

CHAPTER FOUR

DISTRICT COURT REFORM: NATIONWIDE INJUNCTIONS

On November 18, 2022, months after the Supreme Court overturned *Roe v. Wade*,¹ a group of antiabortion doctors and organizations brought suit in the U.S. District Court for the Northern District of Texas.² The plaintiffs sought a preliminary and permanent injunction ordering the U.S. Food and Drug Administration (FDA) to withdraw its two-decade-old approval³ of mifepristone, one drug used as part of a medication abortion regimen — the most common form of abortion in the United States.⁴ The plaintiffs alleged that the FDA's approval process for mifepristone violated the Administrative Procedure Act⁵ (APA).⁶ On April 7, 2023, Judge Kacsmaryk⁷ issued a nationwide stay that suspended the FDA's drug approval.⁸ Hours later, Judge Rice of the U.S. District Court for the Eastern District of Washington granted a “dueling”⁹ injunction that enjoined the FDA from changing its guidance and approvals in seventeen states and the District of Columbia.¹⁰

Outrage and confusion ensued. President Biden called Judge Kacsmaryk's order “the next big step toward the national ban on abortion that Republican elected officials have vowed to make law.”¹¹ Professor Nicholas Bagley asked: “[Judge Kacsmaryk is] just a single

¹ 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

² *All. for Hippocratic Med. v. FDA*, 668 F. Supp. 3d 507, 520 (N.D. Tex. 2023), *aff'd in part, vacated in part*, 78 F.4th 210 (5th Cir. 2023), *cert. granted sub nom.* *Danco Lab'ys, L.L.C. v. All. for Hippocratic Med.*, No. 23-236, 2023 WL 8605744 (U.S. Dec. 13, 2023), and *cert. granted sub nom.* *FDA v. All. for Hippocratic Med.*, No. 23-235, 2023 WL 8605746 (U.S. Dec. 13, 2023).

³ Mifepristone was first approved by the FDA in September 2000. *Questions and Answers on Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation*, U.S. FOOD & DRUG ADMIN. (Sept. 1, 2023), <https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/questions-and-answers-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation> [<https://perma.cc/7BCZ-ZH3V>].

⁴ KATHERINE KORTSMIT ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, *ABORTION SURVEILLANCE — UNITED STATES*, 2020, at 8 (2022), <https://www.cdc.gov/mmwr/volumes/71/ss/ss7110a1.htm> [<https://perma.cc/CV26-79EC>].

⁵ 5 U.S.C. §§ 551–559, 701–706.

⁶ Complaint ¶ 357, *All. for Hippocratic Med.*, 668 F. Supp. 3d 507 (No. 22-CV-223).

⁷ “A devout Christian, . . . [who] has been shaped by his deep antiabortion beliefs,” Judge Kacsmaryk was appointed to the bench by President Trump. Caroline Kitchener & Ann E. Marimow, *The Texas Judge Who Could Take Down the Abortion Pill*, WASH. POST (Feb. 25, 2023, 6:00 AM), <https://www.washingtonpost.com/politics/2023/02/25/texas-judge-abortion-pill-decision> [<https://perma.cc/CXM7-DTK2>].

⁸ *All. for Hippocratic Med.*, 668 F. Supp. 3d at 560.

⁹ *READ: Dueling Rulings from Federal Judges in Texas and Washington on Medication Abortion Pill*, CNN (Apr. 7, 2023, 10:50 PM), <https://www.cnn.com/2023/04/07/politics/read-texas-abortion-pill-mifepristone-ruling/index.html> [<https://perma.cc/NHM5-CT6W>].

¹⁰ See *Washington v. FDA*, 668 F. Supp. 3d 1125, 1144 (E.D. Wash. 2023).

¹¹ Press Release, The White House, Statement from President Joe Biden on Decision in *Alliance for Hippocratic Medicine v. FDA* (Apr. 7, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/04/07/statement-from-president-joe-biden-on-decision-in-alliance-for-hippocratic-medicine-v-fda> [<https://perma.cc/DX6Y-2TB8>].

judge in a small courthouse in Amarillo, Texas. Does he really have the power to dictate national policy about drug safety? If so, *should* he have that power?”¹² Dean Erwin Chemerinsky explained how “the case reveals underlying problems in the judicial system” and argued that “[l]itigants should not be able to handpick a judge who then can issue a nationwide injunction throwing the entire country into chaos.”¹³

A robust scholarly literature has grappled with these questions. Some scholars, jurists, and attorneys criticize the practice of district courts issuing nationwide injunctions as an inappropriate abuse of power.¹⁴ Others defend nationwide injunctions as a powerful way to check federal agency overreach and ensure robust relief for plaintiffs.¹⁵

This Chapter explores these arguments, considering court reform at the district-court level. It also builds on a list of injunctions solicited from the Department of Justice (DOJ)¹⁶ to provide the first empirical evidence documenting a trend that has not been, until now, fully quantified: nationwide injunctions have indeed grown much more common, dramatically spiking during the Trump Administration before decreasing during the Biden Administration. Section A of this Chapter quantitatively surveys this rise. Given this trend, section B identifies the troubling policy consequences of more frequent nationwide injunctions. Section C surveys proposals for reform, taking into consideration the ways in which judges have recently responded to this trend with apparent self-restraint and self-awareness.

Drawing from the list of injunctions, this Chapter notes the increasing risk of politicizing the nationwide injunction and delegitimizing the

¹² Nicholas Bagley, *A Single Judge Shouldn't Have This Kind of National Power*, THE ATLANTIC (Apr. 17, 2023, 2:30 PM), <https://www.theatlantic.com/ideas/archive/2023/04/mifepristone-case-problem-federal-judiciary/673724> [<https://perma.cc/A2BN-96UG>].

¹³ Erwin Chemerinsky, Opinion, *Why One Judge in Amarillo Got to Decide Whether Any American Could Use the Abortion Pill*, L.A. TIMES (Apr. 25, 2023, 3:01 PM), <https://www.latimes.com/opinion/story/2023-04-25/supreme-court-mifepristone-ruling-abortion-judges> [<https://perma.cc/LZ4J-T8EK>].

¹⁴ See, e.g., Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 420 (2017); Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum-Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEO. MASON L. REV. 29, 30–31 (2019); Howard M. Wasserman, “Nationwide” Injunctions Are Really “Universal” Injunctions and They Are Never Appropriate, 22 LEWIS & CLARK L. REV. 335, 353 (2018).

¹⁵ See, e.g., Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1069 (2018); Doug Rendleman, *Preserving the Nationwide National Government Injunction to Stop Illegal Executive Branch Activity*, 91 U. COLO. L. REV. 887, 889 (2020); Portia Pedro, *Toward Establishing a Pre-extinction Definition of “Nationwide Injunctions,”* 91 U. COLO. L. REV. 847, 855 (2020); see also Suzette M. Malveaux, Response, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56, 64 (2017); Spencer E. Amdur & David Hausman, Response, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. F. 49, 51–53 (2017).

¹⁶ *Harvard Law Review* editors submitted a Freedom of Information Act (FOIA) request to the DOJ for its list of nationwide injunctions mentioned in a speech by Deputy Attorney General Rosen. See Jeffrey A. Rosen, Deputy Att’y Gen., Opening Remarks at Forum on Nationwide Injunctions and Federal Regulatory Programs (Feb. 12, 2020), <https://www.justice.gov/opa/speech/deputy-attorney-general-jeffrey-rosen-delivers-opening-remarks-forum-nationwide> [<https://perma.cc/L9KH-4HHP>].

courts, as plaintiffs proceed to cherry-pick judges to increase the likelihood of political outcomes or policy goals. Ultimately, in light of this danger, this Chapter calls for reform to restructure the court system to disincentivize forum shopping. Though lower courts may be policing their use of the nationwide injunction, reforms centering on judicial restraint may miss the mark. If the goal is to disincentivize the political gamesmanship of nationwide injunctions, instead of their absolute use, reforms focused on curbing forum shopping may be most effective.

A. *Quantifying the Rise of Nationwide Injunctions*

1. *Definitions.* — The injunction is an equitable remedy that enables the court to “control a party’s conduct”¹⁷ — either by prohibiting or requiring action by a party. Either option is strong, coercive relief. Injunctions are thus a “drastic”¹⁸ and “extraordinary”¹⁹ remedy. Because of this concern, courts aim to issue injunctions that are “no more burdensome to the defendant than necessary to provide complete relief” to the parties before the court.²⁰ Courts generally retain broad discretion to craft the injunction’s scope. Depending on the stage of litigation, it can take the form of a temporary restraining order (TRO),²¹ a preliminary injunction,²² or a permanent injunction.²³

No statute or Supreme Court case has defined what a “nationwide injunction” is. Indeed, scholars debate the proper terminology.²⁴ In general, however, the nationwide injunction is a universal remedy whereby a court enjoins a party with respect to *all* persons and entities,

¹⁷ Frost, *supra* note 15, at 1070.

¹⁸ Georgia v. President of the U.S., 46 F.4th 1283, 1303 (11th Cir. 2022).

¹⁹ Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) (citing R.R. Comm’n v. Pullman Co., 312 U.S. 496, 500 (1941)).

²⁰ Califano v. Yamasaki, 442 U.S. 682, 702 (1979).

²¹ The TRO standard is the same as the preliminary injunction standard discussed *infra* note 22. See, e.g., Ass’n of Cmty. Cancer Ctrs. v. Azar, 509 F. Supp. 3d. 482, 493 (D. Md. 2020) (applying factors from Winter v. Nat. Res. Def. Council, 555 U.S. 7 (2008)); Hawai’i v. Trump, 241 F. Supp. 3d. 1119, 1134 (D. Haw. 2017) (same).

²² Winter, 555 U.S. at 20 (“A plaintiff seeking 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.” (citing Munaf v. Geren, 553 U.S. 674, 689–90 (2008); Amoco Prod. Co. v. Gambell, 480 U.S. 531, 542 (1987); Weinberger, 456 U.S. at 311–12)).

²³ eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (explaining the four-part test for a permanent injunction: “(1) that [the plaintiff] has suffered an irreparable injury; (2) that remedies available at law . . . are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction” (citing Weinberger, 456 U.S. at 311–13; Gambell, 480 U.S. at 542)).

²⁴ See, e.g., Howard M. Wasserman, *Concepts, Not Nomenclature: Universal Injunctions, Declaratory Judgments, Opinions, and Precedent*, 91 U. COLO. L. REV. 999, 1002–03 (2020); Rendleman, *supra* note 15, at 892 (using the terms “national government injunction” and “nationwide national government injunction”).

not just parties to the litigation.²⁵ Though “no one denies that district courts have the power to enjoin a defendant’s conduct anywhere in the nation . . . as it relates to *the plaintiff*,”²⁶ sharp disagreement exists over courts’ ability to issue relief as applied to nonparties. This Chapter focuses on nationwide injunctions directed against the federal government that completely enjoin the government from implementing and enforcing a federal statute or executive policy.²⁷

2. *Methodology.* — To capture and provide as complete a list as possible of nationwide injunctions as defined above,²⁸ this Chapter relies on two datasets²⁹: First, in response to a Freedom of Information Act (FOIA) request to DOJ, editors of the *Law Review* received a dataset of the nationwide injunctions identified by the Department from 1963 into the beginning of 2020.³⁰ Second, editors compiled a list of nationwide injunctions issued from the beginning of 2020 through the end of 2023.³¹

Though our search was thorough, this data does not purport to be comprehensive. Most obviously, the documents provided by DOJ did not include the methodology by which the Department compiled its list. While editors of the *Law Review* reviewed each case identified by DOJ,³² we did not verify whether DOJ’s list was comprehensive.

²⁵ See, e.g., JOANNA R. LAMPE, CONG. RSCH. SERV., LSB10664, NATIONWIDE INJUNCTIONS: RECENT LEGAL DEVELOPMENTS (2021), <https://crsreports.congress.gov/product/pdf/LSB/LSB10664/1> [<https://perma.cc/X9BZ-5QRC>]; *Trump v. Hawaii*, 138 S. Ct. 2392, 2424–25 & n.1 (2018) (Thomas, J., concurring).

²⁶ Frost, *supra* note 15, at 1071.

²⁷ Our dataset does not include nationwide injunctions issued against nongovernmental actors, such as the one in *National Commission for Certification of Crane Operators, Inc. v. Nationwide Equipment Training, LLC*, No. 20-cv-483, 2020 WL 7389769, at *1 (S.D. Ala. Nov. 24, 2020) (granting nationwide injunction against private company for copyright infringement). Thus, the total number of nationwide injunctions against all parties is larger than the number reported in this Chapter.

²⁸ We did not include TROs in our count. We only counted preliminary and permanent injunctions. We sought to avoid double counting an injunction that was granted on both a preliminary and permanent basis. Thus, where a court preliminarily enjoined a policy and subsequently enjoined the policy on a permanent basis, we counted this as one injunction. See, e.g., *Guilford Coll. v. McAleenan*, 389 F. Supp. 3d 377 (M.D.N.C. 2019) (preliminary injunction); *Guilford Coll. v. Wolf*, No. 18CV891, 2020 WL 586672 (M.D.N.C. Feb. 6, 2020) (permanent injunction).

²⁹ See Appendix, <https://harvardlawreview.org/print/vol-137/district-court-reform-nationwide-injunctions-appendix/> [<https://perma.cc/QG6E-TRMR>].

³⁰ The latest nationwide injunction identified in the dataset occurred on February 6, 2020.

³¹ Editors reviewed cases from a Westlaw search: (((nation!)/3 (injunction OR enjoin!)) OR “order applies nationally” OR ((universal!)/3 (injunction OR enjoin!)) OR “order applies universally”), which was cross-referenced by a LexisNexis search: (“outcome (injunct! OR enjoin!) and name (united states OR U.S. OR Secretary OR Department OR Administration OR Commission)”), and searches of state attorneys’ general websites and news media reports. As discussed in more detail, *infra* section B.3, pp. 1712–15, the dataset does not include cases in which the court issued vacatur, a distinct remedy affording nationwide relief, even where the plaintiffs initially sought an injunction. Nor does the dataset include cases where injunctive relief was issued as to a nationwide class.

³² Our count differs from the count announced by DOJ in 2020. See note 16. DOJ may have double counted preliminary and permanent injunctions. Further, DOJ appears to have included cases where judges vacated a rule under the APA, rather than enjoined a policy nationally. See,

For purposes of our analysis, we focus on injunctions issued beginning in 2001 with the Bush Administration. Finally, we cannot guarantee our own search for nationwide injunctions from 2020 to 2023 picked up every single nationwide injunction issued. Westlaw and LexisNexis do not publish every case. Further, because judges use varying terminology, and do not always identify an injunction as “nationwide,” “national,” or “universal” despite issuing an injunction to that effect, our figures likely underestimate the total number of injunctions issued.³³ At the very least, we are confident this is the most comprehensive dataset of nationwide injunctions compiled and published to date.

3. *The Numbers.* — The dataset includes 127 injunctions. Just over half (64) of the injunctions issued since 1963 were issued against Trump Administration policies.³⁴

Table 1: Nationwide Injunctions from 2001 to 2023

PRESIDENTIAL ADMINISTRATION THAT PROMULGATED THE ENJOINED POLICY	TOTAL INJUNCTIONS	INJUNCTIONS ISSUED BY JUDGE APPOINTED BY PRESIDENT OF OPPOSING PARTY	PERCENTAGE
Bush	6	3	50.0%
Obama	12	7	58.3%
Trump	64	59	92.2%
Biden	14	14	100.0%
TOTAL	96	83	86.5%

Of the 12 nationwide injunctions issued in response to Obama Administration policies, 7 were issued by judges appointed by a Republican President. The 12 injunctions were issued by 8 district courts. Just over half were issued by district courts in Texas: 3 by the Northern District of Texas, 3 by the Eastern District, and 1 by the Southern District.

Of the 64 nationwide injunctions issued against Trump policies, only 5 were issued by judges appointed by a Republican, leaving 92.2% of injunctions issued by a judge appointed by a Democrat. The 64 injunctions were issued by 18 district courts, with 15 (23.4%) issued by the Northern District of California, 10 (15.6%) by the District of the District

e.g., *New York v. U.S. Dep’t of Health & Hum. Servs.*, 414 F. Supp. 3d 475 (S.D.N.Y. 2019); *City & County of San Francisco v. Azar*, 411 F. Supp. 3d 1001 (N.D. Cal. 2019); *Washington v. Azar*, 426 F. Supp. 3d 704 (E.D. Wash. 2019).

³³ Our search terms in Westlaw, for example, did not pick up the case *New York v. Trump*, 490 F. Supp. 3d 225, 245 (D.D.C. 2020). However, we were able to find cases of this kind if they were cited as an example in a case that did populate through our Westlaw and LexisNexis searches.

³⁴ Given that President Trump held office for only one term — half the length of the two-term presidencies of the Bush and Obama Administrations — these numbers are particularly staggering.

of Columbia, and 8 (12.5%) by the District of Maryland.

Through the end of President Biden's third year in office, 14 nationwide injunctions were issued, halting vaccine mandates,³⁵ immigration policies,³⁶ climate-change cost estimates,³⁷ and stimulus programs for farmers of color,³⁸ among other presidential priorities. Every single injunction was issued by a judge appointed by a Republican President. As in the Obama Administration, these injunctions have clustered in Texas: 5 by the Southern District and 1 by the Northern District.

The number of nationwide injunctions issued during the first three years of the Biden Administration is lower than the number issued during President Trump's first three years.³⁹ But two points, which will be discussed in greater depth below, are worth noting. First, the extreme use of nationwide injunctions during the Trump Administration could reflect judicial responsiveness to the unprecedented degree to which President Trump tested the limits of presidential power.⁴⁰ Second, in the Biden years, judges appear to be ordering vacatur in cases where plaintiffs requested an injunction. Whether the falling rate of injunctions from the Trump to the Biden Administration reflects a decrease in abuses of executive power, judicial responsiveness to growing criticism of the nationwide injunction,⁴¹ or the replacement of some injunctions

³⁵ *Georgia v. Biden*, 574 F. Supp. 3d 1337, 1343 (S.D. Ga. 2021) (vaccine mandate for federal contractors); *Louisiana v. Becerra*, 571 F. Supp. 3d 516, 526 (W.D. La. 2021) (Centers for Medicare & Medicaid Services' vaccine mandate).

³⁶ See, e.g., *Texas v. Biden*, 554 F. Supp. 3d 818, 828 (N.D. Tex. 2021), *rev'd*, 142 S. Ct. 2528 (2022); *Texas v. United States*, 555 F. Supp. 3d 351, 362–63 (S.D. Tex. 2021); *Texas v. United States*, 524 F. Supp. 3d 598, 607 (S.D. Tex. 2021); *Louisiana v. Ctrs. for Disease Control & Prevention*, 603 F. Supp. 3d 406, 412, 441 (W.D. La. 2022); *Arizona v. Biden*, 593 F. Supp. 3d 676, 692 (S.D. Ohio 2022), *rev'd*, 40 F.4th 375 (6th Cir. 2022).

³⁷ *Louisiana v. Biden*, 543 F. Supp. 3d 388, 396–97 (W.D. La. 2021).

³⁸ *Wynn v. Vilsack*, 545 F. Supp. 3d 1271, 1295 (M.D. Fla. 2021); *Holman v. Vilsack*, No. 21-1085, 2021 WL 2877915, at *1–2 (W.D. Tenn. July 8, 2021).

³⁹ We estimate that by December 31, 2019, 44 nationwide injunctions had been issued.

⁴⁰ President Trump is the only President to be impeached twice. Lisa Mascaro et al., *Donald Trump Becomes the First U.S. President to Be Impeached Twice*, PBS (Jan. 13, 2021, 4:33 PM), <https://www.pbs.org/newshour/politics/majority-of-house-members-vote-for-2nd-impeachment-of-trump> [<https://perma.cc/Y4DU-466E>]. He also maintained that Article II gave him “the right to do whatever [he] want[s].” Michael Brice-Saddler, *While Bemoaning Mueller Probe, Trump Falsely Says the Constitution Gives Him “The Right to Do Whatever I Want,”* WASH. POST (July 23, 2019, 9:46 PM), <https://www.washingtonpost.com/politics/2019/07/23/trump-falsely-tells-auditorium-full-teens-constitution-gives-him-right-do-whatever-i-want> [<https://perma.cc/2JRN-77FX>]. For more on President Trump's “unprecedented” efforts to “undermine and otherwise reshape domestic policy programs,” see FRANK J. THOMPSON ET AL., *TRUMP, THE ADMINISTRATIVE PRESIDENCY, AND FEDERALISM* (2020). For more on President Trump's disregard for presidential norms and checks on executive power, see generally BOB BAUER & JACK GOLDSMITH, *AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY* (2020).

⁴¹ See *Health Freedom Def. Fund, Inc. v. Biden*, 599 F. Supp. 3d 1144, 1176 (M.D. Fla. 2022) (recognizing “the criticism about nationwide injunctive relief and admittedly shar[ing] some of the skepticism about it”); *Nat'l Urb. League v. Ross*, 489 F. Supp. 3d 939, 1002 (N.D. Cal. 2020) (“The Court is aware of the ongoing debate regarding nationwide injunctions and their scope.”); Gilliam

with the “lesser remedy”⁴² of vacatur, the decrease should not mislead: district court judges appear to be striking down executive policies of opposing administrations with unprecedented frequency.

B. *The Consequences*

Nationwide injunctions issued over the past twenty years collectively reveal three main takeaways: First, nationwide injunctions are becoming more common. Second, they are overwhelmingly issued by judges appointed by a President from the opposite political party as the President who promulgated the policy at issue. Third, some judges are increasingly turning to vacatur, rather than nationwide injunctions, to stop executive action.

1. *The Increase in Nationwide Injunctions.* — Nationwide injunctions are undeniably on the rise. As gridlock in Congress has forced Presidents to turn to executive action, so too have nationwide injunctions increased.⁴³ Scholars theorize that nationwide injunctions interrupt the ordinary development of law in three main ways: by interfering with percolation, creating conflicts in the law, and allowing an end-run around class actions. Two of these concerns have borne out in practice.

(a) *Percolation.* — Scholars contend that proper “percolation” — “the practice of awaiting multiple lower courts’ answers to a legal question that the [Supreme] Court is bound to decide”⁴⁴ — is foundational to legal development. Where legal challenges involve complex questions of law, development across many factual contexts may facilitate a more considered resolution, and granting a nationwide injunction could cut that short.⁴⁵ The Southern District of Georgia’s decision to enjoin the Biden Administration’s vaccine requirement for federal contractors and subcontractors presents a discrete example.⁴⁶ Around the time when the Georgia court enjoined the requirement, three other district courts had also considered and preliminarily enjoined the contractor mandate, but

v. U.S. Dep’t of Agric., 486 F. Supp. 3d 856, 880–81 (E.D. Pa. 2020) (“The Court is also mindful of the skepticism regarding the increased issuance of nationwide injunctions.”); *City & County of San Francisco v. U.S. Citizenship & Immigr. Servs.*, 981 F.3d 742, 763 (9th Cir. 2020) (“The appropriateness of nationwide injunctions in any case has come under serious question.”).

⁴² *All. for Hippocratic Med. v. FDA*, 668 F. Supp. 3d 507, 560 (N.D. Tex. 2023), *aff’d in part, vacated in part*, 78 F.4th 210 (5th Cir. 2023), *cert. granted sub nom. Danco Lab’ys, L.L.C. v. All. for Hippocratic Med.*, No. 23-236, 2023 WL 8605744 (U.S. Dec. 13, 2023), and *cert. granted sub nom. FDA v. All. for Hippocratic Med.*, No. 23-235, 2023 WL 8605746 (U.S. Dec. 13, 2023); *see also Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010) (discussing vacatur as a “less drastic remedy,” *id.* at 165, than injunction); *Kiakombua v. Wolf*, 498 F. Supp. 3d 1, 52 (D.D.C. 2020) (considering vacatur as distinct from injunction and “substantially less intrusive”).

⁴³ *See* Charlton C. Copeland, *Seeing Beyond Courts: The Political Context of the Nationwide Injunction*, 91 U. COLO. L. REV. 789, 808 (2020).

⁴⁴ Michael Coenen & Seth Davis, *Percolation’s Value*, 73 STAN. L. REV. 363, 371 (2021).

⁴⁵ *See id.* at 381 & n.98 (quoting *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011)).

⁴⁶ *See Georgia v. Biden*, 574 F. Supp. 3d 1337, 1357 (S.D. Ga. 2021).

these courts limited the injunctions to the parties in each case.⁴⁷ After the nationwide injunction was issued, at least seven district courts considered cases where plaintiffs challenged the vaccine mandate, but dismissed or stayed the claims instead of offering independent evaluations of the mandate's legality.⁴⁸ The courts claimed they lacked jurisdiction to decide the cases because plaintiffs could not demonstrate an imminent or traceable injury as a result of the preexisting nationwide injunction.⁴⁹ The nationwide injunction also led to more cursory review in circuit courts.⁵⁰ And, in other cases, courts struggled to answer questions tangential to the executive order because the injunction had prevented other courts from exploring them.⁵¹

Furthermore, the lack of percolation fast-tracks to the Supreme Court issues that have not “ha[d] the benefit of varying court of appeals decisions based upon multiple records.”⁵² Instead, the Court may “review a single grant of preliminary relief and effectively decide a legal issue of nationwide importance without a well-developed sense of the consequences of its decision.”⁵³ Justice Gorsuch has lamented the loss of factual development in this manner, which “permits the airing of competing views that aids [the] Court’s own decisionmaking process.”⁵⁴

(b) *Conflicting Law*. — With an increase in nationwide injunctions, some scholars warn that conflicting injunctions “could result in a

⁴⁷ See *Kentucky v. Biden*, 571 F. Supp. 3d 715, 735 (E.D. Ky. 2021) (enjoining mandate in Kentucky, Ohio, and Tennessee); *Missouri v. Biden*, 576 F. Supp. 3d 622, 635 (E.D. Mo. 2021) (enjoining mandate in Alaska, Arkansas, Iowa, Missouri, Montana, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming); *Florida v. Nelson*, 576 F. Supp. 3d 1017, 1040 (M.D. Fla. 2021) (enjoining mandate in Florida).

⁴⁸ See *Conner v. Biden*, No. 21-CV-074, 2021 WL 6773174, at *8 (N.D. Tex. Dec. 28, 2021); *SNL Workforce Freedom All. v. Nat’l Tech. & Eng’g Sols. of Sandia, LLC*, No. 22-cv-00001, 2022 WL 2065062, at *5 (D.N.M. June 8, 2022); *Feds for Med. Freedom v. Biden*, 581 F. Supp. 3d 826, 836 (S.D. Tex. 2022); *Calderwood v. United States*, 623 F. Supp. 3d 1260, 1282 (N.D. Ala. 2022); *de Cristo Cano v. Biden*, 598 F. Supp. 3d 921, 923 (S.D. Cal. 2022); *Flores v. United States*, No. 22-cv-70, 2022 WL 204247, at *1 (M.D. Fla. Jan. 24, 2022); *Texas v. Biden*, No. 21-CV-309, 2022 WL 18436750, at *1 (S.D. Tex. Oct. 20, 2022).

⁴⁹ See sources cited *supra* note 48.

⁵⁰ See, e.g., *Kentucky v. Biden*, 23 F.4th 585, 611 (6th Cir. 2022) (noting “from a practical perspective that the contractor mandate is already subject to a nationwide injunction,” making the court’s decision “somewhat academic” because “even if [it] thought the district court’s injunction an abuse of discretion . . . dissolution of it could not revive the contractor mandate and prevent the government’s allegedly irreparable injuries”).

⁵¹ See, e.g., *Donovan v. Biden*, 603 F. Supp. 3d 975, 982 (E.D. Wash. 2022) (“The issue as to whether the Executive Order 14042, which applies to federal contractors, complies with the Procurement Act is unsettled among district courts and courts of appeal. Currently, Executive Order 14042 is under a nationwide injunction, pending review by the 11th Circuit. However, the Ninth Circuit has not addressed the issue, and therefore, there is no binding authority directly on point.” (citations omitted)).

⁵² Coenen & Davis, *supra* note 44, at 382; see also Bray, *supra* note 14, at 462 (“A world of national injunctions is one in which the Supreme Court will tend to decide important questions more quickly, with fewer facts, and without the benefit of contrary opinions by lower courts.”).

⁵³ Coenen & Davis, *supra* note 44, at 382.

⁵⁴ *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (mem.) (Gorsuch, J., concurring) (citing Bray, *supra* note 14, at 461–62).

defendant being held in contempt of court no matter which injunction the defendant tried to obey.”⁵⁵ But these fears of increased conflicts between jurisdictions may be overblown,⁵⁶ as Professor Amanda Frost has posited.⁵⁷ Judges tend to abide by the principle of comity — which “requires judges to avoid issuing [conflicting] injunctions when possible”⁵⁸ — and often narrow injunctions or otherwise issue injunctions so as not to overlap with preexisting ones.⁵⁹ Take the mifepristone case. Though the Eastern District of Washington limited the scope of its ruling to the Democratic plaintiff states, the Northern District of Texas ruling applied nationwide, leaving the judges’ orders at war with one another in nearly half the states. But only for a moment. The Fifth Circuit stayed the injunction, alleviating the tension.⁶⁰

(c) *Relationship with Class Action.* — The availability of nationwide injunctions makes obtaining class-wide relief under Rule 23(b)(2) seemingly unnecessary. When “plaintiffs can get the same relief in an individual suit that they can in a class action,”⁶¹ it raises the question: Why jump through the procedural hoops to obtain class certification when you can bypass them and still receive the same relief?⁶²

2. *Nationwide Injunctions as Political Weapons.* — Notably, nationwide injunctions are not only increasing in frequency but also overwhelmingly issued by judges appointed by Presidents of the opposite party from the administration whose actions the judges are enjoining. Of the 78 nationwide injunctions issued during the Trump and Biden Administrations, 93.6% of injunctions were issued by judges appointed by a President of the opposing political party. Often, it is the policies that relate to politically hot-button issues or a President’s policy priorities that are enjoined: for President Obama, it was LGBTQ+ civil rights;⁶³

⁵⁵ Frost, *supra* note 15, at 1106.

⁵⁶ See, e.g., Bert I. Huang, *Coordinating Injunctions*, 98 TEX. L. REV. 1331, 1332 & n.8 (2020) (contrasting expectations and reality).

⁵⁷ See Frost, *supra* note 15, at 1106.

⁵⁸ *Id.*

⁵⁹ See, e.g., *Louisiana v. Becerra*, 571 F. Supp. 3d 516, 543–44 (W.D. La. 2021).

⁶⁰ *All. for Hippocratic Med. v. FDA*, 78 F.4th 210, 256 (5th Cir. 2023).

⁶¹ Bray, *supra* note 14, at 464–65.

⁶² We found some instances where plaintiffs certified a nationwide class before obtaining relief. See, e.g., *U.S. Navy Seals 1–26 v. Austin*, 594 F. Supp. 3d 767, 776 (N.D. Tex. 2022) (enjoining the Navy’s COVID-19 vaccine mandate); *Doster v. Kendall*, 596 F. Supp. 3d 995, 1005 (S.D. Ohio 2022) (enjoining the Air Force’s COVID-19 vaccine mandate). However, most nationwide injunctions are issued against individual plaintiffs, and for purposes of our dataset, we only analyzed cases in which individual plaintiffs received nationwide relief.

⁶³ See, e.g., *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 888 (C.D. Cal. 2010) (Don’t Ask, Don’t Tell); *Texas v. United States*, 201 F. Supp. 3d 810, 816 (N.D. Tex. 2016) (transgender bathroom policies in schools); *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 670 (N.D. Tex. 2016) (abortion and gender-affirming surgery).

for President Trump, it was immigration;⁶⁴ and for President Biden, it was policies combatting the COVID-19 pandemic.⁶⁵

Structural features of litigation exacerbate the politicization of the injunction. First, the ability of plaintiffs to target particular courts and forum shop for judges who are most likely to honor a request for injunctive relief results in a “race to the (‘right’) courthouse.”⁶⁶ Since securing a favorable ruling can enjoin enforcement of the challenged policy nationwide, strategic plaintiffs and state attorneys general are incentivized to bring cases in forums “with a particular perceived political valence” that aligns with plaintiffs’ own policy preferences.⁶⁷ Often, that means shopping litigation to states where the likelihood of drawing a judge appointed by a friendly political party is higher. Today, for example, two-thirds of all California federal district judges have been appointed by a Democrat.⁶⁸ The opposite is true in Texas.⁶⁹ It is also often the case in these states — where home-state senators tend to be solidly of one political party — that judges appointed by Presidents of the opposite party as the home-state senators are likely to be more moderate due to the Senate’s tradition of granting home-state senators veto power over a President’s judicial nominees.⁷⁰ It is no surprise that of the 6 injunctions issued against the Bush Administration, 4 (66.7%) were issued by judges in California. Of the 12 injunctions issued against the Obama Administration, Texas district courts issued 7 (58.3%). Like the trend observed during the Bush Administration, district courts in California issued more injunctions against the Trump Administration than any other state. Unsurprisingly, Texas federal courts have again become the hot zone for nationwide injunctions and vacatur after the election of President Biden.⁷¹

⁶⁴ See, e.g., *Hawai‘i v. Trump*, 245 F. Supp. 3d 1227, 1230 (D. Haw. 2017); *Hawai‘i v. Trump*, 265 F. Supp. 3d 1140, 1145 (D. Haw. 2017); *Int’l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 544 (D. Md. 2017); *Int’l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 583 (D. Md. 2017); *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 507 (N.D. Cal. 2017).

⁶⁵ See sources cited *infra* notes 73–76.

⁶⁶ Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095, 2125 (2017).

⁶⁷ Kate Huddleston, *Nationwide Injunctions: Venue Considerations*, 127 YALE L.J.F. 242, 243 (2017); Siddique, *supra* note 66, at 2125 (observing that, in just over one year, Texas district courts issued five nationwide injunctions “curtailing Obama-era regulations”).

⁶⁸ In the Northern and Eastern Districts of California, no judges have been appointed by a Republican President. See *Current Federal Judges by Appointing President and Circuit*, BALLOTPEdia (Feb. 17, 2024), https://ballotpedia.org/Current_federal_judges_by_appointing_president_and_circuit [https://perma.cc/7BCP-7U7R].

⁶⁹ Two-thirds of Texas federal district judges have been appointed by a Republican. See *id.*

⁷⁰ See generally Ryan C. Black et al., *Qualifications or Philosophy? The Use of Blue Slips in a Polarized Era*, 44 PRESIDENTIAL STUD. Q. 290 (2014).

⁷¹ See, e.g., *Texas v. United States*, 524 F. Supp. 3d 598 (S.D. Tex. 2021); *Feds for Med. Freedom v. Biden*, 581 F. Supp. 3d 826 (S.D. Tex. 2022). Although vacaturs were not included in the dataset, plaintiffs often filed those cases — which sought injunctive relief, despite resulting in a stay or vacatur — in Texas district courts as well. See, e.g., *All. for Hippocratic Med. v. FDA*, 668 F. Supp.

Second, for each policy challenged, the asymmetrical effects of preclusion ensure that nationwide injunctions are a powerful tool for political opponents who can challenge the policy in multiple venues. Practically speaking, a successful defense against a nationwide injunction in one court is barely a win for the government at all: because that decision has no preclusive effect on new plaintiffs, other plaintiffs are free to bring the exact same lawsuit elsewhere and “[s]hop ‘til the statute drops.”⁷² All it takes is one judge siding with the plaintiffs to enjoin the challenged law. These asymmetric consequences force the federal government to engage in a game of whack-a-mole. If enough plaintiffs sue — and if they can each target the forum most likely to be hostile to the government’s action — it seems almost inevitable that the action will be nationally enjoined. A prominent example is President Biden’s COVID-19 vaccine mandates: At least four judges declined to issue nationwide injunctions against Executive Order 14,042, but ultimately one did.⁷³ One judge declined to issue a nationwide injunction against Executive Order 14,043, but still the policy was enjoined nationally.⁷⁴ The same is true for the Centers for Medicare & Medicaid Services’ vaccine mandate.⁷⁵ And at least four different judges declined to issue nationwide injunctions against President Biden’s military vaccine mandate, but, ultimately, two enjoined the policy nationally.⁷⁶

Though these structural factors contribute to the increase in nationwide injunctions, the exact causation is hard to pinpoint. As Judge

3d 507 (N.D. Tex. 2023). The trend of filing in Texas is likely not a coincidence, but instead reflects a strategic decision to forum shop the case to a more favorable forum. As Professor Stephen Vladeck has documented, the structural quirks of the Texas federal district court system mean that filing a case in certain Texas divisions yields near certainty of drawing a particular judge. For example, by filing in the Amarillo Division, prospective plaintiffs have a 100% chance of having their case heard before Judge Kacsmark. Steve Vladeck, *18 The Growing Abuse of Single-Judge Divisions*, SUBSTACK: ONE FIRST (Mar. 13, 2023), <https://stevevladeck.substack.com/p/18-shopping-for-judges> [<https://perma.cc/D4RB-SYHJ>].

⁷² Bray, *supra* note 14, at 460.

⁷³ Compare *Brnovich v. Biden*, 562 F. Supp. 3d 123, 167 (D. Ariz. 2022) (limiting injunction to Arizona), *Florida v. Nelson*, 576 F. Supp. 3d 1017, 1040 (M.D. Fla. 2021) (limiting injunction to Florida contracts), *Kentucky v. Biden*, 571 F. Supp. 3d 715, 735 (E.D. Ky. 2021) (limiting injunctions to parties), and *Louisiana v. Biden*, 575 F. Supp. 3d 680, 695 (W.D. La. 2021) (same), with *Georgia v. Biden*, 574 F. Supp. 3d 1337, 1357 (S.D. Ga. 2021) (granting nationwide injunction to reduce confusion in implementation), *aff’d in part, vacated in part sub nom. Georgia v. President of the U.S.*, 46 F.4th 1283, 1303–08 (11th Cir. 2022) (overturning injunction as to nonparties).

⁷⁴ Compare *Rydie v. Biden*, 572 F. Supp. 3d 153, 162 (D. Md. 2021) (denying injunction), with *Feds for Med. Freedom v. Biden*, 581 F. Supp. 3d 826, 836 (S.D. Tex. 2022) (granting injunction).

⁷⁵ Compare *Missouri v. Biden*, 576 F. Supp. 3d 622, 635 (E.D. Mo. 2021) (limiting injunction to party states), with *Louisiana v. Becerra*, 571 F. Supp. 3d 516, 544 (W.D. La. 2021) (expanding reach of existing injunction nationwide).

⁷⁶ Compare *Poffenbarger v. Kendall*, 588 F. Supp. 3d 770, 798 (S.D. Ohio 2022) (limiting injunction to the parties), *Air Force Officer v. Austin*, 588 F. Supp. 3d 1338, 1347 (M.D. Ga. 2022) (same), *Roth v. Austin*, 603 F. Supp. 3d 741, 783 (D. Neb. 2022) (denying injunction), and *Doe #1-#14 v. Austin*, 572 F. Supp. 3d 1224, 1241 (N.D. Fla. 2021) (same), with *Doster v. Kendall*, 596 F. Supp. 3d 995, 1022–23 (S.D. Ohio 2022) (granting classwide injunction), and *U.S. Navy Seals 1–26 v. Austin*, 594 F. Supp. 3d 767, 789 (N.D. Tex. 2022) (same).

Rovner notes, it is difficult to disentangle “whether any such increase signals an expanding judicial overreach or an increasing executive autocracy.”⁷⁷ But, regardless of the exact causation, the numbers nonetheless demonstrate that nationwide injunctions — continually issued out of a select few districts, which change depending on the President’s party — are playing an increasing role in political battles. As a consequence of increased forum shopping and political gamesmanship, the increase in nationwide injunctions on highly politicized issues fuels the public’s perception that the courts themselves are politicized and that federal judges are political actors.⁷⁸ When “judges in the ‘red state’ of Texas halt Obama’s policies, and judges in the ‘blue state’ of Hawaii enjoin Trump’s,” it tests the limits of the public’s imagination to argue that the federal judiciary is impartial, nonpartisan, and legitimate.⁷⁹ The medication abortion cases are a prominent example, garnering public attention⁸⁰ and reigniting concerns that plaintiffs selectively “shopped” for judges they believed would likely rule in their favor.⁸¹

Perception of the judiciary as political is a natural conclusion in light of the fact that injunctions are disproportionately issued by more extreme judges: judges who were selected precisely because plaintiffs saw them as especially ideological and unafraid to reach beyond principles of judicial restraint.⁸² In turn, these judges, who are least representative of the federal judiciary (not to mention unelected and unaccountable), determine policy for the rest of the country.

3. *Relationship with Vacatur.* — Finally, the Chapter’s analysis does not capture many high-profile cases deemed “nationwide injunctions”

⁷⁷ *City of Chicago v. Barr*, 957 F.3d 772, 803 (7th Cir. 2020).

⁷⁸ See Gregg Costa, *An Old Solution to the Nationwide Injunction Problem*, HARV. L. REV. BLOG (Jan. 25, 2018), <https://harvardlawreview.org/blog/2018/01/an-old-solution-to-the-nationwide-injunction-problem> [<https://perma.cc/P6WX-D4VY>].

⁷⁹ See Frost, *supra* note 15, at 1104.

⁸⁰ See, e.g., Sarah McCammon, *Judges’ Dueling Decisions Put Access to a Key Abortion Drug in Jeopardy Nationwide*, NPR (Apr. 8, 2023, 5:45 AM), <https://www.npr.org/2023/04/07/1159220452/abortion-pill-drug-mifepristone-judge-texas-amarillo> [<https://perma.cc/LQN2-NR4N>]; Sandhya Raman, *Dual Court Rulings Throw Confusion into Abortion Drug Debate*, ROLL CALL (Apr. 7, 2023, 8:45 PM), <https://rollcall.com/2023/04/07/federal-judge-in-texas-blocks-use-of-abortion-drug> [<https://perma.cc/PZ5E-J8AK>].

⁸¹ See, e.g., Kevin Breuninger, *Abortion Pill Ruling Puts “Judge Shopping” Concerns Back in Spotlight*, CNBC (Apr. 12, 2023, 5:37 PM), <https://www.cnbc.com/2023/04/12/abortion-pill-ruling-puts-judge-shopping-concerns-back-in-spotlight.html> [<https://perma.cc/AD8T-R2U2>]; Elie Mystal, *Conservatives Have a Sketchy New Legal Plot to Ban the Abortion Pill*, THE NATION, (Jan. 26, 2023), <https://www.thenation.com/article/politics/texas-judge-abortion-pill-case> [<https://perma.cc/9TSV-JNH9>]; Anna Bernstein, *Five Key Takeaways on Mifepristone, After Two Competing Rulings*, CENTURY FOUND. (Apr. 10, 2023), <https://tcf.org/content/commentary/five-key-takeaways-on-mifepristone-after-two-competing-rulings> [<https://perma.cc/JD2M-EE5W>]; Jordan Smith, *The Shadow Medical Community Behind the Attempt to Ban Medication Abortion*, THE INTERCEPT (Feb. 28, 2023, 12:44 PM), <https://theintercept.com/2023/02/28/medication-abortion-lawsuit> [<https://perma.cc/UL3Y-88EE>].

⁸² See, e.g., Mystal, *supra* note 81 (describing Judge Kacsmaryk as a “zealot” who “[r]ight-wingers have actively sought out . . . for their most dubious legal claims”).

because the analysis did not include APA stays or grants of vacatur, which Bagley calls nationwide injunctions' "evil twin."⁸³

Vacatur and injunctions are considered distinct.⁸⁴ First, a vacatur is authorized by the APA, which scholars argue is separate from remedies in equity.⁸⁵ In section 706 of the APA, Congress gave reviewing courts the power to "set aside agency action, findings, and conclusions" that the court found to be unlawful.⁸⁶ Section 705 authorizes stays, which effectively halt enforcement under the statute or regulation, pending judicial review.⁸⁷ Courts have interpreted this language to mean that they have the authority to vacate the entire rule, not simply the application of the rule as to the individual petitioners.⁸⁸ This tees up another distinction: their remedial nature (or lack thereof). While "[v]acatur operates on the legal status of a rule, causing the rule to lose binding force," injunctions operate on the parties to the litigation.⁸⁹ Put differently, "an injunction . . . merely blocks enforcement" while "vacatur unwinds the challenged agency action."⁹⁰ Thus, whether vacatur is considered a remedy is an open question.

Despite their technical differences, vacatur and injunctions function in the same manner when the challenged executive action is an agency rule.⁹¹ Practically, both bar enforcement of the rule against all individuals across all jurisdictions⁹² and "prevent[] some action before the

⁸³ Nicholas Bagley, *A Single Judge Shouldn't Have This Kind of National Power*, YALE J. ON REGUL.: NOTICE & COMMENT (Apr. 14, 2023), <https://www.yalejreg.com/nc/a-single-judge-shouldnt-have-this-kind-of-national-power> [<https://perma.cc/Y7QE-EHW2>].

⁸⁴ See *Alabama v. Ctrs. for Medicare & Medicaid Servs.*, 674 F.3d 1241, 1244–45 (11th Cir. 2012) (per curiam) (differentiating vacatur from injunctions); *Cap. Area Immigrants' Rts. Coal. v. Trump*, 471 F. Supp. 3d 25, 57–60 (D.D.C. 2020) (same).

⁸⁵ See William Baude & Samuel L. Bray, *The Supreme Court, 2022 Term — Comment: Proper Parties, Proper Relief*, 137 HARV. L. REV. 153, 181 (2023) ("[T]here is no traditional legal or equitable remedy of 'vacatur' . . ."). But see Aditya Bamzai, *The Path of Administrative Law Remedies*, 98 NOTRE DAME L. REV. 2037, 2040–41 (2023) (tracking the history of the "set aside" remedy from earlier statutes and into the APA).

⁸⁶ 5 U.S.C. § 706(2).

⁸⁷ See *id.* § 705.

⁸⁸ See, e.g., *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989)).

⁸⁹ John Harrison, *Vacatur of Rules Under the Administrative Procedure Act*, 40 YALE J. ON REGUL. 119, 119–20 (2023).

⁹⁰ *Brown v. U.S. Dep't of Educ.*, 640 F. Supp. 3d 644, 667 (N.D. Tex. 2022) (quoting *Data Mktg. P'ship v. U.S. Dep't of Lab.*, 45 F.4th 846, 859 (5th Cir. 2022)).

⁹¹ See Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121, 1126 (2020); Ronald M. Levin, Opinion, *The National Injunction and the Administrative Procedure Act*, REGUL. REV. (Sept. 18, 2018), <https://www.theregreview.org/2018/09/18/levin-national-injunction-administrative-procedure-act> [<https://perma.cc/Q936-35DZ>] ("[W]hen the challenged agency action is a rule, a judicial order that 'sets it aside' looks equivalent, in practical effect, to an injunction that prevents the rule from applying to anyone.")

⁹² A small but growing literature has emerged that analyzes whether the Administrative Procedure Act's text actually does authorize this broad remedy. The literature dovetails with the debate on nationwide injunctions. See, e.g., Sohoni, *supra* note 91, at 1123 ("This effort to revisit

legality of that action has been conclusively determined.”⁹³ Indeed, vacatur is often colloquially referred to as nationwide injunctions,⁹⁴ and sometimes, courts consider them interchangeable.⁹⁵

Because many of the most high-profile cases where courts issue nationwide prohibitions arise in the context of executive action, courts are free to choose between issuing a nationwide injunction or ordering vacatur. In considering President Trump’s decision to rescind the DACA program, two judges enjoined the rescission,⁹⁶ while one judge decided that vacatur, instead, was the appropriate remedy.⁹⁷ In the mifepristone case discussed above, plaintiffs sought a nationwide injunction in the Texas federal court, but Judge Kacsmaryk ultimately opted to issue a stay, or preliminary vacatur, instead.⁹⁸ He stated: “Because the Court finds injunctive relief is generally appropriate, Section 705 plainly authorizes the lesser remedy of issuing ‘all necessary and appropriate process’ to postpone the effective date of the challenged actions.”⁹⁹

Given the perceived interchangeability between the two remedies, in recent rulings, what was once achieved through the nationwide injunction is increasingly being achieved through vacatur — especially because vacatur is considered a “less drastic remedy” that requires a lower standard.¹⁰⁰ Judge Mizelle’s order blocking President Biden’s

the APA’s remedial scheme has not arisen in a vacuum. Rather, it is largely (though not entirely) an outgrowth of the current maelstrom over the propriety of the ‘universal’ or ‘nationwide’ injunction.” (footnote omitted). It is outside the scope of this Chapter to rehash those arguments.

⁹³ *Nken v. Holder*, 556 U.S. 418, 428 (2009).

⁹⁴ See, e.g., Mark Joseph Stern, *Why Roberts and Kavanaugh Got So Furious at Biden’s Solicitor General*, SLATE (Dec. 2, 2022, 4:27 PM), <https://slate.com/news-and-politics/2022/12/supreme-court-biden-immigration-masks-debt-relief-elizabeth-prelogar.html> [<https://perma.cc/6WYN-VMDM>] (“More recently, however, district courts have used vacatur to function as nationwide injunctions against the executive branch. (To be clear, their decisions largely treat vacatur as a form of nationwide injunction — halting the enforcement of a regulation anywhere, by anyone, against any party — so it’s fair to use the two terms interchangeably, though they’re technically distinct.)”).

⁹⁵ See, e.g., *Guilford Coll. v. Wolf*, No. 18CV891, 2020 WL 586672, at *11 (M.D.N.C. Feb. 6, 2020) (finding that nationwide injunctions were “especially appropriate in the immigration context” as justification to issue vacatur). But see *Cap. Area Immigrants’ Rts. Coal. v. Trump*, 471 F. Supp. 3d 25, 59 (D.D.C. 2020) (concluding that concerns about the “propriety” of issuing a nationwide injunction were “not the issue” when considering whether to order vacatur).

⁹⁶ *Regents of Univ. of Cal. v. Dep’t of Homeland Sec.*, 279 F. Supp. 3d 1011, 1049 (N.D. Cal. 2018); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 437 (E.D.N.Y. 2018).

⁹⁷ *NAACP v. Trump*, 298 F. Supp. 3d 209, 249 (D.D.C. 2018).

⁹⁸ *All. for Hippocratic Med. v. FDA*, 668 F. Supp. 3d 507, 560 (N.D. Tex. 2023), *aff’d in part, vacated in part*, 78 F.4th 210 (5th Cir. 2023), *cert. granted sub nom. Danco Lab’ys, L.L.C. v. All. for Hippocratic Med.*, No. 23-236, 2023 WL 8605744 (U.S. Dec. 13, 2023), and *cert. granted sub nom. FDA v. All. for Hippocratic Med.*, No. 23-235, 2023 WL 8605746 (U.S. Dec. 13, 2023).

⁹⁹ *Id.*

¹⁰⁰ See *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010) (“If a less drastic remedy (such as partial or complete vacatur of agency’s deregulation decision) was sufficient to redress respondents’ injury, no recourse to the additional and extraordinary relief of an injunction was warranted.”); see also *Brown v. U.S. Dep’t of Educ.*, 640 F. Supp. 3d 644, 667 (N.D. Tex. 2022) (“While ‘[i]t is not beyond the power of a court, in appropriate circumstances, to issue a nationwide injunction,’ these circumstances do not justify such a remedy.” (quoting *Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015))).

mask mandate on federal transit was deemed “a national injunction” by the media¹⁰¹ but was actually vacatur.¹⁰² So too was Judge Pittman’s order vacating President Biden’s student loan forgiveness program¹⁰³ and Judge Tipton’s decision invalidating immigration enforcement guidelines.¹⁰⁴ In practice, vacatur’s lower standard, combined with the enhanced opportunity for pre-enforcement challenges under the APA,¹⁰⁵ suggests litigants can use vacatur to achieve the same universal remedy as they might seek when pursuing injunctive relief.¹⁰⁶

Many of the policy concerns regarding nationwide injunctions apply with similar force to vacatur.¹⁰⁷ Most obviously, plaintiffs are similarly incentivized to shop their litigation to friendly forums. And, indeed, this trend has been documented.¹⁰⁸ Further, when judges stay or vacate executive action, the order is still likely to halt the proper development of law, including by making it more likely that the case must be fast-tracked to the Supreme Court without proper factual development.

C. Proposals for Reform

The rise in nationwide injunctions, coupled with the consequences identified in section B, suggest that reform is needed to curb the abuse of extreme nationwide injunctions that risk politicizing the judiciary. This section considers court reform proposals.¹⁰⁹ While many proposals may address one or a few particular symptoms of nationwide injunctions, when taking into account that judges are increasingly using

¹⁰¹ See, e.g., Brad Kutner, *Judge Issues National Injunction Blocking Biden’s Airplane Mask Mandate*, NAT’L L.J. (Apr. 18, 2022, 4:55 PM), <https://www.law.com/nationallawjournal/2022/04/18/judge-issues-national-injunction-blocking-bidens-airplane-mask-mandate> [<https://perma.cc/USV5-LACT>].

¹⁰² *Health Freedom Def. Fund, Inc. v. Biden*, 599 F. Supp. 3d 1144, 1177–78 (M.D. Fla. 2022).

¹⁰³ Compare Danielle Douglas-Gabriel, *Appeals Court Grants Injunction Against Biden’s Student Loan Forgiveness*, WASH. POST (Nov. 14, 2022, 5:14 PM), <https://www.washingtonpost.com/education/2022/11/14/appeals-halts-student-loan-forgiveness> [<https://perma.cc/PH3A-5CMY>], with *Brown*, 640 F. Supp. 3d at 667.

¹⁰⁴ Compare Maria Sacchetti, *Federal Judge in Texas Blocks Biden’s Efforts to Limit Immigration Arrests*, WASH. POST (Aug. 19, 2021, 6:45 PM), https://www.washingtonpost.com/immigration/federal-judge-in-texas-blocks-bidens-efforts-to-limit-immigration-arrests/2021/08/19/673e43f4-011f-11ec-ba7e-2cf966e88e93_story.html [<https://perma.cc/VB4Z-KES9>], with *Texas v. United States*, 606 F. Supp. 3d 437, 499 (S.D. Tex. 2022), *rev’d*, 143 S. Ct. 1964 (2023).

¹⁰⁵ See *Abbott Lab’ys v. Gardner*, 387 U.S. 136, 139–41 (1967); *Sackett v. EPA*, 566 U.S. 120, 130–31 (2012).

¹⁰⁶ See Kathryn Kimball Mizelle, *To Vacate or Not to Vacate: Some (Still) Unanswered Questions in the APA Vacatur Debate*, HARV. J.L. & PUB. POL’Y PER CURIAM, Fall 2023, at 1, 12–13.

¹⁰⁷ Frank Chang, Essay, *The Administrative Procedure Act’s Stay Provision: Bypassing Scylla and Charybdis of Preliminary Injunctions*, 85 GEO. WASH. L. REV. 1529, 1551 (2017).

¹⁰⁸ Vladeck, *supra* note 71. As of March 13, 2023, of the twenty-nine suits Texas had filed against the Biden Administration, zero were filed in Austin — where there is only a fifty percent chance of drawing a Republican-appointed judge. *Id.* By contrast, eight cases were filed in Victoria and seven in Amarillo, where plaintiffs are “guaranteed” to draw a specific Republican-appointed judge. *Id.*

¹⁰⁹ For reforms to nationwide injunctions that focus on curbing this type of remedy-seeking by litigants and litigators, see Elysa M. Dishman, *Generals of the Resistance: Multistate Actions and Nationwide Injunctions*, 54 ARIZ. ST. L.J. 359, 412–18 (2022).

vacatur to do what was once achieved through nationwide injunctions, structural reforms focused on limiting forum shopping are best suited to address the problem. These proposals preserve the ability of courts to use these remedies as a tool to curb executive abuses of power, while simultaneously limiting the most extreme uses.

Hanging over the debate on whether and how to reform nationwide injunctions is one large question: Are they constitutional? Scholars¹¹⁰ and jurists¹¹¹ disagree — arguing about when the remedy first emerged and whether the remedy is consistent with traditional equitable principles.¹¹² Given the existing robust scholarly debate on the subject, the rest of this Chapter sets the question of constitutionality to the side. The increase in both executive policymaking and the issuance of nationwide injunctions supports the notion that nationwide injunctions are a critical tool in maintaining the constitutional separation of powers and protecting against executive abuse. For the purposes of this Chapter, we assume nationwide injunctions are not unconstitutional as a matter of law.

I. Prohibiting Nonparty Relief. — Some scholars and commentators argue for blanket prohibitions on nationwide relief. For example, Professor Michael Morley recommends adding to the Federal Rules of Civil Procedure a rule that would eliminate nationwide injunctions

¹¹⁰ With regard to the history, compare Bray, *supra* note 14, at 43, which cites *Wirtz v. Baldor Electric Co.*, 337 F.2d 518 (D.C. Cir. 1963); *Flast v. Cohen*, 392 U.S. 83 (1968); and *Harlem Valley Transportation Ass'n v. Stafford*, 360 F. Supp. 1057 (S.D.N.Y. 1973), as early cases in which a national injunction was issued, with Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 943 (2020), which identifies *Lewis Publishing Co. v. Morgan*, 229 U.S. 288 (1913), as an earlier instance in which a court issued a nationwide injunction. Professor Mila Sohoni does not argue that *Lewis Publishing* is the first nationwide injunction issued against a federal law, only that it is at least one example that predates the previously recognized “first.” Sohoni, *supra*, at 943. With regard to constitutionality, compare Bray, *supra* note 14, at 420–21, who argues nationwide injunctions are beyond the scope of Article III, with Frost, *supra* note 15, at 1069, who argues nationwide injunctive relief is constitutional, and Alan M. Trammell, *The Constitutionality of Nationwide Injunctions*, 91 U. COLO. L. REV. 977, 981 (2020), who argues nationwide relief is an issue of scope of relief, not standing, so is properly within Article III.

¹¹¹ Justices Thomas and Gorsuch are skeptical of nationwide injunctions’ historical and constitutional basis. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2426, 2429 (2018) (Thomas, J., concurring) (arguing courts may lack not only constitutional and statutory authority to issue such injunctions but also historical precedent in equity); *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in the grant of stay) (arguing nationwide injunctions have “little basis in traditional equitable practice” because they “direct how the defendant must act toward persons who are not parties to the case” and may be “a sign of our impatient times”). Meanwhile, Justices Sotomayor and Jackson have indicated their support of nationwide injunctions where warranted to provide “complete relief.” See *Hawaii*, 138 S. Ct. at 2246 n.13 (Sotomayor, J., dissenting); *Make the Rd. N.Y. v. McAleenan*, 405 F. Supp. 3d 1, 66 (D.D.C. 2019) (saying of the government’s arguments against a nationwide injunction: “[I]t reeks of bad faith, demonstrates contempt for the authority that the Constitution’s Framers have vested in the judicial branch, and, ultimately, deprives successful plaintiffs of the full measure of the remedy to which they are entitled.”).

¹¹² If the Court takes up this question, a major issue is likely to be whether nationwide injunctions are within the equitable jurisdiction of the federal courts. See *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308 (1999).

altogether and limit relief to the parties in the case.¹¹³ Another commentator proposes a rule that would allow only circuit courts to issue nonparty relief.¹¹⁴ Others suggest limiting injunctions by issue area, providing clear-cut cases where nationwide relief should be circumscribed.¹¹⁵ And others look to limit by geographic scope, such as by a “circuit-border rule”¹¹⁶ or a state-line boundary.¹¹⁷ These reforms look to balance “the need for uniformity with the benefits of regional percolation.”¹¹⁸ They also even the asymmetrical effects of an injunction: to enjoin a policy nationwide, plaintiffs must win multiple times.

However, outlawing nonparty injunctions altogether would be overly broad. Based on our survey of nationwide injunctions, many courts weigh heavily the need for restraint — suggesting the excessive use of nationwide injunctions is limited to certain judges and certain courthouses. Moreover, in some instances, nationwide injunctions may be the only remedy that could meaningfully check the executive branch’s power.¹¹⁹ Indeed, outlawing nationwide injunctions in response to their increase could confuse cause and effect: nationwide injunctions might be increasingly common in part because they are increasingly

¹¹³ Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 ALA. L. REV. 1, 28, 49 (2019). In Congress, Senator Cotton and Representative Meadows introduced the Nationwide Injunction Abuse Prevention Act of 2019, which sought to outlaw nationwide injunctions altogether by limiting federal injunctions to the parties to the suit and the geographic limits of the district, but they have yet to reintroduce the bill during the Biden Administration. S. 2464, 116th Cong. (2019); H.R. 4292, 116th Cong. (2019). Representative Biggs’s Injunctive Authority Clarification Act of 2019, H.R. 77, 116th Cong. (2019), sought to limit injunctive orders that reach beyond the parties to the suit “unless the non-party is represented by a party” in a class action lawsuit.

¹¹⁴ Sam Heavenrich, *An Appellate Solution to Nationwide Injunctions*, 96 IND. L.J. SUPP. 1, 3 (2020).

¹¹⁵ See, e.g., Madison J. Scaggs, Note, *How Nationwide Injunctions Have Thwarted Recent Immigration Policy*, 105 IOWA L. REV. 1447, 1469–73 (2020) (proposing prohibiting nationwide injunctions as a remedy in the immigration context).

¹¹⁶ Getzel Berger, Note, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. REV. 1068, 1100 (2017).

¹¹⁷ Joseph D. Kmak, Comment, *Abusing the Judicial Power: A Geographic Approach to Address Nationwide Injunctions and State Standing*, 70 EMORY L.J. 1325, 1363 (2021). Often, courts have taken this approach when defining an injunction’s scope, sometimes limiting the injunction to a single state. See, e.g., *Mayor & City Council of Balt. v. Azar*, 439 F. Supp. 3d 591, 616 (D. Md. 2020) (enjoining the Department of Health and Human Services from implementing or enforcing a final rule only in the state of Maryland); *Cook County v. McAleenan*, 417 F. Supp. 3d 1008, 1031 (N.D. Ill. 2019) (enjoining enforcement of a final rule in Illinois); *Colorado v. EPA*, 445 F. Supp. 3d 1295, 1313 (D. Colo. 2020) (enjoining agencies to continue administering statute in Colorado).

¹¹⁸ Berger, *supra* note 116, at 1101. Advocates for limiting the boundary of an injunction argue the injunction will still cover the entire territory where the decision has precedential value without choking off development of the same legal questions in other jurisdictions across the nation. *Id.*

¹¹⁹ See Frost, *supra* note 15, at 1116; Malveaux, *supra* note 15, at 62 (noting the importance of nationwide relief as a judicial check in light of congressional gridlock); Ezra Ishmael Young, *The Chancellors Are Alright: Nationwide Injunctions and an Abstention Doctrine to Salve What Ails Us*, 69 CLEV. ST. L. REV. 859, 902 (2021) (“The judiciary cannot serve its constitutional function if it allows the executive to neuter it.”). *But see generally* Wasserman, *supra* note 14 (arguing that without national injunctions, complete relief for plaintiffs can still be achieved by expanding the scope of litigation through class actions, associational standing, and third-party standing).

warranted. From the plaintiff's perspective, nationwide injunctions are also a powerful tool in stopping or pausing irreparable harm.¹²⁰ Finally, from the government's perspective, nonparty relief is a "practical necessity" that ensures the government does not have to track its enforcement on an individual-by-individual basis.¹²¹ As a matter of policy, this Chapter recognizes the nationwide injunction as a critical tool in protecting plaintiffs and ensuring governmental efficiency and thus does not recommend a blanket prohibition.

2. *Judicial Standards and Procedures.* — Some scholars believe courts can be trusted to self-regulate their use of nationwide injunctions and note that courts are well suited to "impos[e] self-disciplining rules and standards to calibrate the effect that the nationwide injunction has."¹²² But this Chapter's empirical analysis suggests reforms that rely on judicial restraint may not effectively address the problem — that plaintiffs strategically shop their cases to the forums and judges most likely to issue drastic remedies. So even if the vast majority of federal judges exercised self-restraint, those judges may not be the ones driving the rise in nationwide injunctions. Instead, the small pocket of judges who issue most nationwide orders — and who seem least likely to display restraint — would remain. And so would nationwide injunctions.

Scholars have detailed several proposals counseling self-restraint. Self-regulation could take the form of adopting a multifactor balancing test¹²³ or a strengthened presumption against issuing nationwide injunctions.¹²⁴ For example, Professor Alan Trammell draws on principles of preclusion and acquiescence to propose a "preclusion-based theory" where a presumption against issuing nationwide injunctions can be overcome only if a government official is acting in bad faith by ignoring settled law.¹²⁵ Zayn Siddique suggests amending Federal Rule of Civil Procedure 65 to codify a standard that nationwide injunctions can be issued only when necessary to provide complete relief to the parties.¹²⁶

¹²⁰ Amdur & Hausman, *supra* note 15, at 51.

¹²¹ See Ronald M. Levin, *Vacatur, Nationwide Injunctions, and the Evolving APA*, 98 NOTRE DAME L. REV. 1997, 2005 (2023).

¹²² Z. Payvand Ahdout, *Enforcement Lawmaking and Judicial Review*, 135 HARV. L. REV. 937, 996–97 (2022).

¹²³ See Daniel J. Walker, Note, *Administrative Injunctions: Assessing the Propriety of Non-class Collective Relief*, 90 CORNELL L. REV. 1119, 1145 (2005); 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, 335 (2018).

¹²⁴ See, e.g., Katherine B. Wheeler, Comment, *Why There Should Be a Presumption Against Nationwide Preliminary Injunctions*, 96 N.C. L. REV. 200, 203 (2017).

¹²⁵ Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67, 103–04, 108 (2019). Trammell notes that nationwide injunctions can be appropriate where an official is not technically acting in bad faith but where the law is nevertheless "settled enough." *Id.* at 108.

¹²⁶ Siddique, *supra* note 66, at 2139–47. Any judicially created rule that constrains injunctive relief must be "expressly cast in procedural terms" because the Rules Enabling Act grants the

But appellate courts have already attempted to institute standards and presumptions against issuing nonparty injunctions.¹²⁷ The Ninth Circuit instituted a presumption against issuing nonparty injunctions that reach beyond the circuit, absent “a showing of nationwide impact or sufficient similarity.”¹²⁸ The Fifth Circuit deemed nationwide injunctions appropriate if there is “(1) concern that a geographically limited injunction would fail to prevent a plaintiff’s harm or (2) a constitutional command for a consistent national policy,” such as immigration.¹²⁹ The Eleventh Circuit expressed skepticism of district courts’ ability to issue nationwide relief, explaining that courts should be “weary and wary” of such a “drastic form of relief” that “push[es] against the boundaries of judicial power” by allowing “a single district court an outsized role in the federal system.”¹³⁰ To cabin discretion, the Eleventh Circuit noted “a range of factors that may counsel in favor of a nationwide injunction.”¹³¹ The Second and Sixth Circuits have also urged caution.¹³²

District courts are catching on, taking steps to constrain or restrict broad nationwide injunctions.¹³³ In particular, courts have shown interest in respecting judicial comity¹³⁴ and avoiding “chaos and confusion”¹³⁵ when considering an order that may cause conflicts.¹³⁶ Lower

judiciary rulemaking power over “procedural,” as opposed to substantive, rules. *See* Morley, *supra* note 113, at 49 & n.277. *But see* Rendleman, *supra* note 15, at 969 (calling an amendment to limit federal court orders “inadvisable and wrongheaded” because “[i]t would limit the courts’ remedial power based on [a] dubious analysis of legal history”).

¹²⁷ *See* Georgia v. President of the U.S., 46 F.4th 1283, 1305–06 (11th Cir. 2022) (“We are not the first to catalog these problems — many have already done so in response to the growing trend of nationwide injunctions against federal action.” (citing, inter alia, Arizona v. Biden, 40 F.4th 375, 395–98 (6th Cir. 2022) (Sutton, C.J., concurring); City of Chicago v. Barr, 961 F.3d 882, 936–38 (7th Cir. 2020) (Manion, J., concurring in the judgment); CASA de Md., Inc. v. Trump, 971 F.3d 220, 256–62 (4th Cir. 2020) (Wilkinson, J.), *vacated for reh’g en banc*, 981 F.3d 311 (4th Cir. 2020); California v. Azar, 911 F.3d 558, 583–84 (9th Cir. 2018))).

¹²⁸ *Azar*, 911 F.3d at 584.

¹²⁹ *Nuziard v. Minority Bus. Dev. Agency*, No. 23-CV-0278, 2023 WL 3869323, at *7–8 (N.D. Tex. June 5, 2023) (citing *O’Donnell v. Harris County*, 892 F.3d 147, 155 (5th Cir. 2018); *Louisiana v. Becerra*, 20 F.4th 260, 263–64 (5th Cir. 2021)).

¹³⁰ *Georgia v. President of the U.S.*, 46 F.4th at 1303–04.

¹³¹ *Id.* at 1306 (citing *Florida v. Dep’t of Health & Hum. Servs.*, 19 F.4th 1271, 1281–83 (11th Cir. 2021)).

¹³² *See* *New York v. U.S. Dep’t of Homeland Sec.*, 969 F.3d 42, 88 (2d Cir. 2020); *Kentucky v. Biden*, 57 F.4th 545, 556–57 (6th Cir. 2023).

¹³³ *See, e.g.,* *Texas v. Becerra*, 623 F. Supp. 3d 696, 704 (N.D. Tex. 2022) (limiting injunction to the state of Texas and the class of plaintiffs); *Washington v. FDA*, 668 F. Supp. 3d 1125, 1144 (E.D. Wash. 2023) (declining to issue a nationwide injunction as abortion restrictions vary state by state and plaintiffs’ alleged harm was not shared nationwide).

¹³⁴ *See* *Religious Sisters of Mercy v. Azar*, 513 F. Supp. 3d 1113, 1144 (D.N.D. 2021) (citing, inter alia, *California ex rel. Lockyer v. USDA*, 710 F. Supp. 2d 916, 921–23 (N.D. Cal. 2008); *Fund for Animals v. Norton*, 323 F. Supp. 2d 7, 10–11 (D.D.C. 2004)).

¹³⁵ *Colon v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 23-cv-223, 2024 WL 309975, at *6 (M.D. Fla. Jan. 26, 2024).

¹³⁶ *See, e.g.,* *Texas v. Biden*, No. 22-CV-00004, 2023 WL 6281319, at *16 (S.D. Tex. Sept. 26, 2023) (declining to issue nationwide injunctive relief because “extending relief nationwide would result in this Court encroaching upon the jurisdiction of other courts who have ruled on this issue”).

courts weigh this factor against whether a policy demands uniformity, often declining to issue nationwide relief when it does not.¹³⁷

Yet, despite these standards and warnings, nationwide injunctions are still on the rise,¹³⁸ illustrating how difficult standardizing complete relief is. The proliferation of nationwide injunctions also indicates that reforms of this nature will be less likely to be effective. Any reform to the injunction that relies on the exercise of judicial restraint, even if adopted by the majority of judges, might be ignored by the particular judges who are *most likely* to issue nationwide injunctions — those whom plaintiffs seek out precisely because they may be unrestrained.

Alternatively, some recommend procedural reforms to cabin judicial discretion. For example, Judge Milan Smith of the Ninth Circuit supports requiring special hearings to determine the appropriate scope of a potential injunction and requiring district courts to fully explain their reasoning in writing with regard to the costs and benefits of enjoining the federal government.¹³⁹ In the context of permanent injunctions, parties might also be required to “brief the appropriate scope of the injunction after the court has issued its substantive decision,” which would allow the government to present arguments specifically related to the scope of the injunction in light of the judge’s findings and conclusions.¹⁴⁰ Others propose allowing more outsiders to intervene in cases seeking nationwide injunctions, which would provide more information to courts looking to understand the impact of an injunction and prompt either a better analysis or record for appellate review.¹⁴¹

But here too, procedural reforms may be an inadequate solution. More transparency does not stop judges from overissuing nationwide injunctions or necessarily make them think twice. Many opinions issuing nationwide injunctions thoroughly explain the court’s reasoning.

Regardless of their efficacy, such proposals may be missing the point: the consequences and problems purportedly resolved in the context of injunctions would still rear their head in the context of *vacatur*. As executive rulemaking under the APA increases, plaintiffs — and judges — could evade limits on nationwide injunctions by

¹³⁷ *Texas v. EPA*, No. 23-cv-17, 2023 WL 2574591, at *12 (S.D. Tex. Mar. 19, 2023) (noting nationwide relief was inappropriate because some states had not challenged the regulation and there was “no compelling need for uniform relief”); *Texas v. Becerra*, 577 F. Supp. 3d 527, 562 (N.D. Tex. 2021) (limiting injunction in the absence of a “constitutional command for nationwide uniformity”).

¹³⁸ Though there have been fewer injunctions against Biden policies than Trump policies, the number issued against the Biden Administration has exceeded those issued against Presidents Bush and Obama, both of whom served two terms. See *supra* Table 1.

¹³⁹ Milan D. Smith, Jr., *Only Where Justified: Toward Limits and Explanatory Requirements for Nationwide Injunctions*, 95 NOTRE DAME L. REV. 2013, 2036 (2020).

¹⁴⁰ *Id.* at 2036 & n.111 (emphasis omitted).

¹⁴¹ Monica Haymond, *Intervention and Universal Remedies*, 91 U. CHI. L. REV. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4703842 [<https://perma.cc/SL6F-5E43>].

seeking — and granting — vacatur instead.¹⁴² The same concerns about politicization and forum shopping would arise. Reforms aimed at addressing the increase in nationwide relief broadly — but that focus on injunctive relief narrowly — would prove ineffective in curbing partisan actors who see universal relief, in any form, as a tool for political ends.

Even if courts were able to resolve questions pertaining to nationwide relief more broadly, uniform and systematic judicial reforms seem practically unlikely in the short term. The Supreme Court has considered nationwide injunctions on a number of occasions¹⁴³ but has continually sidestepped the question.¹⁴⁴ In turn, lower courts have generally construed the Court's silence as an implicit endorsement.¹⁴⁵ The judiciary seems likely to continue to do so absent greater pressure.

3. *Reforms to Curb Judge Shopping.* — Perhaps, then, reform may be better focused on curbing judge shopping, which would target the underlying concern raised by universal remedies: namely, that the polarization of the judiciary, combined with the ability of plaintiffs to stack the deck by picking certain forums, undermines the legitimacy of the decision. Such proposals would preserve the judiciary's check on the Executive, but would undercut the ability of plaintiffs to forum shop by eliminating the ability to seek out a single extreme judge.

Indeed, support for limiting forum shopping is mounting. Justice Kagan and Chief Justice Roberts have expressed concerns with forum shopping. Speaking on the Court's legitimacy, Justice Kagan observed: "It just can't be right that one district judge can stop a nationwide policy in its tracks and leave it stopped for the years that it takes to go through the normal process."¹⁴⁶ Chief Justice Roberts has endorsed the random assignment of judges for patent cases as a cornerstone of the court system's legitimacy.¹⁴⁷ Last summer, nineteen Democratic senators asked the Judicial Conference to recommend rules to district courts regarding

¹⁴² Notably, courts have recognized that in APA cases, there is often an "unstated" presumption "that the offending agency action should be set aside in its entirety rather than only in limited geographical areas." *Innovation L. Lab v. Wolf*, 951 F.3d 1073, 1094 (9th Cir. 2020).

¹⁴³ *Young*, *supra* note 119, at 864 & n.19 (2021) (collecting ten Supreme Court cases).

¹⁴⁴ *See, e.g.*, *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1916 n.7 (2020) ("Our affirmance of the . . . order vacating the rescission makes it unnecessary to examine the propriety of the nationwide scope of the injunctions . . .").

¹⁴⁵ *See Young*, *supra* note 119, at 873 & n.64 (citing *Roe v. Dep't of Def.*, 947 F.3d 207, 232 (4th Cir. 2020)); *City of Chicago v. Barr*, 961 F.3d 882, 916 (7th Cir. 2020) ("If the lower court was without the power to impose an injunction that provided relief to non-parties, and thus relief greater than that necessary for the parties before the court, then the Supreme Court's decision to allow the injunction to remain in place as to those non-parties would be inexplicable.")

¹⁴⁶ Josh Gerstein, *Kagan Repeats Warning that Supreme Court Is Damaging Its Legitimacy*, POLITICO (Sept. 14, 2022, 5:56 PM), <https://www.politico.com/news/2022/09/14/kagan-supreme-court-legitimacy-00056766> [<https://perma.cc/LBA4-4TR7>].

¹⁴⁷ *See* JOHN G. ROBERTS, JR., U.S. SUP. CT., 2021 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5 (2021).

the random assignment of judges.¹⁴⁸ Just prior to print, the Judicial Conference of the United States announced a policy for random case assignment in nationwide injunction cases.¹⁴⁹

This Chapter identifies three buckets of forum-shopping reforms:

(a) *Ensure the Random Assignment of Judges.* — At its annual meeting last year, the American Bar Association adopted a resolution urging federal courts to eliminate case-assignment procedures that “predictably assign cases to a single United States District Judge without random assignment” when an injunction is contemplated in a case of nationwide impact and one of the parties raises concerns about case assignment.¹⁵⁰ Representative Sherrill’s End Judge Shopping Act would require plaintiffs seeking nationwide injunctions to file in a forum where at least two judges are available to hear a case, eliminating the possibility that plaintiffs can select a single-judge forum.¹⁵¹

Professor Adam White recommends instituting a national lottery for nationwide injunctions, modeled off of the procedures for multi-court challenges to agency action under 28 U.S.C. § 2112.¹⁵² White’s reform would involve establishing a timeframe in which plaintiffs seeking nationwide injunctions against government action must file, and then running a lottery among all federal district courts to determine which court would collectively decide the cases.¹⁵³ White also proposes this reform be accompanied by fast-tracking provisions directing reviewing courts to expedite any appeals of a district court’s injunction.¹⁵⁴

(b) *Transfer to the District of the District of Columbia.* — Some propose requiring all lawsuits requesting national injunctive relief to be filed in the District Court for the District of Columbia, or another specific district, to curtail forum shopping.¹⁵⁵ The D.C. District Court could then consolidate similar cases and randomly select a judge to hear the case. After the mifepristone case, Democrats introduced legislation to this effect. Senator Hirono, for example, proposed the Stop Judge Shopping Act, which would give exclusive jurisdiction over cases

¹⁴⁸ Letter from Senator Chuck Schumer et al., to Robin L. Rosenberg, Chair, Advisory Comm. on Civ. Rules (July 10, 2023), <https://www.democracydocket.com/wp-content/uploads/2023/07/Letter-on-judge-shopping.pdf> [<https://perma.cc/VQ9R-GQ2X>].

¹⁴⁹ See Memorandum from Judge Gregory Van Tatenhove, Chair, Comm. On Ct. Admin. & Case Mgmt., to U.S. District Court Judges et al. (Mar. 15, 2024), <https://s3.documentcloud.org/documents/24483622/judicial-conference-policy.pdf> [<https://perma.cc/K8QW-MTG7>].

¹⁵⁰ Resolution Adopted by the House of Delegates, 521 A.B.A. REP. (2023), at 1, <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2023/521-annual-2023.pdf> [<https://perma.cc/9W3H-V2JH>].

¹⁵¹ End Judge Shopping Act of 2023, H.R. 3163, 118th Cong. (2023).

¹⁵² Adam J. White, *Congress Should Fix the Nationwide Injunction Problem with a Lottery*, YALE J. ON REGUL.: NOTICE & COMMENT (Feb. 11, 2020), <https://www.yalejreg.com/nc/congress-should-fix-the-nationwide-injunction-problem-with-a-lottery> [<https://perma.cc/2W96-WCD7>].

¹⁵³ *Id.*

¹⁵⁴ *Id.*; see also Court Shopping Deterrence Act, H.R. 893, 117th Cong. (2021).

¹⁵⁵ See Bradford Mank & Michael E. Solimine, *State Standing and National Injunctions*, 94 NOTRE DAME L. REV. 1955, 1978 & n.139 (2019).

seeking national remedies to the D.C. District Court.¹⁵⁶ (Notably, this proposal echoes legislation that was introduced by Republican Representative Palmer at the start of the Trump Administration.¹⁵⁷)

Professors Bradford Mank and Michael Solimine argue that the D.C. District would be particularly well suited to hear these cases because Congress has granted it exclusive jurisdiction over other federal administrative agency actions and it has built up relevant expertise.¹⁵⁸ They also note that these federal judges are often regarded as less partisan, which might add to the legitimacy of the court's decisions.¹⁵⁹

(c) *Panel Systems.* — The last set of proposals recommends multi-judge panels review cases where nationwide relief is requested — requiring multiple judges to agree on the remedy. This agreement could lend credibility that the complete relief principle is operating as it should. Representative Casten proposes deterring forum shopping by creating a randomized multi-circuit panel of thirteen judges to hear cases against the Executive concerning challenges to statutory or executive actions.¹⁶⁰ A supermajority of at least nine judges would be required to invalidate the action.¹⁶¹ Senator Wyden and Representative Ross's Fair Courts Act of 2023¹⁶² would codify former Fifth Circuit Judge Gregg Costa's proposal to require plaintiffs seeking nationwide relief to be heard by a three-judge panel of randomly assigned judges.¹⁶³

Panel-system proposals are reminiscent of reforms undertaken in response to the Supreme Court's hostility to Progressive Era policies¹⁶⁴: Between 1937 and 1976, Congress required constitutional challenges to be heard by three-judge district courts.¹⁶⁵ This reform aimed to improve legitimacy and instill more confidence in judicial action: “[I]f three judges declare that a state statute is unconstitutional the people would rest easy under it.”¹⁶⁶ It also decreased the risk of conflicting injunctions.¹⁶⁷ Eventually, motivated by concern over wasted judicial resources,¹⁶⁸ and the American Law Institute's belief that that “[m]odern rules of procedure safeguarded against district judges granting

¹⁵⁶ Stop Judge Shopping Act, S. 1265, 118th Cong. (2023).

¹⁵⁷ Assigning Proper Placement of Executive Action Lawsuits Act (“APPEAL Act”), H.R. 2660, 115th Cong. (2017).

¹⁵⁸ Mank & Solimine, *supra* note 155, at 1978–79.

¹⁵⁹ *Id.* at 1979.

¹⁶⁰ Restoring Judicial Separation of Powers Act, H.R. 642, 118th Cong. (2023).

¹⁶¹ *Id.*

¹⁶² S. 1758, 118th Cong. (2023); H.R. 3652, 118th Cong. (2023).

¹⁶³ Costa, *supra* note 78.

¹⁶⁴ Michael E. Solimine & James L. Walker, *The Strange Career of the Three-Judge District Court: Federalism and Civil Rights, 1954–76*, 72 CASE W. RESV. L. REV. 909, 914–15 (2022).

¹⁶⁵ Michael E. Solimine, *Three-Judge District Courts, Direct Appeals, and Reforming the Supreme Court's Shadow Docket*, 98 IND. L.J. SUPP. 37, 37 (2023).

¹⁶⁶ *Swift & Co. v. Wickham*, 382 U.S. 111, 118 (1965) (quoting 45 CONG. REC. 7256 (1910) (statement of Sen. Lee Overman)).

¹⁶⁷ See Morley, *supra* note 113, at 30.

¹⁶⁸ *Id.* at 31.

precipitous *ex parte* injunctions,”¹⁶⁹ Congress reverted to default procedures for appellate review.¹⁷⁰ Notably, Congress *has* retained the three-judge system for redistricting and some voting rights cases,¹⁷¹ in recognition of the fact that “such cases were ones of ‘great public concern’ that require an unusual degree of ‘public acceptance.’”¹⁷²

Conclusion

As nationwide injunctions — and vacatur — against high-profile executive policy initiatives continue to increase, inaction risks politicizing the nationwide injunction further. Proposals to curb forum shopping directly address the main problems revealed by our empirical analysis. Even if the exact causes of the increase in nationwide injunctions cannot be neatly disentangled from the increasing role of executive policymaking, the fact remains that plaintiffs can strategically shop litigation to judges they perceive as the most political or otherwise most predisposed to issue the requested relief.

If the goal is to disincentivize the political gamesmanship of nationwide injunctions, instead of their absolute use, random judge selection, multi-judge panels, or funneling through designated forums can constrain the most extreme uses without eliminating the remedy entirely. And most importantly, these reforms could also help restore perceptions of the judiciary as nonpartisan, while preserving judges’ ability to issue nationwide relief in cases where it is necessary to curb executive abuse.

Though these reforms may appear radical, they are not novel. Many of the proposals’ mechanisms have historical analogues, providing a powerful reminder that Congress not only possesses the power to retool the scheme for judicial review, but has historically experimented with and enacted reforms in response to concerns of judicial overreach.

Importantly, and unlike judicial reforms that solely focus on injunctive relief as a remedy, these proposals can also address the ways in which judges are increasingly turning to vacatur to issue universal relief. Structural reforms, if limited to the injunctive context, leave plaintiffs able to plead in a manner that avoids triggering any proposed guardrails for injunctions specifically. Thus, structural reforms dealing solely with nationwide injunctive relief may ultimately fall short if they do not also take account of vacatur. A robust set of reforms that work in tandem with one another would be the most effective approach.

¹⁶⁹ Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. MICH. J.L. REFORM 79, 85–86 (1996) (citing AM. L. INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 318–19 (1969)).

¹⁷⁰ Morley, *supra* note 113, at 31.

¹⁷¹ Solimine, *supra* note 169, at 87; *see also* Costa, *supra* note 78.

¹⁷² *See* Solimine, *supra* note 169, at 86 (quoting *Hearings on S. 1876 Before the Subcomm. on Improvements in Judicial Mach. of the S. Comm. on the Judiciary*, 92d Cong. 791 (1971–72) (statement of Hon. J. Skelly Wright)).