth Circuit Local Rule 40A(b)—should be denied because the scope of the injunction is appropriate on these facts.

ARGUMENT

I. The State's petition for rehearing en banc should be denied.

A. The State attempts to interject the issue of nationwide or universal injunctions, which is not at issue in this case.

Broadly attacking the issuance of nationwide or universal injunctions, the State raises the specter of such injunctions in this action. (Pet. for Rehrg. En Banc, at 1.) Despite the State's hyperbole, the instant case does not raise one of the most "hotly contested legal questions of our time." (Pet. for Rehrg En Banc, at 1.) To the contrary, this case is not a proper vehicle for deciding issues related to universal injunctions as this case involves an injunction that is neither "nationwide," nor "universal."

As the panel noted, this case does not involve federal policy decisions with nationwide implications, nor does it involve the same concerns as a nationwide injunction, *Rodgers v. Bryant,* 301 F.Supp.3d 928 (E.D. Ark. 2017), *aff'd* 942 F.3d 451, 458 n. 4 (8th Cir. 2019) (citing Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U.L. Rev. 1065, 1104-15 (2018)). This case thus differs from such cases as *Texas v. United States,* 86 F.Supp.3d 591, 604 (S.D. Tex), *aff'd* 809 F.3d 134

(5th Cir. 2015), *aff'd* 136 S. Ct. 2271 (2016) (affirming by equally divided Supreme Court the injunction enjoining DACA); *Texas v. United States,* 201 F.Supp.3d 810, 835-36 (N.D. Tex. 2016) (enjoining Department of Education's guidance on transgender students in public schools); *Franciscan All., Inc. v. Burwell,* 227 F.Supp.3d 660, 696 (N.D. Tex. 2016)(enjoining federal regulation requiring federal contractors to report labor violations); *City of Chicago v. Sessions,* 364 F.Supp.3d 933, 951-52 (N.D. Ill. 2017) (enjoining withholding of federal funds based on City's refusal to assist federal immigration officials); *County of Santa Clara v. Trump*, 250 F.Supp.3d 497, 539 (N.D. Cal. 2017) (enjoining withholding of federal funds based on County's refusal to assist federal immigration officials); and *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.,* 279 F.Supp.3d 1011, 1049-50 (N.D. Cal. 2018) (enjoining rescission of DACA status for nearly 700,000 children), which did involve federal policy and nationwide injunctions.

To the contrary, this case involves only a facial challenge to one subparagraph of the Arkansas Anti-Loitering Statute, Ark. Code Ann. §5-71-213 (2017)—a criminal statute applicable only in Arkansas. Ark. Code Ann. § 5-1-104(a) (Repl. 2013)(detailing territorial limitations of

Arkansas criminal law). The injunction only prohibits enforcement of this one subparagraph held unconstitutional in Arkansas. *Rodgers*, 301 F.Supp.3d at 937. If the State seeks to address the issue of nationwide injunctions, this case does not raise the issue, and is not an appropriate vehicle to address nationwide, universal injunctions. Addressing such injunctions is not an appropriate basis for rehearing en banc (or by the panel). The State's petition should, therefore, be denied.

B. The statewide injunction was proper to address the harm sought to be remedied in this facial—not as-applied— challenge to the Arkansas Anti-Loitering Statute.

This case was brought as a facial challenge to the constitutionality of Ark. Code Ann. § 5-71-213(a)(3). *Rodgers,* 301 F.Supp.3d at 928. The District Court held that §5-71-213(a)(3) is a content-based restriction on speech, not narrowly tailored to promote a compelling governmental interest. *Id.* at 934, 936. The District Court thus held that the Arkansas Anti-Loitering Statute was "plainly unconstitutional," not just "likely" unconstitutional. *Id.* at 937. The State concedes this result. Yet, the State now complains about the scope of the District Court's injunction, which was proper. The issue before this Court is simply: did the District Court abuse its discretion in granting injunctive relief to the Plaintiffs by finding the State could not enforce a "plainly unconstitutional" law, rather than limiting the injunction to only the plaintiffs? Messers. Rodgers and Dilbeck contend neither the District Court nor this Court's panel erred.

All three panel members agreed that Messers. Rodgers and Dilbeck had standing to bring a facial First Amendment challenge, that they would likely succeed in proving that statute was facially invalid,

and that they were each entitled to a preliminary injunction. *Rodgers,* 942 F.3d at 460 (Stras, J., concurring in part and dissenting in part). In other words, the panel agreed the law was unconstitutional as written, that it had no legitimate application, and that its enforcement as to the plaintiffs should be enjoined. *Id.*

Judge Stras's disagreement with the panel's conclusions was limited only to the scope of the injunction issued. *Id*. at 460. He did not find the statute had a legitimate application. *Id.* Rather, he objected to a statewide preliminary injunction for two reasons: (1) such relief was not available in 18th Century English Chancery Courts; and (2) the District Court abused its discretion in awarding a statewide injunction because the finding of unconstitutionality was preliminary and the factors mandated by *Dataphase* Sys., *Inc. v. C L Sys., Inc.*, 640 F.2d 113 (8th Cir. 1981)(en banc) should not be presumed to permit to a statewide injunction.[1] *Rodgers,* 942 F.3d at 460-63.

The State's suggestion that this decision creates conflicts among precedent is in error. (Pet. for Rehrg. En Banc at 5.) The panel's

[1]Judge Stras apparently concluded all the *Dataphase* factors were met with regard to Plaintiffs. *See id.*

holding does not conflict with Supreme Court, Eighth Circuit or other circuit court precedent. Rather, the panel's decision applies a longstanding principle of equity jurisprudence that "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." *Rodgers,* 942 F.3d at 458 (quoting *Califano v. Yamasaki*, 442 U.S. 682,702 (1979)). It also reflects the Supreme Court's rulings in facial challenges to statutes under the First Amendment, where, as here, "[t]here is a potential for extraordinary harm and a serious chill upon protected speech" and such "potential for harm extends beyond the parties." *Id.* at 459 (quoting *Ashcroft v. Am. Civil Liberties Union,* 542 U.S. 656, 671 (2004)); *see also John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010) (stating a preliminary injunction may "reach beyond the particular circumstances of [the] plaintiffs" if they "satisfy our standard for a facial challenge," as Plaintiffs have done here). Indeed, the dissent acknowledges as much. *Rodgers,* 942 F.3d at 466 ("To be sure, as the court claims, showing a

strong likelihood of success on the merits *generally* entitles a plaintiff to a preliminary injunction in First Amendment cases.")(citation omitted).

The dissent and Appellant, however, attempt to convert the panel's finding that the anti-loitering statute was facially invalid—such that it could not be legitimately enforced under any circumstances—into a law that is only unconstitutional *as applied* to the particular facts of Plaintiffs' circumstances. This shift contravenes the panel's opinion, which upheld the District Court's finding that the statute was facially invalid, and a statewide injunction appropriate as such findings "in no way depended on facts unique to Rodgers and Dilbeck." *Rodgers,* 942 F.3d at 458. None of the cases relied upon by Colonel Bryant in support of his petition involve facial challenges under the First Amendment. They are neither precedential nor persuasive and are not relevant here, where the District Court did not presume the plaintiffs entitled to broad relief, but instead, examined the impracticability of more narrow relief, and exercised its discretion in fashioning such relief. *Rodgers,* 942 F.3d at 460.

C. Whether a Court of Chancery in 18th Century England permitted nationwide injunctions is not a convincing rationale to justify rehearing by this Court.

The dissent argues the statewide preliminary injunction did not exist in 18th century English Courts of Chancery. The argument is not persuasive because in instances like this, the King of England could not be enjoined at all.

Sir William Blackstone observed "[t]he law ascribes to the King the attribute of sovereignty." 1 William Blackstone, *Commentaries,* *242. The King was thus "sovereign and independent within these his dominions … and owes no kind of subjection to any other potentate upon earth." *Id.* at *242. Blackstone continued "Hence, it is that no suit or action can be brought against the King, even in civil matters, because no court can have jurisdiction over him." *Id.*

Blackstone noted that the common law left English subjects limited remedies for invasions of their rights by the Crown. *Id.* As to private injuries, English subjects could petition the King in his Court of Chancery, where "his chancellor will administer right as a matter of grace, though not upon compulsion." *Id.* at *243. For cases of public oppression, the common law noted indictments and parliamentary

impeachments were the remedy for "evil counsellors" and "wicked ministers," who might assist the King in acts contrary to the law. *Id.* at *244. This view existed in part because the law viewed the King not only as incapable of doing wrong, but incapable of even thinking wrongly, so the sovereign was not answerable personally to the people for exceptionable conduct in his public affairs. *Id.* at *246. As a result, if induced to grant a franchise or privilege contrary to reason or prejudicial to the commonwealth or a private person, the law concluded the King was not unwise or intending an injury, but rather that the King must have been deceived, such that the grant was void due to fraud and deception either by the agents of the Crown or upon them. *Id.*

Even before the Courts of Chancery, however, the King long had the ability to grant equitable relief broadly beyond just the parties. *See Men of Canterbury* (c. 1148) (ordering that no one interfere with the men of Canterbury going to or coming from the mill), *reported in* Melville Bigelow, *Placita Anglo-Normanica: Law Cases from William I to Richard I* 159 (Little Brown & Co. 1879); *Abbott Faritius v. Ared* (c. 1108)(ordering Ared, the King's falconer and the King's foresters to

permit the Abbott to take away wood), *reported in* Bigelow, *supra*, at 96. This Court, however, need not concern itself with the finer details of 18th Century Chancery practice in England.

While historically interesting, the record on 18th Century Chancery practice is at best inconclusive. Clearly, some ability to grant relief beyond the parties existed. Yet, resort to the finer points of another nation's practice more than two hundred years ago is not particularly convincing. While the equity practice at the time the United States revolted against English rule to establish its own separate nation may provide a convenient starting point for analysis, nothing requires this court, or any American court to follow 18th Century English Chancery practice. In fact, this Court ought not to defer to an 18th Century English practice, only to ignore over 200 years of intervening American precedents. That is particularly true given that successful facial challenges to unconstitutional laws deserve remedies protecting fundamental individual liberties, like speech, from government infringement.

D. The panel properly decided that the District Court did not abuse its discretion when it issued a statewide injunction.

The panel considered whether the District Court had abused its discretion in imposing a statewide preliminary injunction and concluded that it did not. *Rodgers,* 942 F.3d at 458. The District Court made specific findings that the provision at issue is "plainly unconstitutional," that Arkansas suffers no injury from not enforcing a "plainly unconstitutional law," and that it is in the public interest that the State not enforce this provision. *Id.* Thus, all *Dataphase* factors were satisfied. *Id.* The District Court stated "I can think of no injury caused by preventing Defendant from enforcing a law that is plainly unconstitutional—particularly considering other laws cover the concerns raised by Defendant." *Rodgers,* 301 F.Supp.3d at 937. The State cannot have a legitimate interest in continuing to enforce an unconstitutional speech restriction on speakers who are not parties to this action, especially in the extremely unlikely event that State could later prove the law to be constitutional. *Id.* Indeed, this Court has permitted broad injunctions with little more justification than was

offered by the District Court. *See, e.g., Minn. Citizens Concerned for Life, Inc. v. Swanson,* 692 F.3d 864, 870 (8th Cir. 2012)(en banc).

The panel correctly found the chances of the State later proving the law constitutional to be remote—a conclusion borne out by the record evidence. *Rodgers,* 942 F.3d at 458. The State offered no justification for the law's discriminatory singling out of panhandlers. *Rodgers,* 301 F.Supp.3d at 932-33. The panel also correctly found this remote chance was insufficient under Eighth Circuit precedent to overcome the public's interest in protecting First Amendment freedom of expression before a final ruling is rendered. *Rodgers,* 942 F.3d at 458-59 (citing *Phelps-Roper v. Nixon,* 545 F.3d 685, 690 *overruled on other grounds by Phelps-Roper v. City of Manchester,* 697 F.3d 678, 692 (8th Cir. 2012)); *see also Sanders Cty. Republican Cent. Comm. v. Bullock,* 698 F.3d 741, 749 (9th Cir. 2012); *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 641 (9th Cir. 2004).

The panel also correctly affirmed that Plaintiffs carried their substantial burden under *Rounds'* deferential analysis when challenging a "duly enacted state statute" by proving they were likely to succeed on the merits. *Rodgers,* 942 F.3d at 459 (discussing *Planned*

Parenthood Minn., N.D., S.D., v. Rounds, 530 F.3d, 724, 732 (8th Cir. 2008)). In fact, the District Court held not merely that Plaintiffs had met their substantial burden under *Rounds* showing not just that the Statute was "likely unconstitutional," but that it was "plainly unconstitutional." *Id.* The panel correctly observed that *Rounds* does not impose any of the additional burdens proposed by the dissent on a plaintiff seeking statewide relief and that considering this finding, as well as the other findings of the District Court discussed in the panel's opinion, the statewide injunction was entirely justified. *Id.*

The panel also rightly rejected the notion that every plaintiff seeking statewide relief has to seek class certification, instead holding that broad preliminary relief is appropriate to protect fundamental speech rights when, as here, a District Court has sustained a facial challenge to a state statute. *Id.* at 458-59. *See also John Doe No. 1*, 561 U.S. at 194.

The panel is correct that requiring a panhandler to file a class action would impose an obstacle to the relief historically provided by a successful facial challenge. To maintain a class action, the plaintiffs would have to prove, among other things, that they are adequate

representatives of a proposed class of panhandlers. Fed. R. Civ. P. 23(a)(4). The State's litigation history shows that it would hotly contest an assertion of adequacy of representation. *See Def.'s Opp. to Motion for Class Cert.* at 3, *Planned Parenthood of Ark. & Okla., d/b/a Planned Parenthood of Heartland v. Selig,* Case No. 16CV8003 (8th Cir. Mar. 8, 2016). Given the limited resources of panhandlers, imposing an extra burden of requiring class certification in a case like this one—where the District Court and the panel agreed the statute has no legitimate application to anyone—makes little sense.

E. Less than a statewide injunction would chill the First Amendment rights of Plaintiffs and others.

The State does not dispute that the defects found by the District Court and affirmed by the panel which make the Anti-Loitering Statute unconstitutional apply to all potential applications of the facially invalid provision. The First Amendment protects free speech from being improperly chilled, including the speech of Messers. Dilbeck and Rodgers, and others. *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973).

The practical difficulties inherent in a narrower injunction illustrate that, absent a statewide injunction, the speech of both

Plaintiffs and other parties not before the Court would be improperly chilled. If the injunction were limited to just Plaintiffs, they could continue to panhandle, yet, it is not clear how they would do so without having their speech repeatedly chilled and their First Amendment rights violated. The dissent argues that although Plaintiffs personally faced "the threat of irreparable harm" a narrower injunction would have "fully remedied this[,]" and that "[a]n injunction directing the state police not to arrest 'them'" would provide Plaintiffs complete relief. *Rodgers,* 942 F.3d at 466. This assumption is incorrect. As argued to the District Court, narrower relief to Plaintiffs is impracticable. *Id.* at 466 n. 9.

Less than a statewide ban would be completely unworkable and fail to prevent the State from violating the plaintiffs' First Amendment rights, effectively chilling their speech. *Lemon v. Kurtzman,* 411 U.S. 192, 200 (1973). Absent approaching them to ask for identification, how could a law enforcement officer from the state police or from another agency where Plaintiffs panhandle distinguish them from other panhandlers? At a minimum, Plaintiffs would have to have and to carry identification and the District Court's order while panhandling.

Investigatory stops and requests for identification would subject them to unwanted attention from law enforcement each time they attempted to exercise their free speech rights. Undoubtedly, such intrusions would chill their exercise of their fundamental rights.

With a less than statewide ban, panhandlers other than Plaintiffs would be subjected to the same intrusive requests for identification in order to allow officers to establish the panhandlers are not Plaintiffs, and thus subject to arrest under a law already determined facially unconstitutional. "[T]here is a potential for extraordinary harm and a serious chill upon protected speech" and such "potential for harm extends beyond the parties." *Ashcroft,* 542 U.S. at 671. It is difficult to imagine a scenario that would encourage a more widespread chilling effect on the rights of panhandlers than enforcement of this unconstitutional provision under less than a statewide injunction.

It is also difficult to conceive of a scenario less likely to serve the Arkansas public's interest to prevent governmental intrusion into constitutionally-protected rights. While the dissent complains that neither the District Court, nor the panel offered any reason to believe that protecting Plaintiffs' speech rights depends on preventing

enforcement of the anti-loitering law against everyone else, that does not accurately address the District Court's conclusion. The District Court observed that this provision of the Anti-Loitering law was "plainly unconstitutional," that preventing the State from enforcing an unconstitutional law would cause "no injury," and that the public interest was best served by preventing governmental intrusion on fundamental speech rights, and by saving taxpayers' resources from being wasted on prosecuting panhandlers under this provision. *Rodgers*, 301 F.Supp.3d at 937. That is particularly so, since as the District Court observed, other criminal statutes apply to all of the conduct the State had articulated as concerns. *Id.* at 934-36. As a result, the District Court appropriately considered these factors and did not err in establishing the scope of its injunction.

CONCLUSION

For the foregoing reasons, the Petition for Rehearing en banc and by the panel should be denied.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Eighth Circuit Rule 28A(c), the undersigned certifies that this response complies with the applicable type-volume limitations and that, exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 32(f), this response contains 3,218 words. This certificate was prepared in reliance on the word count of the word processing system (Microsoft Word 2010) used to prepare this response. The undersigned also certifies that this document complies with the typeface requirements of Fed. R. App. P. 32(a)(5)-(6) and Eighth Circuit Rule 28A(c) because the document was prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century Schoolbook font. The undersigned also certifies that pursuant to Local Rule 28A (h)(2) the electronic copy of the response has been scanned for viruses and the electronic copy is virus-free.

/s/Bettina Brownstein
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 13, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which shall send notification of such filing to CM/ECF participants including:

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