Note

Get in, Litigants: We're Going Judge Shopping!

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Abstract

Judge shopping, which is distinct from forum shopping, refers to the practice of plaintiffs strategically filing lawsuits in jurisdictions where they have a high probability of drawing a judge who will be favorable to them. Over the past few years, judge shopping has increasingly come under scrutiny, particularly where plaintiff states like Texas have employed the practice in lawsuits against the federal government with high success rates. In response, the Department of Justice undertook a new strategy to combat judge shopping by filing motions to transfer venue away from the judge-shopped federal district courts in which it was sued. Texas federal judges, however, have largely been unreceptive to these motions to transfer, thereby allowing the effects of judge shopping to stand and causing a need for reform.

To solve this problem, this Note proposes amending the general federal venue statute, 28 U.S.C. § 1391(e), to require actions initiated by plaintiff states against the federal government to be filed in their respective state capitals unless a substantial part of the events or omissions giving rise to the claim occurred in a different judicial district in the state, thereby making it a more appropriate

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* J.D., expected May 2025, The George Washington University Law School; B.Sc. 2020, The London School of Economics and Political Science. I extend my deep thanks to Professor Steve Vladeck for inspiring me to write about this topic. I am also grateful to Professor JP Collins for his guidance and feedback on this piece. I thank the editors—particularly Brian Smallshaw—of *The George Washington Law Review* for selecting and preparing this piece for publication. Finally, I would like to sincerely thank my parents, friends (with a special shoutout to Elanor Sands), and partner for their steadfast support throughout this thrilling journey.

venue. Relatedly, this Note also suggests modification of the Gulf Oil Corp. v. Gilbert *public interest factor analysis for motions to transfer, including according strong weight to the interest of justice as a separate, explicit factor supporting transfer in judge-shopped cases, as well as establishing a presumption in favor of transfer when equitable relief is sought on a nationwide basis.*

Table of Contents

Introduction 160
I. Judge Shopping Explained and Applied 163
A. *Local Court Rules and the Assignment of Cases to Judges in Texas* 166
B. *Texas's Use of Single-Judge Districts to Challenge Executive Action* 169
C. *Federal Venue Requirements and Department of Justice Motions to Transfer Venue* 171
D. *Judge Shopping and Nationwide Injunctions* 174
II. Moving Away from Judge Shopping 176
A. *Issues with Existing Proposals and Solutions* 176
B. *Analysis of Emerging Caselaw Rejecting Department of Justice Motions to Transfer* 179
III. Reforming Venue Requirements and the *Gilbert* Analysis to Curb Judge Shopping 182
A. *Congress Should Amend 28 U.S.C. § 1391(e)* 182
B. *Courts Should Focus the* Gilbert *Analysis on the "Interest of Justice" and Relief Sought* 186
Conclusion 188

Introduction

Immigration. Environnent. Vaccines. Abortion. Adoption. Medicare. Medicaid. Transgender protections. The list goes on. Between January 2021 and October 2024, the State of Texas collectively sued the federal government more than fifty times over these issues and others.[1] Texas filed almost two-thirds of these cases in divisions where a single judge heard at least 95 percent of that division's cases.[2] In one case, the judge vacated federal guidance promulgated by the Equal Employment Opportunity Commission ("EEOC") regarding workplace protections

[1] Steve Vladeck (@steve_vladeck), X (Oct. 24, 2024, 9:36 AM), https://x.com/steve_vladeck/status/1849444857539883335?s=43&t=L887NIdKkws1GJNzhLYl5A [https://perma.cc/P54G-XRM4].

[2] *Id.*

for LGBTQ+ employees.[3] In another, a judge enjoined the Environmental Protection Agency ("EPA") from implementing a federal rule interpreting the Clean Water Act.[4] And in a third, Texas explicitly acknowledged its strategy of repeatedly filing lawsuits in the same divisions.[5] This practice, referred to as judge shopping, has skyrocketed over the past few years, particularly concerning legal challenges by states against federal rules and action.[6] To be clear, the concept of litigants filing lawsuits in advantageous fora is not new and has even been recognized by the Supreme Court.[7] In fact, over the last several years, states have strategically exploited venue to challenge policies implemented by both Republican and Democratic administrations in favorable fora.[8] Judge shopping, however, takes this practice one step further, as litigants seek not only to choose the *forum* in which they file their claim but also the specific *judge* who will hear their suit.[9]

Perhaps surprisingly, the current legal framework constitutes no bar to judge shopping; case assignment across federal district courts is not required to be randomized and remains within the discretion of each district's chief judge.[10] In Texas, this discretion has led to a system of case assignments that gives a handful of judges a disproportionately high percentage of—if not all—cases filed in certain divisions.[11] Aided by permissive federal venue requirements and a body of caselaw establishing that states are resident everywhere within their borders, plaintiff states like Texas need not argue that the single-judge divisions in which they file have any meaningful connection to the challenged federal action.[12] In other words, in suits against the federal government, a state can file in *any* of its internal judicial districts for venue to be proper.[13] As a result, motions to transfer venue that are put forward by the federal

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3 Texas v. EEOC, 633 F. Supp. 3d 824, 847 (N.D. Tex. 2022).

4 33 U.S.C. §§ 1251–1387; Texas v. EPA, 662 F. Supp. 3d 739, 758–59 (S.D. Tex. 2023).

5 *See* Transcript of Motion Hearing at 45, Texas v. DHS, No. 6:23-CV-00007, 2024 WL 1021068 (S.D. Tex. Mar. 8, 2024), ECF No. 55-1 ("THE COURT: . . . Why are you filing in Victoria? MR. OLSON: The case is being filed in Victoria, quite frankly, Your Honor, because of our experience with you . . . ."); *see also id.* (Mr. Olson acknowledging that "our office chooses to file in seven divisions over and over").

6 Steve Vladeck, *The Growing Abuse of Single-Judge Divisions*, One First (Mar. 13, 2023), https://stevevladeck.substack.com/p/18-shopping-for-judges [https://perma.cc/X9GJ-VD6N].

7 *See* discussion *infra* Section I.D.

8 *See* discussion *infra* Part I.

9 See discussion *infra* Part I.

10 28 U.S.C. § 137.

11 See discussion *infra* Section I.A.

12 *See* 28 U.S.C. § 1391(c), (e); Atlanta & F.R. Co. v. W. Ry. Co., 50 F. 790, 791 (5th Cir. 1892); California v. Azar, 911 F.3d 558, 570 (9th Cir. 2018).

13 28 U.S.C. § 1391(c), (e); *Atlanta & F.R. Co.*, 50 F. at 791; *Azar*, 911 F.3d at 570.

government are outright rejected on the basis that judge shopping does not violate any jurisdictional requirements.[14]

As an example, one of Texas's first lawsuits against the Biden Administration was filed in January 2021—just two days after President Biden took office—and challenged the Department of Homeland Security's ("DHS") temporary pause on deportations.[15] Texas chose to file the case not in Austin or Houston—its seat of government and most populous city, respectively—but in Victoria, where it had a 100% probability of drawing Judge Drew Tipton, a President Trump appointee.[16] Following Texas's motion for a preliminary injunction and briefing on the legal issues, Judge Tipton granted Texas's motion and entered a nationwide injunction against the defendants.[17] As such, the court's relief extended not only to Texas but also to every other state across the country.[18] Texas's strategy was remarkably calculated and effective: it filed suit in a division where it knew with certainty the judge who would be assigned to the case, then sought—and was granted—relief enjoining the government's policy across the country.[19] And nothing in the law prevented Texas from doing so.[20]

Even if judge shopping is not legally impermissible, the ability of litigants to handpick their judges, particularly in cases seeking to enjoin or vacate federal action on a nationwide basis, is cause for great concern.[21] Such a practice also implicates questions of fundamental fairness and, in the context of patent litigation, led Chief Justice Roberts to acknowledge in 2021 "that case assignment procedures allowing [a] party filing a case to select a division of a district court might, in effect, enable the plaintiff to select a particular judge to hear a case" and that solving the issue is "important to public confidence in the courts."[22] A similarly pressing concern should persist for nonpatent cases, leading to the strong need for reform in this area.

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14 *See, e.g.*, Texas v. DHS, 661 F. Supp. 3d 683, 687 (S.D. Tex. 2023) (denying motion to transfer).

15 Complaint at 2, 6–7, Texas v. United States, 524 F. Supp. 3d 598 (S.D. Tex. 2021) (No. 6:21-cv-00003), ECF No. 1.

16 Vladeck, *supra* note 6; *Drew Tipton*, Ballotpedia, https://ballotpedia.org/Drew_Tipton [https://perma.cc/J9KQ-W4K8].

17 Texas v. United States, 524 F. Supp. 3d at 667.

18 *Id.* at 667–68.

19 *See* Vladeck, *supra* note 6; Texas v. United States, 524 F. Supp. 3d at 667–68.

20 *See* 28 U.S.C. § 137; *id.* § 1391(b)–(c).

21 *See* DHS v. New York, 140 S. Ct. 599, 601 (2020) (mem.) (Gorsuch, J., concurring in the grant of stay) ("Because plaintiffs generally are not bound by adverse decisions in cases to which they were not a party, there is a nearly boundless opportunity to shop for a friendly forum to secure a win nationwide.").

22 John G. Roberts, Jr., 2021 Year-End Report on the Federal Judiciary 5 (2021), https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf [https://perma.cc/4CRM-9K75].

Much of the tension and issues inherent in judge shopping can be distilled into two strands: how to grapple with states' residencies under the federal venue statute[23] and how to apply the motion to transfer analysis established under *Gulf Oil Corp. v. Gilbert*.[24] Each of these contributes distinctly to the judge shopping problem: the former enables judge shopping by permitting states to file suit in any district within its borders, while the latter has thus far failed to function as a stopgap when the venue has been selected by a state to shop for a certain judge.[25] Therefore, to effectively counter the practice of judge shopping, any solution should adequately address both venue and transfer considerations.

Part I of this Note examines the foundations and context for recent judge shopping practices, particularly as applied to suits by Texas against the federal government.[26] Part II analyzes existing proposals and solutions, and emerging caselaw that can be used as a basis for reform moving forward.[27] Finally, Part III proposes two interrelated solutions to address issues inherent in judge shopping.[28] First, Congress should amend the general federal venue statute to require actions initiated by plaintiff states against federal executive action to be filed in their respective state capitals unless a substantial part of the events or omissions giving rise to the claim occurred in a different judicial district in the state, thereby making it a more appropriate venue.[29] Second, this Note suggests modifying the *Gulf Oil Corp. v. Gilbert* public interest factor analysis for motions to transfer,[30] including according strong weight to the interest of justice as a separate, explicit factor supporting transfer in judge-shopped cases, as well as establishing a presumption in favor of transfer when equitable relief is sought on a nationwide basis.[31]

I. Judge Shopping Explained and Applied

Forum shopping refers to the action of a litigant who seeks "to have his action tried in a particular court or jurisdiction where he feels

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23 28 U.S.C. § 1391.

24 330 U.S. 501, 508–09 (1947); *see also* discussion *infra* Part III.

25 *See infra* Part III.

26 *See infra* Part I.

27 *See infra* Part II.

28 *See infra* Part III.

29 *See infra* Section III.A. The phrase "a substantial part of the events or omissions giving rise to the claim occurred" is drawn from the general federal venue statute itself. 28 U.S.C. § 1391(b)(2). This phrase is repeated throughout this Note to preserve consistency in the language of the statute while proposing a novel amendment to § 1391(e).

30 *See* 330 U.S. 501, 508–09 (1947).

31 *See infra* Section III.A.

he will receive the most favorable judgment or verdict."[32] As a practical matter, forum shopping is historically rooted and not necessarily negative; the justice system recognizes that where venue is appropriate in multiple jurisdictions, a plaintiff might seek redress in the most favorable forum.[33] As relevant here, forum shopping in lawsuits against the government has been widely employed against both Republican and Democratic administrations; for example, in *Hawai'i v. Trump*,[34] involving President Trump's "Muslim ban,"[35] many viewed the selection of Hawai'i as an instance of forum shopping that was likely to benefit the challengers.[36] Groups challenging executive action taken by conservative administrations are also likely to file suit in Democratic-leaning states like California and Washington.[37] On the other hand, in multistate challenges to President Biden's Occupational Safety and Health Administration ("OSHA") vaccine mandate, Republican attorneys general ("AGs") forum shopped in more conservative jurisdictions.[38]

Judge shopping, however, is distinct from forum shopping and refers to "when an attorney specifically chooses what judge their case [will] be heard in front of in order to inflate their chances of a preferable

32 Denise Cartolano, *How the Lone Star State Reached the Entire Nation: The Need to Limit the Nationwide Injunction Against DAPA and DACA in* United States v. Texas, 12 FLA. A&M U. L. REV. 135, 151 (2016) (quoting Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1677 (1990)).

33 *See* Atl. Marine Constr. Co. v. U.S. Dist. Ct., 571 U.S. 49, 63 (2013) ("Because plaintiffs are ordinarily allowed to select whatever forum they consider most advantageous (consistent with jurisdictional and venue limitations), we have termed their selection the 'plaintiff's venue privilege.'" (quoting Van Dusen v. Barrack, 376 U.S. 612, 635 (1963))); *see also* Pamela K. Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 NOTRE DAME L. REV. 579, 583 (2016) (arguing forum shopping is "importan[t] in protecting access to justice, promoting regulatory enforcement, and propelling substantive and procedural reform").

34 245 F. Supp. 3d 1227 (D. Haw. 2017), *aff'd in part, vacated in part*, 859 F.3d 741 (9th Cir. 2017), *vacated*, 583 U.S. 941 (2017).

35 *Id.* at 1231.

36 *See* Matthew Erickson, Note, *Who, What, and Where: A Case for a Multifactor Balancing Test as a Solution to Abuse of Nationwide Injunctions*, 113 NW. U. L. REV. 331, 338–39 (2018); *see also* Alexander Burns, *Hawaii Sues to Block Trump Travel Ban; First Challenge to Order*, N.Y. TIMES (Mar. 8, 2017), https://www.nytimes.com/2017/03/08/us/trump-travel-ban-hawaii.html [https://perma.cc/4UUB-LJDT] (detailing that the Hawai'i Attorney General, Doug Chin, said the travel ban "stirred strong opposition in Hawaii" and that Mr. Chin had "shown an appetite for challenging Mr. Trump in recent weeks").

37 Nadin R. Linthorst, *Entering the Political Thicket with Nationwide Injunctions*, 125 PENN ST. L. REV. 67, 86 (2020) (listing multiple such lawsuits filed against the United States Department of Agriculture in California).

38 *See* Elysa M. Dishman, *Calling the Shots: Multistate Challenges to Federal Vaccine Mandates*, 96 S. CAL. L. REV. POSTSCRIPT 15, 31 (2023) ("[E]very state led by a Republican AG located in the Ninth Circuit Court of Appeals joined a multistate action in a different circuit court of appeals.").

outcome."[39] As an illustration, during President Obama's tenure, Texas routinely filed suit challenging executive action in divisions of its federal districts where it was highly likely, if not guaranteed, to be assigned a favorable judge.[40] Over the past few years, particularly during the Biden Administration, the topic of judge shopping has been reborn with increasing frequency.[41] This is due largely to efforts by the State of Texas to block executive policy from taking effect, frequently by filing lawsuits in single-judge federal district court divisions where the assignment of a particular judge is often ex ante known and guaranteed.[42]

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39 Cartolano, *supra* note 32, at 151. It is worth making the distinction between forum shopping and judge shopping clear from a fundamental fairness perspective. When Hawai'i forum shopped by filing suit against the Trump Administration in the District of Hawai'i, it had a fifty percent chance of drawing a judge appointed by a Republican president. *See United States District Court for the District of Hawaii*, BALLOTPEDIA, https://ballotpedia.org/United_States_District_Court_for_the_District_of_Hawaii [https://perma.cc/B6HW-GNYV]. When liberal groups engaged in forum shopping by filing various lawsuits against the Bush Administration in California district courts, there were at least ten total judges in each federal district—drawn from both Democratic and Republican appointees—to whom the cases could have been assigned. *See United States District Court for the Eastern District of California*, BALLOTPEDIA, https://ballotpedia.org/United_States_District_Court_for_the_Eastern_District_of_California [https://perma.cc/2W3Y-DYR4]; *United States District Court for the Northern District of California*, BALLOTPEDIA, https://ballotpedia.org/United_States_District_Court_for_the_Northern_District_of_California [https://perma.cc/BY8J-RYLA]; *see also* Linthorst, *supra* note 37, at 86–87. In lawsuits challenging President Biden's OSHA vaccine mandate, Republican AGs forum shopped by filing in conservative circuits, each containing at least one Democratic-appointed judge. *See* Linthorst, *supra* note 37, at 86; *United States Court of Appeals for the Eighth Circuit*, BALLOTPEDIA, https://ballotpedia.org/United_States_Court_of_Appeals_for_the_Eighth_Circuit [https://perma.cc/7Q4G-4QRL]; *United States Court of Appeals for the Sixth Circuit*, BALLOTPEDIA, https://ballotpedia.org/United_States_Court_of_Appeals_for_the_Sixth_Circuit [https://perma.cc/MZP5-C7T8]; *United States Court of Appeals for the Fifth Circuit*, BALLOTPEDIA, https://ballotpedia.org/United_States_Court_of_Appeals_for_the_Fifth_Circuit [https://perma.cc/TE6G-XRVT]. Although all these litigants might have sought to secure an advantage by filing suit in a favorable forum, in none of these cases did the litigants ex ante know the judge or the circuit panel who would hear their case. In other words, forum shopping did not provide these litigants with any *guarantees*—it was wholly possible that, despite their best efforts, they might draw an unfavorable district judge or circuit panel. This is not so with judge shopping, which is used to ex ante guarantee the assignment of a favorable judge to a case. *See* Cartolano, *supra* note 32, at 151. The unfairness inherent in manipulating the judicial system to ex ante remove substantial amounts of uncertainty in the outcome of litigation is what distinguishes forum shopping from judge shopping and what makes the latter so pernicious. *See* Joseph Mead, *Ending Judge-Shopping in Cases Challenging Federal Law*, YALE J. ON REG. (Mar. 18, 2024), https://www.yalejreg.com/nc/ending-judge-shopping-in-cases-challenging-federal-law-by-joseph-mead/ [https://perma.cc/YK94-QV9L] ("Judge-shopping has always been treated differently however; picking a pool of judges is categorically different than picking the *specific* judge who will hear a matter.").

40 *See* Alex Botoman, Note, *Divisional Judge-Shopping*, 49 COLUM. HUM. RTS. L. REV. 297, 298–99 (2018).

41 *See, e.g.*, Vladeck, *supra* note 6 (describing dozens of judge-shopped lawsuits that Texas filed against the federal government).

42 *See* Letter from Kica Matos, President, Nat'l Immigr. L. Ctr., to C.Js. of the Texas Fed. Dist. Cts., at 5 (Sept. 11, 2023) [hereinafter Letter from Kica Matos to C.Js], https://www.nilc.org/

This Part explores the mechanisms underlying judge shopping, including case assignment procedures, judicial districts in Texas,[43] examples of Texas's judge shopping strategy,[44] federal venue and transfer requirements,[45] and the unique challenges that judge shopping poses in relation to nationwide injunctions.[46]

A. Local Court Rules and the Assignment of Cases to Judges in Texas

When a federal district court has multiple judges, 28 U.S.C. § 137 grants the chief judge broad power to "divide the business and assign the cases" of the court.[47] Notably, the federal statute does not require that cases be assigned randomly, and the chief judge, therefore, retains discretion to assign cases to judges using any mechanism.[48]

As an illustration, Texas is split into four judicial districts: the Northern District of Texas ("N.D. Tex."), the Southern District of Texas ("S.D. Tex."), the Eastern District of Texas ("E.D. Tex."), and the Western District of Texas ("W.D. Tex.").[49] Each of these four judicial districts is further subdivided, yielding a total of twenty-seven federal divisions across the state.[50] And because of the discretion provided by federal statute, the chief judge of each of Texas's four judicial districts is free to determine how to assign judges to cases in each subdivision.[51] In the N.D. Tex., Judge Matthew Kacsmaryk receives 100% of the cases filed in the Amarillo division.[52] Similarly, Judge Reed O'Connor is assigned 100% of the cases filed in the Wichita Falls division,[53] and Judge Wes Hendrix receives 67% of the civil cases filed "in the Lubbock, Abilene, and San Angelo" divisions.[54] These numbers stand in stark contrast to

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wp-content/uploads/2023/09/Judge-Shopping-LTR-to-Courts-2023-.pdf [https://perma.cc/Z8GY-USAL] ("Texas has chosen its filing divisions in nearly three dozen cases such that it has usually known with near-100-percent certainty the precise judge who would preside, and in all of which Texas had *at least* 19-in-20 odds of avoiding judges appointed during Democratic presidencies.").

43 *See infra* Section I.A.

44 *See infra* Section I.B.

45 *See infra* Section I.C.

46 *See infra* Section I.D.

47 28 U.S.C. § 137(a).

48 *See id.*

49 Vladeck, *supra* note 6.

50 *Id.*

51 *Id.*; 28 U.S.C. § 137(a).

52 Special Order No. 3-344 (N.D. Tex. Sept. 14, 2022), https://www.txnd.uscourts.gov/sites/default/files/orders/3-344.pdf [https://perma.cc/R84A-BT8P].

53 Special Order No. 3-343 (N.D. Tex. Sept. 14, 2022), https://www.txnd.uscourts.gov/sites/default/files/orders/3-343.pdf [https://perma.cc/4QHT-JU8H].

54 Special Order No. 3-345 (N.D. Tex. Dec. 18, 2023), https://www.txnd.uscourts.gov/sites/default/files/orders/3-345-12-18-23.pdf [https://perma.cc/L6D3-JCPQ].

the Dallas division, where no individual judge receives more than 13% of the civil or criminal cases assigned.[55]

In the S.D. Tex., Judge Jeffrey Brown receives 100% of the cases filed in the Galveston division.[56] Judge Drew Tipton, until February 2023, received 100% of the cases filed in the Victoria division; such cases are now split evenly between Judges Nelva Gonzales Ramos and David S. Morales.[57] No individual judge receives more than 12.75% of the cases filed in the Houston division.[58]

In the E.D. Tex., Judge Trey Schroeder receives 90% of the civil cases filed in the Texarkana division, and Judge Michael J. Truncale is assigned 100% of civil cases in the Lufkin division.[59] Chief Judge Rodney Gilstrap receives 90% of civil cases and 100% of criminal cases filed in the Marshall division.[60]

Finally, in the W.D. Tex., Chief Judge Alia Moses—who, until May 2024, received 100% of both the civil and criminal dockets in the Del Rio division[61]—now receives 65% of the civil docket and 35% of the criminal docket in that division.[62] Judge David Counts is assigned all cases and proceedings in the Midland-Odessa and Pecos divisions.[63] Judge Robert Pitman receives 50% of the civil docket and 50% of the criminal docket in Austin and has "[o]versight and management of the remaining" 50% of Austin's civil and criminal dockets.[64] Judge Alan D. Albright is assigned 100% of the civil docket in the Waco division, excluding patent cases.[65]

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55 Special Order No. 3-352 (N.D. Tex. May 8, 2024), https://www.txnd.uscourts.gov/sites/default/files/orders/3-352.pdf [https://perma.cc/AFQ5-3G3H].

56 General Order No. 2024-7, at 3 (S.D. Tex. June 26, 2024), https://www.txs.uscourts.gov/file/8453/download?token=zOHKhHHU [https://perma.cc/EN7T-2LUE].

57 General Order No. 2022-19, at 5 (S.D. Tex. Nov. 22, 2022), https://www.txs.uscourts.gov/file/6673/download?token=ybBXraXE [https://perma.cc/VN4J-Z4P4]; General Order No. 2024-7, at 2–3 (S.D. Tex. June 26, 2024), https://www.txs.uscourts.gov/file/8453/download?token=zOHKhHHU [https://perma.cc/EN7T-2LUE].

58 General Order No. 2024-7, at 1–5 (S.D. Tex. June 26, 2024), https://www.txs.uscourts.gov/file/8453/download?token=zOHKhHHU [https://perma.cc/EN7T-2LUE].

59 General Order No. 23-01 (E.D. Tex. Jan. 6, 2023), https://txed.uscourts.gov/sites/default/files/goFiles/GO%2023-01%20Assigning%20Civil%20and%20Criminal%20Actions.pdf [https://perma.cc/6RQK-CX45].

60 *Id.*

61 Amended Order Assigning the Business of the Court (W.D. Tex. May 25, 2023), https://www.txwd.uscourts.gov/wp-content/uploads/2022/12/AmendedOrderAssigningBusinessoftheCourt-052723.pdf [https://perma.cc/SKM4-F6B5].

62 Amended Order Assigning the Business of the Court (W.D. Tex. May 31, 2024), https://www.txwd.uscourts.gov/wp-content/uploads/2022/12/Amended-Order-Assigning-Business-of-the-Court-053124.pdf [https://perma.cc/VXN7-88GY].

63 *Id.*

64 *Id.*

65 *Id.*

Texas is not the only state with case assignment mechanisms that enable judge shopping. In the Lake Charles Division of the Western District of Louisiana, 90% of civil cases are assigned to Judge James D. Cain—a feature that, like in Texas, has been exploited by states suing the federal government.[66] But Texas's and Louisiana's precise, and arguably disproportionate, division of cases in this fashion stands in direct contrast with many other federal judicial districts around the country, where local rules prescribe that judges be assigned randomly to cases.[67] To list a few examples, the Eastern, Western, and Northern Districts of Oklahoma all provide for the random assignment of judges.[68] The Central and Northern Districts of California likewise prescribe that judges be randomly assigned to cases.[69] The Eastern and Northern Districts of New York contain identical provisions.[70] As applied, therefore, the broad discretion granted to chief judges to assign cases runs the gamut from random assignment to guaranteed assignment.[71] But nothing is stopping jurisdictions like California and New York from adopting case assignment procedures like those in Texas and Louisiana,[72] which would enable judge shopping on an even wider scale.

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66 Standing Order SO 1.61, at 2 (W.D. La. Sept. 20, 2024), https://www.lawd.uscourts.gov/sites/lawd/files/UPLOADS/SO_1.61_9-20-24.pdf [https://perma.cc/HVN4-H3VD]; *see also* Steve Vladeck (@steve_vladeck), X (Mar. 22, 2024, 9:40 AM), https://x.com/steve_vladeck/status/1771170009076650020?s=43&t=L887NIdKkws1GJNzhLYl5A [https://perma.cc/4L8M-XGHB] (describing a lawsuit by 16 red states, including Texas, "challenging the Biden administration's ban on liquefied natural gas (LNG) exports" in the Lake Charles Division of Western District of Louisiana).

67 Marcel Kahan & Troy A. McKenzie, *Judge Shopping*, 13 J. Legal Analysis 341, 344 (2021) ("The random assignment of cases is the norm in the federal district courts.").

68 *Case Assignment and Numbering*, U.S. Dist. Ct. E. Dist. of Okla., https://www.oked.uscourts.gov/case-assignment-and-numbering [https://perma.cc/6SMN-LWRB]; *How Are Cases Assigned to Judges?*, U.S. Dist. Ct. W. Dist. of Okla., https://www.okwd.uscourts.gov/ufaq/q-how-are-cases-assigned-to-judges/ [https://perma.cc/AHB5-V39M]; *Case Assignment and Numbering*, U.S. Dist. Ct. N. Dist. of Okla., https://www.oknd.uscourts.gov/case_assignment_and_numbering [https://perma.cc/S6CA-ULEJ].

69 General Order No. 24-04, at 2, 9 (C.D. Cal. May 31, 2024), https://www.cacd.uscourts.gov/sites/default/files/general-orders/GO%2024-04_0.pdf [https://perma.cc/8FKA-9B2V]; General Order No. 44, at 1 (N.D. Cal. Jan. 1, 2018), https://www.cand.uscourts.gov/wp-content/uploads/general-orders/GO_44_01-01-2018.pdf [https://perma.cc/BF8Y-7EHL].

70 Rules for the Division of Business for the Eastern District of New York, at 3 (E.D.N.Y. Sept. 25, 2023), https://img.nyed.uscourts.gov/files/local_rules/Rules4_DOB.pdf [https://perma.cc/ZYF6-879C]; General Order No. 12, at 3–4 (N.D.N.Y. Oct. 8, 2020), https://www.nynd.uscourts.gov/sites/nynd/files/general-ordes/GO12.pdf [https://perma.cc/8HMC-KTWA].

71 *See supra* notes 47–70 and accompanying text.

72 *See supra* notes 47–66 and accompanying text.

B. *Texas's Use of Single-Judge Districts to Challenge Executive Action*

In recent years, capitalizing on the large number of single-judge divisions in Texas, the State of Texas has filed dozens of lawsuits challenging the Biden Administration's executive policies in districts with a high probability, if not a 100% likelihood, that a particular judge would be assigned.[73] A few such cases are summarized in this Section.

Texas v. EEOC[74]

Following the Supreme Court's decision in *Bostock v. Clayton County*,[75] the EEOC in 2021 promulgated guidance on protections in the workplace for LGBTQ+ employees that addressed "issues such as workplace attire, pronouns and names, and the use of bathrooms, locker rooms and showers."[76] The Department of Health and Human Services ("HHS") Office for Civil Rights issued similar guidance that forbade entities receiving federal funding from interfering with an "individual's ability to receive medically necessary care, including gender-affirming care."[77] The State of Texas swiftly filed suit in the Amarillo division of the N.D. Tex., where it was virtually guaranteed the assignment of Judge Kacsmaryk, a Trump appointee, to the case.[78] After cross-motions for summary judgment were filed, Judge Kacsmaryk ruled in Texas's favor, granting the plaintiffs a declaratory judgment that both sets of guidance were unlawful and vacating them.[79]

Texas v. Becerra[80]

In the wake of *Dobbs v. Jackson Women's Health Organization*,[81] President Biden issued Executive Order 14,076, which mandated the Secretary of HHS to identify "potential actions . . . to protect and expand access to abortion care . . . and . . . to the full range of reproductive healthcare services . . . by considering updates to current guidance on

73 Letter from Kica Matos to C.Js., *supra* note 42, at 5.

74 663 F. Supp. 3d 824 (N.D. Tex. 2022).

75 590 U.S. 644 (2020).

76 Manatt, Phelps & Phillips, LLP, *Texas Court Strikes Down EEOC's LGBTQ+ Guidance*, JD Supra (Oct. 25, 2022), https://www.jdsupra.com/legalnews/texas-court-strikes-down-eeoc-s-lgbtq-9370219/ [https://perma.cc/AXV6-2SYH].

77 *Id.* (quoting Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47,824, 47,828 (Aug. 4, 2022) (to be codified at 45 C.F.R. pts. 438, 440, 457, 460)).

78 Special Order No. 3-344 (N.D. Tex. Sept. 14, 2022), https://www.txnd.uscourts.gov/sites/default/files/orders/3-344.pdf [https://perma.cc/R84A-BT8P].

79 *See* Texas v. EEOC, 633 F. Supp. 3d at 828, 847.

80 623 F. Supp. 3d 696 (N.D. Tex. 2022).

81 597 U.S. 215 (2022).

obligations specific to emergency conditions and stabilizing care under the Emergency Medical Treatment and Labor Act [("EMTALA")]."[82] In conjunction with the Executive Order, HHS Secretary Xavier Becerra and the Centers for Medicare and Medicaid Services promulgated documents dictating that if healthcare providers determine a pregnant patient "is experiencing an emergency medical condition as defined by EMTALA, and that abortion is the stabilizing treatment necessary to resolve that condition, the physician must provide that treatment. When a state law prohibits abortion . . . that state law is preempted."[83] Arguing, inter alia, that the issuance of these documents violated the Administrative Procedure Act ("APA"),[84] Texas filed suit in the Lubbock division of the N.D. Tex. where it had an approximately two-thirds probability of drawing Judge Hendrix, another Trump appointee.[85] In August 2022, Judge Hendrix granted Texas's request for a preliminary injunction, prohibiting both sets of documents from taking effect in Texas.[86]

Texas v. EPA[87]

In January 2023, the Biden Administration promulgated a final administrative rule called "Revised Definition of 'Waters of the United States,'" which purported to alter the interpretation of the phrase "waters of the United States" in the Clean Water Act by expanding its meaning.[88] Texas, asserting that the administrative rule misconstrued existing precedent and violated state sovereignty, filed suit against the EPA in the Galveston division of the S.D. Tex.,[89] where it had a 100% chance of being assigned Judge Brown, a Trump appointee.[90] In March 2023, Judge Brown issued a preliminary injunction that enjoined the

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82 Exec. Order No. 14,076, 87 Fed. Reg. 42,053, 42,053–54 (July 8, 2022); 42 U.S.C. § 1395dd.

83 U.S. Dep't of Health & Hum. Servs. Centers for Medicare & Medicaid Servs., Reinforcement of EMTALA Obligations Specific to Patients Who Are Pregnant or Are Experiencing Pregnancy Loss 1 (July 25, 2022) (emphasis omitted), https://www.cms.gov/files/document/qso-22-22-hospitals.pdf [https://perma.cc/7MJ6-GMKL]; *see also* Letter from Xavier Becerra, Sec'y, U.S. Dep't of Health & Hum. Servs., to Health Care Providers (July 11, 2022), https://www.hhs.gov/sites/default/files/emergency-medical-care-letter-to-health-care-providers.pdf [https://perma.cc/8Q79-R2VP].

84 Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

85 Special Order No. 3-345, at 1 (N.D. Tex. Dec. 18, 2023), https://www.txnd.uscourts.gov/sites/default/files/orders/3-345-12-18-23.pdf [https://perma.cc/L6D3-JCPQ]; *see* Texas v. Becerra, 623 F. Supp. 3d 696, 696, 708–09, 738 (N.D. Tex. 2022).

86 *Becerra*, 623 F. Supp. 3d at 739.

87 662 F. Supp. 3d 739 (S.D. Tex. 2023).

88 Complaint at 2–3, Texas v. EPA, 662 F. Supp. 3d 739 (No. 3:23-cv-17), ECF No. 1.

89 *Id.* at 0–2.

90 *See* General Order No. 2024-1, at 3 (S.D. Tex. Jan. 18, 2024), https://www.txs.uscourts.gov/file/7956/download?token=ugXoKOdu [https://perma.cc/RPC3-CBSY].

EPA "from implementing or enforcing the final rule" in either Texas or Idaho.[91]

These three cases, constituting just a subset of the total number of cases filed, demonstrate Texas's judge shopping strategy as applied to lawsuits challenging executive action.[92] Noticeably, the strategy is highly effective: in each of the three cases, by filing in a particular jurisdiction, Texas was granted the equitable relief that it sought, including two preliminary injunctions.[93] These cases merely function as examples of Texas's success in judge shopping so far; as pending lawsuits play out across the state, it is likely that this strategy will continue to pay off for Texas.[94]

C. Federal Venue Requirements and Department of Justice Motions to Transfer Venue

Texas's ability to judge shop is premised on a series of federal statutes that govern proper venue in federal courts.[95] 28 U.S.C. § 1391 stipulates, in relevant part, that "a civil action may be brought in . . . a judicial district in which any defendant resides" or "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred."[96] When, however, the "defendant is an officer or employee of the United States," such an action can also be brought where the plaintiff resides.[97] A separate provision of the same venue statute defines residency, stating that a natural person's residence is the judicial district in which they live, and that plaintiffs "with the capacity to sue and be sued in [their] common name under applicable law, whether or not incorporated, shall be deemed to reside . . . only in the judicial district in which it maintains its principal place of business."[98] Crucially, the statute does not explicitly refer to states as parties to lawsuits or define the residency of a state.[99]

Once a plaintiff files a lawsuit in a particular venue, the defendant can challenge the plaintiff's selection. If the plaintiff has filed in an incorrect venue, 28 U.S.C. § 1406(a) allows the defendant to seek either

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91 Texas v. EPA, 662 F. Supp. 3d at 758–59.

92 *See supra* notes 75–91 and accompanying text.

93 *See supra* notes 75–91 and accompanying text.

94 *See, e.g.*, Texas v. Biden, 694 F. Supp. 3d 851, 873–74 (S.D. Tex. 2023) (enjoining the Biden Administration from enforcing its executive order and final rule as to several states); Texas v. Garland, 719 F. Supp. 3d 521, 599–600 (N.D. Tex. 2024) (granting, in part, Texas's request for a preliminary injunction in litigation concerning the Consolidated Appropriations Act of 2023).

95 *See* 28 U.S.C. §§ 1391, 1404(a), 1406(a).

96 *Id.* § 1391(b).

97 *Id.* § 1391(e).

98 *Id.* § 1391(c).

99 *See id.*

dismissal of the case or transfer to a proper venue.[100] If, however, venue is proper, the defendant can nonetheless challenge the plaintiff's choice of venue by seeking transfer to another suitable venue "in the interest of justice."[101] In evaluating motions to transfer, courts consider a combination of private and public interest factors drawn from the Supreme Court's decision in *Gulf Oil Corp. v. Gilbert*.[102] The four private interest factors are

> (1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive. The public concerns include: (1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of . . . conflict of laws.[103]

Though these factors are illustrative, they are "not necessarily exhaustive or exclusive."[104]

In response to Texas's judge shopping attempts, in 2023, the Department of Justice ("DOJ") filed a series of motions to transfer venue in three cases.[105] In two of the cases, *Texas v. DHS*,[106] concerning the DHS's parole program for certain groups of immigrants, and *Texas v. Garland*,[107] arguing that Congress's passing of the Consolidated Appropriations Act of 2023[108] violated the Constitution's Quorum Clause, DOJ sought transfer to either the Austin Division of the N.D. Tex. or the District Court for the District of Columbia ("D.D.C.").[109] In the third case, *Utah v. Walsh*,[110] challenging the Biden Administration's "Investment Duties

100 *See id.* § 1406(a).

101 *Id.* § 1404(a).

102 330 U.S. 501, 508–09 (1947).

103 *In re* Volkswagen AG, 371 F.3d 201, 203 (5th Cir. 2004) (citation omitted); *see also Gilbert*, 330 U.S. at 508–09.

104 *In re* Volkswagen of Am., Inc., 545 F.3d 304, 315 (5th Cir. 2008).

105 *See* Defendant's Memorandum in Support of Their Motion to Transfer Venue, Texas v. Garland, No. 5:23-cv-034-H, 2023 WL 4851893 (N.D. Tex. July 28, 2023), ECF No. 10 [hereinafter Motion to Transfer, Texas v. Garland]; Motion to Transfer Venue, Utah v. Walsh, No. 2:23-cv-16-Z, 2023 WL 266256 (N.D. Tex. July 28, 2023), ECF No. 15 [hereinafter Motion to Transfer, Utah v. Walsh]; Supplemental Brief in Support of Motion to Transfer, Texas v. DHS, 661 F. Supp. 3d 683 (S.D. Tex. 2023) (No. 6:23-cv-00007), ECF No. 74 [hereinafter Motion to Transfer, Texas v. DHS].

106 661 F. Supp. 3d 683 (S.D. Tex. 2023).

107 No. 5:23-cv-034-H, 2023 WL 4851893 (N.D. Tex. July 28, 2023) (decision relating to motion of transfer).

108 Pub. L. No. 117-328, 136 Stat. 4459 (2022).

109 Motion to Transfer, Texas v. DHS, *supra* note 105, at 7–8; Motion to Transfer, Texas v. Garland, *supra* note 105, at 10.

110 No. 2:23-cv-017-Z, 2023 WL 2663256 (N.D. Tex. Mar. 28, 2023).

Rule" under the Employee Retirement Income Security Act of 1974,[111] DOJ sought transfer to D.D.C., Austin, or in the alternative, "another District in which a Plaintiff reside[d]."[112] All three motions to transfer were denied.[113]

One major theme underlying DOJ's motions to transfer concerned the interplay between 28 U.S.C. § 1391(c), defining residency for venue purposes, and 28 U.S.C. § 1391(e), detailing venue requirements for actions in which the defendant is an "officer or employee of the United States."[114] Specifically, DOJ argued that 28 U.S.C. § 1391(c) defines the residency of a plaintiff state as its principal place of business, i.e., its state capital, and that therefore, under 28 U.S.C. § 1391(e), the proper venue for Texas was in Austin.[115] DOJ's argument, however, was flatly rejected by each of the district judges, who, in addition to citing authority outside of the Fifth Circuit, invoked established circuit precedent to hold that the government of a state "resides at every point within the boundaries of the state."[116]

In an interesting development, during oral argument on the motion to transfer in *Texas v. DHS*, plaintiff's counsel appeared to concede that Texas was engaging in judge shopping, explaining that "[t]he case is being filed in Victoria, quite frankly, Your Honor, because of our experience with you."[117] Earlier in that same hearing, Texas again seemed to acknowledge its practice of repeatedly filing lawsuits in the same judicial districts in Texas.[118]

Ultimately, despite denial of the motion to transfer, summary judgment was granted to the Department of Labor in *Utah v. Walsh*, and the Biden Administration's rule was initially upheld.[119] Notwithstanding the government's win in this case, however, such admissions of judge shopping are alarming, and the practice accordingly merits further scrutiny.

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111 Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 U.S.C. and 29 U.S.C.).

112 Motion to Transfer, Utah v. Walsh, *supra* note 105, at 2, 17.

113 Texas v. Garland, No. 5:23-cv-034-H, 2023 WL 4851893, at *12 (N.D. Tex. July 28, 2023); *Walsh*, 2023 WL 2663256, at *1; Texas v. DHS, 661 F. Supp. 3d 683, 687 (S.D. Tex. 2023).

114 *See, e.g.*, Motion to Transfer, Texas v. Garland, *supra* note 105, at 10–15; *see also* 28 U.S.C. § 1391.

115 *See, e.g.*, Motion to Transfer, Texas v. Garland, *supra* note 105, at 10–15.

116 *See, e.g.*, Texas v. DHS, 661 F. Supp. 3d at 689 (quoting Atlanta & F.R. Co. v. W. Ry. Co., 50 F. 790, 791 (5th Cir. 1892)).

117 *See* Transcript of Motion Hearing, *supra* note 5, at 45.

118 *Id.* (Mr. Olson acknowledging that "our office chooses to file in seven divisions over and over").

119 Utah v. Walsh, No. 23-CV-16, 2023 WL 6205926, at *8 (N.D. Tex. Sept. 21, 2023), *vacated and remanded sub nom.* Utah v. Su, 109 F.4th 313 (5th Cir. 2024).

D. Judge Shopping and Nationwide Injunctions

Where judge shopping is involved, there are also strong reasons to be concerned about the growing use of injunctive relief, particularly nationwide injunctions, in lawsuits challenging executive action. Rule 65 of the Federal Rules of Civil Procedure endows courts with the equitable power to issue preliminary injunctions.[120] In normal course, a "preliminary injunction is an extraordinary remedy never awarded as of right."[121] A plaintiff who requests a preliminary injunction must "establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."[122] Nationwide injunctions, by contrast, are a subset of preliminary injunctions that result "when a single district court judge completely prevents the government from enforcing a statute, regulation, or policy."[123]

Perhaps the most memorable nationwide injunction is Judge Kacsmaryk's in a case involving the Food and Drug Administration's ("FDA") approval of mifepristone, a medication used in abortion.[124] In response to the plaintiffs' claims that the FDA improperly approved mifepristone in 2000, Judge Kacsmaryk issued a preliminary, nationwide injunction staying its approval across the country.[125] The plaintiff's choice of venue, however, was no coincidence. The plaintiff organization, the Alliance for Hippocratic Medicine, incorporated itself in Amarillo shortly before filing suit there—"where it was guaranteed to draw Judge Kacsmaryk."[126] Similarly, Texas, as a plaintiff, has also had success in obtaining nationwide injunctions against the federal government, including in one of its first lawsuits filed against the Biden Administration over its temporary moratorium on deportations.[127]

Some United States Supreme Court Justices, like Justice Gorsuch, have questioned the propriety of nationwide injunctions, voicing specific concerns that they promote forum shopping.[128] Justice Thomas has

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120 *See* FED. R. CIV. P. 65.

121 Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24 (2008).

122 *Id.* at 20.

123 Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67, 67 (2019).

124 *See generally* All. for Hippocratic Med. v. FDA, 668 F. Supp. 3d 507 (N.D. Tex. 2023), *vacated in part and aff'd in part*, 78 F.4th 210 (5th Cir. 2023), *rev'd and remanded*, 602 U.S. 367 (2024).

125 *See id.* at 559–60.

126 Vladeck, *supra* note 6.

127 *See* Texas v. United States, 524 F. Supp. 3d 598, 667 (S.D. Tex. 2021).

128 *See* DHS v. New York, 140 S. Ct. 599, 601 (2020) (mem.) (Gorsuch, J., concurring in the grant of stay) ("Because plaintiffs generally are not bound by adverse decisions in cases to which they were not a party, there is a nearly boundless opportunity to shop for a friendly forum to secure a win nationwide.").

further questioned whether the use of nationwide injunctions is consistent with the judicial power of Article III courts.[129] In the same case, however, Justice Sotomayor reached the opposite conclusion, expressly endorsing the nationwide injunction entered by the district court.[130] Importantly—and of particular relevance when executive action is challenged—in a recent order, Justice Barrett expressly declined to join a footnote in which Justice Kavanaugh acknowledged the ability of federal judges to "set aside" unlawful action under the APA.[131] Legal commentators are equally divided on the propriety of nationwide injunctions; many argue that although nationwide injunctions have the potential for overreach, injunctions can generally be exercised prudently.[132]

One final issue concerning nationwide injunctions is the potential for the coexistence of clashing injunctions.[133] Historically, such a prospect was not viewed as a major issue or likelihood.[134] In April 2023, however, such a possibility came to fruition when Judge Kacsmaryk and Judge Thomas Rice issued conflicting preliminary injunctions regarding the mifepristone pill.[135] Although the injunction issued by Judge Rice—which enjoined the federal government from making mifepristone unavailable—was not nationwide and applied only to the plaintiff states, the injunction issued by Judge Kacsmaryk staying mifepristone's

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129 *See* Trump v. Hawaii, 585 U.S. 667, 713 (2018) (Thomas, J., concurring) (noting skepticism that "district courts have the authority to enter universal injunctions").

130 *See id.* at 751 n.13 (Sotomayor, J., dissenting) ("The District Court did not abuse its discretion by granting nationwide relief . . . . [T]he imposition of a nationwide injunction was 'necessary to provide complete relief to the plaintiffs.'" (quoting Madsen v. Women's Health Ctr., Inc., 512 U. S. 753, 765 (1994))).

131 *See* Griffin v. HM Florida-ORL, LLC, 144 S. Ct. 1, 1, 2 n.1 (2023) (mem.) (Kavanaugh, J., joined by Barrett, J., except as to footnote 1, respecting the denial of the application for stay). *But see* Mila Sohoni, *The Power to Vacate a Rule*, 88 Geo. Wash. L. Rev. 1121, 1192 (2020) ("[I]f a rule is unlawful, the APA gives the reviewing court the power to vacate that rule universally.").

132 *See* Trammell, *supra* note 123, at 120 (analogizing nationwide injunctions to the preclusion doctrine and concluding they can be both prudent and constitutionally sound); *see also* Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. Rev. 1065, 1090 (2018) (concluding that nationwide injunctions are not constitutionally barred and are appropriate remedies in certain types of cases).

133 *Compare* All. for Hippocratic Med. v. FDA, 668 F. Supp. 3d 507, 559–60 (N.D. Tex. 2023), *vacated in part and aff'd in part*, 78 F.4th 210 (5th Cir. 2023) (staying mifepristone's approval), *rev'd and remanded*, 602 U.S. 367 (2024), *with* Washington v. FDA, 668 F. Supp. 3d 1125, 1144 (E.D. Wash. 2023) (enjoining federal government from making mifepristone unavailable).

134 *See* Bert I. Huang, *Coordinating Injunctions*, 98 Tex. L. Rev. 1331, 1333–34 (2020) (likening the issuance of conflicting injunctions to a coordination game and arguing that such an equilibrium avoids clashing injunctions); *see also* Elysa M. Dishman, *Generals of the Resistance: Multistate Actions and Nationwide Injunctions*, 54 Ariz. St. L.J. 359, 403 (2022) (arguing that lasting conflicting injunctions are rare, and courts can adapt to the risk).

135 *All. for Hippocratic Med.*, 668 F. Supp. 3d at 560; *Washington*, 668 F. Supp. 3d at 1144.

approval was universal, therefore causing a clash.[136] Insofar as this conflict was resolved only when the Supreme Court intervened to stay—and ultimately reverse—Judge Kacsmaryk's ruling on appeal, it provides an impactful example of the complex and confusing legal issues that can be expected when judge shopping and nationwide injunctions go hand-in-hand.[137]

In the judge shopping context, these concerns regarding nationwide injunctions apply especially vigorously because they are more likely to occur; after all, parties engage in judge shopping "in order to inflate their chances of a preferable outcome."[138] Therefore, there are numerous reasons to doubt the propriety of injunctive relief entered on a nationwide basis by a single district judge, particularly when such relief applies against the federal government and when the underlying forum has been selected through judge shopping.

II. Moving Away from Judge Shopping

Given that the legal structures described in Part I have enabled the practice of judge shopping, there is a compelling need to evaluate and reform these structures to strengthen limits on the ability of parties to exploit federal jurisdiction and remedies through judge shopping.[139] Section II.A discusses existing proposals to curb judge shopping and their associated difficulties.[140] Section II.B analyzes the emerging body of caselaw surrounding DOJ motions to transfer venue to develop arguments for use in future judge shopping cases.[141]

A. Issues with Existing Proposals and Solutions

The most recent proposal for reform was promulgated in March 2024 by the Judicial Conference of the United States, which announced a policy recommending that district courts randomize case assignments "in civil actions seeking to bar or mandate statewide or nationwide enforcement of a state or federal law, including a rule, regulation, policy, or order of the executive branch or a state or federal agency, whether by declaratory judgment and/or any form of injunctive relief."[142] However, both the policy and the authority of the Judicial Conference to enforce it

136 *See All. for Hippocratic Med.*, 668 F. Supp. 3d at 560; *Washington*, 668 F. Supp. 3d at 1144.

137 *See* All. for Hippocratic Med. v. FDA, 602 U.S. 367, 396–97 (2024).

138 Cartolano, *supra* note 32, at 151.

139 *See supra* Part I.

140 *See infra* Section II.A.

141 *See infra* Section II.B.

142 Letter from Judge Gregory F. Van Tatenhove, Chair, Comm. on Ct. Admin. & Case Mgmt., to Judges of the U.S. Dist. Cts., at 3 (Mar. 15, 2024), https://s3.documentcloud.org/documents/24483622/judicial-conference-policy.pdf [https://perma.cc/275Z-W3FQ].

were immediately questioned, leading the Judicial Conference to clarify that the policy was discretionary and did not interfere with the ability of district courts to dictate case assignment policies under 28 U.S.C. § 137.[143] Indeed, since then, at least one federal district court in Texas, the N.D. Tex., has expressly repudiated the Judicial Conference's policy, stating that it agreed "not to make any change to our case assignment process at this time."[144] Absent any binding force,[145] and faced already with public opposition from at least one federal district court in which judge shopping routinely occurs,[146] the Judicial Conference policy is unlikely to be an effective solution to judge shopping.

In a separate development, at its meeting in October 2024, the United States Judicial Conference's Advisory Committee on Civil Rules continued to debate whether to propose rules—as opposed to policy—aimed at stopping judge shopping.[147] Although an important step, the Committee's investigation has suffered various hurdles at a preliminary stage. First, the actual authority of the Committee is unclear, as any change it requires to case assignment procedures would necessarily conflict with 28 U.S.C. § 137, which allows each judicial district to create its own assignment procedures.[148] Second, at least one member of the Committee, himself a judge, has expressed hesitancy over the proposal and whether it vitiates local interests in litigation.[149] Third, even assuming the judiciary has the power to promulgate such a rule, it would first have to go through multiple levels of approval.[150] If the Committee decided to publish a draft of the proposed amendment, it would then be open to comment "from the bench, bar, and general public."[151] After incorporating any revisions, the advisory committee

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143 Tobi Raji, *U.S. Courts Clarify Policy Limiting 'Judge Shopping'*, Wash. Post (Mar. 16, 2024, 12:51 PM), https://www.washingtonpost.com/politics/2024/03/16/judge-shopping-guidance-abortion-patent-courts/ [https://perma.cc/24WP-Q7SD].

144 Nate Raymond, *Texas Federal Court Will Not Adopt Policy Against 'Judge Shopping'*, Reuters (Apr. 1, 2024, 5:08 AM), https://www.reuters.com/legal/texas-federal-court-will-not-adopt-policy-against-judge-shopping-2024-03-30/ [https://perma.cc/J6AE-GKV3].

145 *See* Raji, *supra* note 143.

146 *See* Raymond, *supra* note 144.

147 Advisory Comm. on Civ. Rules, Meeting of the Advisory Committee on Civil Rules 414–15 (Oct. 10, 2024), https://www.uscourts.gov/sites/default/files/2024-10_civil_rules_agenda_book_final_10-6.pdf [https://perma.cc/G97X-ZG7L].

148 *See* Avalon Zoppo, *US Judiciary Panel Debates Rule Proposal to Curb Judge Shopping*, ALM (Oct. 17, 2023, 7:36 PM), https://www.law.com/nationallawjournal/2023/10/17/us-judiciary-panel-debates-rule-proposal-to-curb-judge-shopping/ [https://perma.cc/GMQ9-L3SN] (noting that Judge Kent Jordan and at least one official from the Department of Justice questioned the power of the judiciary to effect such changes to federal statutes).

149 *See id.* (reporting that C.J. Godbey of N.D. Tex. "defended the district's single-judge divisions, saying they ensure local access to the courts in rural areas of Texas").

150 *See How the Rulemaking Process Works*, U.S. Cts., https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works [https://perma.cc/976S-VAFZ].

151 *Id.*

would then have to transmit the amendment to a Standing Committee, which would independently review the rule and recommend changes to the Judicial Conference.[152] The Judicial Conference would, in turn, pass on these recommendations to the Supreme Court, which would have the final say in whether to adopt the suggested rule.[153] Thus, given the extensiveness of the rulemaking process from beginning to end, any solution offered by the Advisory Committee would likely take years to formulate and implement.[154]

One of the primary existing legislative proposals for judge shopping is the "Stop Judge Shopping Act" introduced by U.S. Senator Mazie Hirono, which would endow "the United States District Court for the District of Columbia with original and exclusive jurisdiction over civil actions with a nationwide effect."[155] Although this bill addresses the issue of judge shopping by fixing jurisdiction at the forum level, it is highly unlikely to pass given newfound Republican control of both the House of Representatives and the Senate, whose clotures rules prevent one party from passing most types of legislation without the support of the other party.[156] Further, even if this legislation were considered by a subsequent Congress, there may be other causes for concern. For example, this bill is overinclusive by not only prohibiting judge shopping but by prohibiting forum shopping altogether when nationwide relief is sought.[157] But this country has historically recognized a longstanding tradition of forum shopping and the related principle that where plaintiffs are able to sue in multiple jurisdictions, they should have the right to choose a favorable forum.[158] Thus, by depriving plaintiffs of their choice of forum entirely, this legislation is overbroad and unfair

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152 *Id.*

153 *Id.*

154 *See* Steve Vladeck, *The Supreme Court's (Formal) Rulemaking Power*, One First (Apr. 8, 2024), https://stevevladeck.substack.com/p/75-the-supreme-courts-formal-rulemaking [https://perma.cc/ULE5-E5LP].

155 Stop Judge Shopping Act, S. 1265, 118th Cong. (2023).

156 *See* Tierney Sneed, *Senate Democrat Unveils Bill Aimed to End Tactic of Judge-Shopping to Block Federal Policies*, CNN: Pol. (Apr. 26, 2023, 10:08 AM), https://www.cnn.com/2023/04/26/politics/judge-shopping-bill-senate-democrat/index.html [https://perma.cc/HPJ7-KK27] ("Given the current Republican control of the House and the bevy of other judiciary-related matters Democratic lawmakers have spearheaded, it's unclear what traction Hirono's bill will get in [the 118th] Congress."); *see also S. 1265: Stop Judge Shopping Act*, GovTrack (May 10, 2023), https://www.govtrack.us/congress/bills/118/s1265 [https://perma.cc/2E33-TE3F] (indicating a 3% likelihood of enactment).

157 *See* S. 1265; *see also* note 39 and accompanying text.

158 *See* Atl. Marine Constr. Co. v. U.S. Dist. Ct., 571 U.S. 49, 63 (2013) ("Because plaintiffs are ordinarily allowed to select whatever forum they consider most advantageous (consistent with jurisdictional and venue limitations), we have termed their selection the 'plaintiff's venue privilege.'" (quoting Van Dusen v. Barrack, 376 U.S. 612, 635 (1963))); *see also* Bookman, *supra* note 33 ("[Forum shopping is important] in protecting access to justice, promoting regulatory enforcement, and propelling substantive and procedural reform.").

to litigants.[159] Arguably, however, plaintiffs could easily circumvent this limitation and retain their ability to forum shop by simply seeking relief that extends only to the parties in the case.[160]

Another legislative proposal would require a panel of three district judges in lawsuits that seek nationwide relief.[161] This solution, as Professor Alan Morrison notes, was used for constitutional challenges until 1976.[162] Therefore, although Congress has had experience creating such panels, the fact that they were repealed with widespread support suggests an institutional unwillingness to return to that framework on a large scale.[163]

B. Analysis of Emerging Caselaw Rejecting Department of Justice Motions to Transfer

Given the difficulties described in Section II.A with existing proposals to curtail judge shopping,[164] the DOJ has instead pushed back by filing motions to transfer venue.[165] Despite district courts' wholesale rejection of DOJ motions to transfer venue, the judges' resulting discussions of proper venue and the *Gilbert* factors yield important points of contention that can be applied to future motions to transfer in the judge shopping context.[166]

From a venue perspective, in all three cases described in Section I.C in which the DOJ filed motions to transfer venue, the DOJ attempted to argue that plaintiff states like Texas who sue the federal government under 28 U.S.C. § 1391(e) should be considered residents of their state capitals.[167] Relying on the definition of residency in an earlier part of the

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159 *See* Bookman, *supra* note 33.

160 *See* S. 1265 § 2 (providing the D.D.C. with "exclusive jurisdiction . . . *if the relief extends beyond the parties to the civil action*" (emphasis added)).

161 *See* Fair Courts Act of 2023, H.R. 3652, 118th Cong. § 2 (2023); *see also* Alan Morrison, *It's Time to Enact a 3-Judge Court Law for National Injunctions*, Bloomberg L. (Feb. 6, 2023, 4:00 AM), https://news.bloomberglaw.com/us-law-week/its-time-to-enact-a-3-judge-court-law-for-national-injunctions [https://perma.cc/H6XM-NX23]. Like Senator Hirono's legislative proposal in the Senate, this bill also has a very low likelihood of passage. *See H.R. 3652: Fair Courts Act of 2023*, GovTrack (May 24, 2023), https://www.govtrack.us/congress/bills/118/hr3652 [https://perma.cc/LR8F-AGCG] (indicating a 2% likelihood of enactment).

162 *See* Morrison, *supra* note 161.

163 *See* Michael E. Solimine & James L. Walker, *The Strange Career of the Three-Judge District Court: Federalism and Civil Rights, 1954–1976*, 72 Case W. Res. L. Rev. 909, 923 (2022) ("The reasons for drastically limiting the jurisdiction of the three-judge district court were framed almost exclusively in efficiency and administrative concerns.").

164 *See supra* Section II.A.

165 *See* Motion to Transfer, Texas v. Garland, *supra* note 105; Motion to Transfer, Utah v. Walsh, *supra* note 105; Motion to Transfer, Texas v. DHS, *supra* note 105.

166 *See supra* Section I.C.

167 Motion to Transfer, Texas v. Garland, *supra* note 105, at 18; Motion to Transfer, Utah v. Walsh, *supra* note 105, at 12; Motion to Transfer, Texas v. DHS, *supra* note 105, at 7.

statute, 28 U.S.C. § 1391(c), the DOJ argued that sovereign states are entities "with the capacity to sue and be sued in [their] common name" that, as plaintiffs, can only sue in their "principal place of business," i.e., their state capitals.[168] Texas federal judges, however, overwhelmingly rejected this interpretation of the venue statute, relying on decades-old Fifth Circuit precedent to conclude that even if the text of 28 U.S.C. § 1391(c) were ambiguous as to the residency of a state, a "state government 'resides at every point within the boundaries of the state.'"[169] Given that this presumption has since become more established in other caselaw across the country, any future compelling argument concerning proper venue in the judge shopping context will likely require amending the text of 28 U.S.C. § 1391 in a way that is consistent with such caselaw.[170]

Turning to the *Gilbert* analysis, in denying the motion to transfer venue in *Texas v. Garland*, Judge Hendrix drew on the work of Wright and Miller's *Federal Practice and Procedure* to note that the "interest of justice" in the statutory language of the 28 U.S.C. § 1404 transfer statute mirrors the four *Gilbert* public interest factors.[171] Wright and Miller, however, seem to dispute this proposition, writing that "it has long been clear that the interest of justice is a factor . . . to be considered on its own and that it is very important."[172] Thus, there appears to be a lack of clarity as to whether the *Gilbert* public interest factors entirely overlap with the "interest of justice" analysis, or whether the latter is a separate consideration. At the very least, for example, the "interest of justice" could also include Wright and Miller's factor of "possibility of prejudice against a party," which is not captured in the existing *Gilbert* public interest factors.[173] Indeed, in the *Texas v. DHS* case, Texas specifically insinuated that it filed in the division it had selected because it had positive prior experiences with the judge and could therefore more efficiently prepare for trial.[174] In the motion to transfer analysis,

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168 Motion to Transfer, Texas v. Garland, *supra* note 105, at 18; Motion to Transfer, Utah v. Walsh, *supra* note 105, at 12; Motion to Transfer, Texas v. DHS, *supra* note 105, at 7; *see also* 28 U.S.C. § 1391.

169 *See, e.g.*, Texas v. DHS, 661 F. Supp. 3d 683, 689 (S.D. Tex. 2023) (quoting Atlanta & F.R. Co. v. W. Ry. Co., 50 F. 790, 791 (5th Cir. 1892)).

170 *See, e.g.*, California v. Azar, 911 F.3d 558, 570 (9th Cir. 2018) ("A state is ubiquitous throughout its sovereign borders."); Florida v. United States, No. 3:21CV1066-TKW-EMT, 2022 WL 2431443, at *2 (N.D. Fla. Jan. 18, 2022) ("It is well established that a state 'resides at every point within [its] boundaries.'" (alteration in original) (quoting *Atlanta & F.R. Co.*, 50 F. at 791)).

171 *See* Texas v. Garland, No. 5:23-CV-34-H, 2023 WL 4851893, at *10 (N.D. Tex. July 28, 2023).

172 15 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3854 (4th ed. 2008).

173 *Id.*; *see also* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947).

174 *See* Transcript of Motion Hearing, Texas v. DHS, *supra* note 5, at 45–46. To be sure, Texas also asserted during the motion to transfer hearing that the Victoria division was appropriate because of the court's familiarity with the relevant statutes. *Id.* at 45. Though this justification

such a justification for judge shopping does not seem to fall within the traditional public interest factors, as it does not directly bear on court congestion-related issues, conflict of laws issues, the importance in "having localized controversies decided at home," or a forum's special knowledge of governing caselaw.[175] Therefore, to capture such factors and properly consider them at the motion to transfer stage, there is good reason to treat the "interest of justice" as being sensitive to judge shopping concerns and not completely overlapping with the *Gilbert* public interest factors.[176]

Further, in *Utah v. Walsh*, Judge Kacsmaryk cited *James v. Experian Information Solutions, Inc.*[177] to support the proposition that "'some manipulation of the assignment process' could be pertinent" in the public interest factor analysis but ultimately concluded that "[d]efendants do not explain how simply filing cases in a District where venue is proper and then prosecuting the case can be considered 'manipulation of the assignment process.'"[178] *James*, however, distinguishes between multiple cases that are randomly assigned to a particular judge, which are insufficient to support transfer, and those in which the assignment process is actively manipulated, which could support transfer.[179] Given the latter was effectively admitted in *Texas v. DHS*, at least some caselaw, including Judge Kacsmaryk's denial of the motion to transfer in *Utah v. Walsh*, has recognized that judge shopping can have a role to play in the interest of justice analysis for motions to transfer venue.[180]

In summary, based on the preceding analysis of emerging caselaw on motions to transfer, much of the tension in judge shopping cases surrounding venue and motions to transfer can be distilled into two strands: first, the residency of a state under the federal venue statute, and second, the extent to which the "interest of justice" in 28 U.S.C. § 1404 is subsumed in the traditional *Gilbert* factor analysis.[181] Both of

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appears to weigh in favor of the third public interest factor, *see Gilbert*, 330 U.S. at 508–09, courts should be skeptical in crediting such an argument in the *Gilbert* analysis. It may instead be the case that a particular judge has increased familiarity with certain statutes *because* judge shopping enables litigants to repeatedly bring challenges before that judge. *See supra* Part I. Thus, crediting a litigant's *Gilbert* argument that the court has special knowledge of the governing caselaw would be unfair because it would allow a litigant to benefit from judge shopping over successive litigations.

175 *See Gilbert*, 330 U.S. at 508–09.

176 *See* 15 Wright & Miller, *supra* note 172, § 3854.

177 No. 12-CV-902, 2014 WL 29041 (E.D. Va. Jan. 2, 2014).

178 Utah v. Walsh, No. 23-CV-16-Z, 2023 WL 2663256, at *5 (N.D. Tex. Mar. 28, 2023) (quoting *James*, 2014 WL 29041, at *6).

179 *James*, 2014 WL 29041, at *5–6.

180 *See Walsh*, 2023 WL 2663256, at *5; *James*, 2014 WL 29041, at *5–6; *see also* Transcript of Motion Hearing, Texas v. DHS, *supra* note 5, at 45–46.

181 *See, e.g.*, Texas v. Garland, No. 5:23-cv-034-H, 2023 WL 4851893, at *2–3 (N.D. Tex. July 28, 2023); *see also* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947); *In re* Volkswagen AG, 371 F.3d 201, 203 (5th Cir. 2004); 28 U.S.C. § 1404.

these strands contribute uniquely to the judge shopping problem: the former enables judge shopping by permitting states to file in any district within its borders,[182] while the latter has thus far failed to function as a stopgap when the venue has been selected by a state to shop for a certain judge.[183] The following Part, in proposing a solution to each of these strands, therefore aims to comprehensively solve the judge shopping problem by targeting both direct and subsidiary issues enabling judge shopping.[184]

III. Reforming Venue Requirements and the *Gilbert* Analysis to Curb Judge Shopping

As described in Part II, the prevalence of judge shopping can be traced into two strands stemming from existing law.[185] This Part proposes a solution to each of these strands. Section III.A considers the residential status of a state under the federal venue statute, arguing that Congress should amend 28 U.S.C. § 1391(e) to provide that a state's capital should be the default venue unless a substantial part of the events or omissions giving rise to the claim occurred in a different judicial district in the state, thereby making it a more appropriate venue for the purposes of the litigation.[186] Section III.B addresses the "interest of justice" analysis for motions to transfer, arguing that courts should make the "interest of justice" a fifth *Gilbert* factor, as well as enact a presumption under the *Gilbert* test favoring transfer when parties seek equitable relief that applies nationwide.[187] Given the exclusive ability of the legislature to enact the solution proposed in Section III.A, the solution described in Section III.B is a complementary proposal that courts can implement immediately to curtail judge shopping.[188]

A. Congress Should Amend 28 U.S.C. § 1391(e)

This Note proposes that Congress should amend 28 U.S.C. § 1391(e) to require that unless a substantial part of the events or omissions giving rise to the claim occurred in a different judicial district in the state, the state must file in its capital when challenging executive action. Such an amendment could be achieved by adding the following proposed language:

182 *See supra* notes 167–70.
183 *See supra* notes 171–80.
184 *See infra* Part III.
185 *See supra* Section II.B.
186 *See infra* Section III.A.
187 *See infra* Section III.B.
188 *See infra* Sections III.A–.B.

(e) Actions Where Defendant Is Officer or Employee of the United States.—

(1) In general.—

A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (A) a defendant in the action resides, (B) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (C) the plaintiff resides if no real property is involved in the action. *Where such a plaintiff is a State, such an action shall be brought in the judicial district where its capital is located, unless a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated, in a different judicial district in the State*.[189]

This proposed requirement is sensible for several reasons. First, the word "State" in the proposed language for subpart (e)(1) is already used in an identical fashion across other provisions of 28 U.S.C. § 1391, thereby achieving consistency in terminology.[190] Second, this proposal is fully compatible with the established presumption in existing caselaw, both in the Fifth Circuit and elsewhere, that for venue purposes, a state is a resident of "every [judicial] district within its borders" because it does not suggest that a state resides only in its capital—it merely provides for a default filing venue.[191] This solution therefore leaves intact and does not require modification of 28 U.S.C. § 1391(c), which does not explicitly define the residency of a state.[192] Third, by not strictly requiring such actions to be filed in states' respective capitals, this proposal preserves the well-recognized entitlement of plaintiffs to forum shop.[193] In other words, such a solution would not unfairly prejudice litigants whose actions are appropriate in multiple fora, assuming, of course, that the venue in which the suit is filed has a particularized relation to

189 28 U.S.C. § 1391(e). Note that the emphasized text is the proposed language change.

190 *See, e.g.*, 28 U.S.C. § 1391(d).

191 *See* California v. Azar, 911 F.3d 558, 570 (9th Cir. 2018); Atlanta & F. R. Co. v. W. Ry. Co., 50 F. 790, 791 (5th Cir. 1892).

192 *See* 28 U.S.C. § 1391(c).

193 *See, e.g.*, Atl. Marine Constr. Co. v. U.S. Dist. Ct., 571 U.S. 49, 63 (2013) ("Because plaintiffs are ordinarily allowed to select whatever forum they consider most advantageous (consistent with jurisdictional and venue limitations), we have termed their selection the 'plaintiff 's venue privilege.'" (quoting Van Dusen v. Barrack, 376 U.S. 612, 635 (1964))); *see also* Bookman, *supra* note 33, at 583.

the litigation.[194] Arguably, nowhere in a given state is more impacted by general federal policy than its seat of government—i.e., its capital—so filing in another district should require a particularly strong showing that the federal policy singles it out.[195] As the Supreme Court explained in *Gilbert*, "In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only."[196] As of July 2022, the populations of Amarillo, Lubbock City, and Victoria City[197] in Texas were approximately 200,000, 260,000, and 65,000 people, respectively.[198] By contrast, the approximate population of Austin at the same time was 980,000, greater than all three cities combined.[199] In light of the Supreme Court's statement in *Gilbert*, it would make overwhelming sense that in cases challenging federal rules that affect millions of people, the trial should be held where a large number of them reside—in Austin.[200] Concededly, it may well be the case that a state's most populous city is not its capital, as is the case with Texas, whose largest city is Houston.[201] From a practical standpoint, however, such a rule is consistent and fair and is nonetheless likely to eliminate the most egregious instances of judge shopping, which, in Texas, have overwhelmingly occurred in rural cities with lower populations than Austin.[202] Finally, this solution would not disturb the authority granted to federal district judges under 28 U.S.C. § 137 to determine local court procedures because it does not require chief judges to change the way they assign cases to other district judges.[203] By retaining district court

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194 *See* Transcript of Motion Hearing, Texas v. DHS, *supra* note 105, at 32–33 (DOJ acknowledging that in a lawsuit against the federal government involving the Texas-Mexico border, it would be logical for Texas to file in the McAllen Division because "that's where everything relevant to that case . . . had occurred").

195 *See id.* at 33–34.

196 Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947).

197 These are examples of Texas divisions in which judge shopping has routinely occurred. *See supra* Section I.A.

198 *QuickFacts: Amarillo City, Texas*, U.S. Census Bureau (July 1, 2023), https://www.census.gov/quickfacts/fact/table/amarillocitytexas/PST045223 [https://perma.cc/AY8D-ZB84]; *QuickFacts: Lubbock, Texas; Lubbock County, Texas*, U.S. Census Bureau (July 1, 2023), https://www.census.gov/quickfacts/fact/table/lubbockcitytexas,lubbockcountytexas/PST045222 [https://perma.cc/KL22-LHM2]; *Victoria, TX*, Data USA, https://datausa.io/profile/geo/victoria-tx [https://perma.cc/A4FE-4B9A].

199 *QuickFacts: Austin City, Texas*, U.S. Census Bureau (July 1, 2023), https://www.census.gov/quickfacts/fact/table/austincitytexas/LND110210 [https://perma.cc/Q7D4-GPCK].

200 *See id.*

201 *See QuickFacts: Houston City, TX*, U.S. Census Bureau (July 1, 2023), https://www.census.gov/quickfacts/fact/table/houstoncitytexas/PST045223 [https://perma.cc/J9DT-23NZ].

202 *See supra* notes 197–200; *QuickFacts: Galveston City, TX*, U.S. Census Bureau (July 1, 2023), https://www.census.gov/quickfacts/fact/table/galvestoncitytexas/PST045223 [https://perma.cc/PR6H-W3QB] (population of approximately 53,000).

203 *See* 28 U.S.C. § 137.

discretion over case assignments, this solution avoids major pushback associated with other existing proposals to limit judge shopping.[204]

Further, a corporation suing the federal government under 28 U.S.C. § 1391(e) would be required to file in its principal place of business or where "a substantial part of the events . . . giving rise to the claim occurred."[205] The Supreme Court has held that a corporation's principal place of business is "where the corporation's high level officers direct, control, and coordinate the corporation's activities" and is typically found "at a corporation's headquarters."[206] Using this definition, by analogy, Texas should ordinarily sue in Austin, where its capital is located, because this is where high level officers like the Governor and Attorney General sit.[207]

Similarly, a private plaintiff suing the federal government under the identical provision would be required to sue in her place of domicile or, again, where a significant part of the events causing the claim occurred.[208] In each of these cases, a plaintiff has the option of either filing in a "discrete" location—i.e., principal place of business or domicile—or any venue substantially related to the claim.[209] But under the existing framework, states are treated with disproportionate favor: they can file in any internal judicial district they would like or any other venue substantially related to the claim.[210] This proposed solution would, therefore, achieve congruence between states and other entities that sue the federal government by similarly requiring them to file in a "discrete" location, a state's capital, or any other venue substantially related to the state's claim.[211]

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204 *See* Lindsay Whitehurst, *Republicans Push Back on New Federal Court Policy Aimed at 'Judge Shopping' in National Cases*, ASSOCIATED PRESS (Mar. 14, 2024, 6:24 PM), https://apnews.com/article/judge-shopping-republicans-0c02f6cee235e1e17a843c5ad879bf82 [https://perma.cc/HG9Q-PW8Q] (reporting criticism by Senate Republicans regarding the Judicial Conference's March 2024 policy because of its incompatibility with discretion provided to "district courts to set their own rules").

205 28 U.S.C. § 1391(e); *see id.* § 1391(c)(2) (defining the residency of a plaintiff-corporation to be "only in the judicial district in which it maintains its principal place of business").

206 Hertz Corp. v. Friend, 559 U.S. 77, 80–81 (2010).

207 *About the Governor*, OFF. OF THE TEX. GOVERNOR: GREG ABBOTT, https://gov.texas.gov [https://perma.cc/B4D3-HFY3]; *About the Attorney General*, ATT'Y GEN. OF TEX.: KEN PAXTON, https://www.texasattorneygeneral.gov/about-office [https://perma.cc/J947-F8XV].

208 *See* 28 U.S.C. § 1391(c), (e).

209 *See id.*

210 *See id.*; *see also* Atlanta & F.R. Co. v. W. Ry. Co., 50 F. 790, 791 (5th Cir. 1892) (A state government "resides at every point within the boundaries of the state.").

211 *See supra* notes 205–10.

B. *Courts Should Focus the* Gilbert *Analysis on the "Interest of Justice" and Relief Sought*

Given the unpredictable timeframe for enactment of the legislation proposed in Section III.A,[212] this Note proposes an additional, complementary solution that can be implemented immediately. For motions to transfer venue, courts should explicitly adopt the "interest of justice" referred to in 28 U.S.C. § 1404(a)[213] as a fifth public interest factor in the *Gilbert* analysis.[214] This interest of justice factor should be given a presumption of strong weight when executive action is challenged and sought to be enjoined, when the underlying forum has been selected through judge shopping, and when the challenged action bears little to no particularized relation to the selected forum.

Though "interest of justice" is part of the statutory text of 28 U.S.C. § 1404(a), debate persists as to whether it is its own factor in the public interest analysis or whether it is already captured as part of the other four factors.[215] The enumeration of the "interest of justice" as a fifth public interest factor carrying strong weight in cases in which the underlying forum is likely to have been selected through judge shopping should therefore help to resolve ambiguity.[216] Although it may ordinarily be difficult to determine whether the underlying venue has been selected through judge shopping, judges can look at, inter alia, the likelihood of their assignment to the case based on local court rules, the number of previous lawsuits filed by the plaintiff(s) with that particular judge, and any plaintiff statements made in filings or during oral argument regarding venue selection.[217] Further, giving the "interest of justice" factor presumptive, rather than controlling, weight is consistent with *In re Volkswagen AG*,[218] which establishes that no factor is independently

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212 *See supra* Section III.A; *see also supra* notes 155–60.

213 *See* 28 U.S.C. § 1404(a).

214 *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947).

215 *Compare* Utah v. Walsh, No. 23-CV-016-Z, 2023 WL 2663256, at *5 (N.D. Tex. Mar. 28, 2023) ("[T]he 'interest of justice' analysis referenced in Section 1404(a) is already encompassed in the public interest factors that courts consider under existing precedent."), *with* 15 Wright & Miller, *supra* note 172, § 3854 ("[I]t has long been clear that the interest of justice is a factor . . . to be considered on its own and that it is very important."), *and* Rsch. Automation, Inc. v. Schrader-Bridgeport Int'l, Inc., 626 F.3d 973, 978 (7th Cir. 2010) ("The interest of justice may be determinative, warranting transfer or its denial even where the convenience of the parties and witnesses points toward the opposite result.").

216 *See Walsh*, 2023 WL 2663256, at *5. *But see* 15 Wright & Miller, *supra* note 172.

217 *Cf.* Transcript of Motion Hearing, Texas v. DHS, *supra* note 105, at 45 ("THE COURT: Why are you filing in Victoria? MR. OLSON: The case is being filed in Victoria, quite frankly, Your Honor, because of our experience with you."); *id.* (Mr. Olson acknowledging that "our office chooses to file in seven divisions over and over").

218 371 F.3d 201 (5th Cir. 2004).

decisive.[219] This solution thus has the utility of simultaneously clarifying an ambiguous area of the law while being consistent with established precedent.[220] Additionally, this proposal is not dependent on legislative reform and could be implemented immediately by judges, making it a desirable route through which to shape caselaw absent legislative action.[221]

Finally, and closely related, this Note proposes a *per se* presumption in favor of transfer under the public interest factor of "local interest in having localized [interests] decided at home"[222] when parties seek injunctive relief on a nationwide basis as opposed to injunctive relief applying only to the parties at hand. Logic and consistency dictate that plaintiffs requesting nationwide relief, as they do in each of the three cases in which the DOJ filed motions to transfer, should not be able to claim a localized interest in a case in which the relief sought is not similarly localized.[223] If such an interest were truly local, it follows that a plaintiff's primary objective should be to have the rule enjoined on an individualized rather than a nationwide basis.[224] Adopting such a presumption would provide advance notice to parties seeking universal relief that their suits are susceptible to transfer, thereby disincentivizing parties from seeking broad forms of relief and, in turn, alleviating forum shopping concerns.[225] Further, in jury cases seeking nonlocalized relief, the importance of having a local jury is of diminished importance, as the local jury's connection to the overall litigation is weaker.[226] One could argue that the jury pool in a transferee venue is no better equipped

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219 *See id.* at 203 ("The determination of 'convenience' turns on a number of private and public interest factors, none of which are given dispositive weight.").

220 *See supra* notes 215–19.

221 *See supra* notes 155–60.

222 Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947); *Volkswagen AG*, 371 F.3d at 203.

223 *See* Complaint for Declaratory & Injunctive Relief at 40, Utah v. Walsh, No. 23-CV-016-Z, 2023 WL 2663256 (N.D. Tex. Mar. 28, 2023), ECF No. 1 (seeking nationwide relief); Original Complaint at 16, Texas v. Garland, No. 5:23-cv-00034-H, 2023 WL 4851893 (N.D. Tex. July 28, 2023), ECF No. 1 (seeking nationwide relief); Complaint at 32, Texas v. DHS, No. 6:23-cv-00007, 2024 WL 1021068 (S.D. Tex. Mar. 8, 2024), ECF No. 1 (seeking nationwide relief); *see also* ABA Litig. Section, Resolution 521, at 3 ("[In] cases challenging federal or state law or agency action beyond the division's geographic limits, the interest in having 'litigants . . . served by federal judges tied to their communities' is not at issue." (quoting Roberts, *supra* note 22, at 5)).

224 *Cf.* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 469 (2017) ("[A]n injunction should be no broader than what the plaintiffs—not in any kind of representative capacity, but solely for themselves—should logically be able to bring contempt proceedings to enforce.").

225 *Cf.* DHS v. New York, 140 S. Ct. 599, 601 (2020) (mem.) (Gorsuch, J., concurring in the grant of stay) ("Because plaintiffs generally are not bound by adverse decisions in cases to which they were not a party, there is a nearly boundless opportunity to shop for a friendly forum to secure a win nationwide.").

226 *See Gilbert*, 330 U.S. at 508–09 ("Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation."); *see also* Moreno v. LG Elecs.,

to adjudicate broad challenges to federal rules than a jury pool in the transferor venue; however, in such a case, all else being equal, this public interest factor should weigh strongly in favor of transfer to prevent litigants from proverbially having two bites at the apple by selecting both a favorable venue and judge and by seeking nationwide relief.[227]

Conclusion

In recent years, single-judge divisions have been increasingly exploited in lawsuits against the federal government that carry momentous implications across the country.[228] This sustained and strategic judge shopping requires reform to prevent large-scale manipulation of the federal courts and federal jurisdiction.[229] To address concerns with judge shopping, Congress should amend 28 U.S.C. § 1391(e) to provide that a plaintiff state challenging executive action must file in the judicial district containing its capital unless a substantial part of the events or omissions giving rise to the claim occurred in a different judicial district in the state, thereby making it a more appropriate venue.[230] Further, the courts should consider the "interest of justice" and enact certain presumptions favoring venue transfer for judge-shopped cases under the existing *Gilbert* test to promote consistency and fairness across the federal judiciary.[231]

USA Inc., 800 F.3d 692, 700 (5th Cir. 2015) ("[F]ederal courts have an interest in . . . not burdening United States citizens with jury duty in an unrelated forum.").

227 *See* DHS v. New York, 140 S. Ct. at 601 (Gorsuch, J., concurring in the grant of stay) ("Because plaintiffs generally are not bound by adverse decisions in cases to which they were not a party, there is a nearly boundless opportunity to shop for a friendly forum to secure a win nationwide.").

228 *See supra* Introduction.

229 *See supra* Introduction.

230 *Supra* Section III.A.

231 *Supra* Section III.B.