VENUE DIVERSION

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Venue is having a moment. Despite its frequent relegation to the third tier of threshold procedural issues that control a litigant's ability to seek relief, ongoing litigation highlights venue's importance to the availability and substance of relief. During its 2024–25 Term, the Supreme Court will resolve at least two distinct questions about venue, including three cases about the proper interpretation of the Clean Air Act's venue-channeling provision and a fourth case dealing with the bifurcation of standing and venue requirements. In the federal courts of appeals, disputes about proper venue have predominated in administrative challenges to the NLRB's power to enforce labor standards and to the CFPB's authority to protect consumers from predatory lending. Meanwhile, the proliferation of nationwide injunctions has focused scholarly attention on venue reform as a potential solution for hyperpartisan forum shopping.

Venue's recent salience destabilizes the perception that it is a strictly procedural issue pertaining to the location of adjudication. And, as this Article uncovers, Congress has repeatedly recognized and deployed venue's substantive potential to achieve legislative objectives and reinforce desired normative values. But as venue questions have come to the fore in recent administrative litigation, some courts have developed doctrinal tests and deployed extraordinary procedures to decide venue disputes in a way that aggrandizes their adjudicatory power at the expense of other courts. These interpretive choices and procedures enable courts to exercise authority over cases for which they are improper forums, in violation of statutory text and structure and separation-of-powers principles.

This Article offers the first account and critical assessment of this emerging phenomenon, which I call "venue diversion." This critique builds

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on an original statutory analysis of how Congress uses venue provisions to shape Article III adjudication, including through the general venue statute and through specialized "venue-diffusing" and "venue-channeling" provisions. The Article constructs a theory of venue diversion and evaluates its practical significance through two case studies of recent venue litigation. The investigation reveals that venue diversion is both inherently and consequentially deregulatory and contributes to an accountability gap in which the policies of a democratically accountable administration are encumbered by the exercise of unaccountable judicial power. Moreover, because it enables courts to selectively decide substantive questions through an ostensibly neutral procedural mechanism, venue diversion represents a particularly problematic form of deregulation. In this way, venue diversion implicates many of the same normative issues as other emerging structural phenomena that blur the substance-procedure distinction, like nationwide injunctions and the shadow docket.

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INTRODUCTION

During its 2024–25 Term, the Supreme Court will hear arguments in three cases that each ask whether, under the specialized venue

provision of the Clean Air Act (CAA),[1] venue for the underlying administrative challenge is proper only in the D.C. Circuit and not in one of the regional circuits.[2] Although the questions presented involve venue, the cases concern EPA's ability to enforce the CAA and protect human health and welfare from air pollution. In two consolidated cases, industry and state petitioners have appealed the Tenth Circuit's transfer to the D.C. Circuit of their administrative challenge to EPA's enforcement of the CAA's Good Neighbor Provision, which protects downwind states from upwind ozone production.[3] In the third case, EPA has appealed the Fifth Circuit's refusal to transfer to the D.C. Circuit an administrative challenge to EPA's enforcement of the CAA's Renewable Fuel Standard Program.[4] Even though the questions granted do not reach the merits of the underlying administrative challenges, both sides believe that resolution of the venue question will affect resolution of the merits and, ultimately, the stringency with which EPA can regulate interstate air pollution under the CAA. Moreover, the existence of disputes over the proper interpretation of the CAA's venue provision has already impeded EPA's ability to enforce the Act's protections.[5]

Somewhat remarkably, the three CAA cases are not the only cases involving an administrative statute's specialized venue provision that the Supreme Court agreed to hear this Term. In a fourth case, *FDA v. R.J. Reynolds Vapor Co.*,[6] the federal government has asked the Court to close a loophole in Fifth Circuit standing and venue precedent that enables industry petitioners to escape the channeling function of the

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1. *See* 42 U.S.C. § 7607(b). As discussed in detail *infra* Section I.B.2.a, the Act's venue provision channels review of EPA action informed by national policy considerations to the D.C. Circuit, leaving only locally or regionally applicable actions subject to challenge in regional circuits.

2. *See* Order List, 604 U.S. (Oct. 21, 2024) (consolidating and granting cert. to *Oklahoma ex rel. Drummond v. EPA* and *PacifiCorp v. EPA*, 93 F.4th 1262 (10th Cir. 2024) (Nos. 23-1067, 23-1068), and granting cert. to *Calumet Shreveport Ref., L.L.C. v. EPA*, 86 F.4th 1121 (5th Cir. 2023) (No. 23-1229)).

3. *Drummond*, 93 F.4th at 1262; *see also Ohio v. EPA*, 144 S. Ct. 2040, 2048–49 (2024) (describing the Good Neighbor Provision and Plan).

4. *Calumet*, 86 F.4th at 1121.

5. In particular, when the Supreme Court issued an emergency stay of EPA's Good Neighbor Plan at the end of its 2023–24 Term, its reasoning rested on temporary lower court stays issued despite unresolved underlying disputes about the proper interpretation and application of the CAA's venue provision. *Ohio*, 144 S. Ct. at 2051 & n.6; *see infra* Section IV.B.

6. Nos. 23-60037, 23-60128, 23-60545, 2024 WL 1945307 (5th Cir. Feb. 2, 2024) (per curiam), *cert. granted*, No. 23-1187 (U.S. Oct. 4, 2024) (mem.) The Fifth Circuit held—in the latest stage of an ongoing saga between R.J. Reynolds's vape devices manufacturing and FDA—that it remained bound by its prior holding that venue is proper in that circuit, *R.J. Reynolds Vapor Co. v. FDA*, 65 F.4th 182 (5th Cir. 2023).

Tobacco Control Act's (TCA) specialized venue provision.[7] That precedent allows a TCA petitioner who possesses Article III standing, but lacks statutory authority to sue in a regional circuit, to nevertheless sue in the regional circuit by petitioning alongside an entity covered by the TCA's venue provision, even if that co-petitioner lacks standing.[8] Although the question presented in *R.J. Reynolds Vapor Co.* is limited to the proper interpretation of the TCA's venue provision, the circuit precedent that allows standing and venue to be bifurcated among co-petitioners applies to other venue provisions,[9] which increases the stakes of the Court's ultimate resolution of the case.

But high-stakes litigation over venue is not limited to the four cases pending on the Supreme Court's docket or even the context of venue-channeling provisions. In recent years, petitioners in administrative litigation have begun to advocate increasingly expansive interpretations of the general venue statute, 28 U.S.C. § 1391, to support filing their challenges to agency action in forums selected for their perceived deregulatory bias. In early 2024, for example, SpaceX urged a district court in Texas to conclude that an email sent to *all* SpaceX employees detailing labor standards violations in California constituted a "substantial" act in Texas, thereby establishing proper venue in Texas for its challenge to NLRB's enforcement of labor standards in California.[10] Soon thereafter, the U.S. Chamber of Commerce advocated a similarly sweeping interpretation of § 1391 in its ongoing challenge, in Texas, to the CFPB's junk credit card fee rule.[11] In both cases, the Fifth Circuit deployed the extraordinary remedy of mandamus to review and vacate district court decisions that had rejected these expansionist readings of § 1391, and created circuit precedent that will make it more difficult for future litigants to prevail on motions to transfer venue outside of the circuit.[12]

And as these venue disputes unfold in the courts, venue reform is being proposed as a way to mitigate the forum-shopping problems

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7. Petition for a Writ of Certiorari, *FDA v. R.J. Reynolds Vapor Co.*, No. 23-1187 (U.S. May 2, 2024); *see also* 21 U.S.C. § 387*l* (authorizing judicial review of a denied application under the TCA in the D.C. Circuit or in the circuit where "any person adversely affected by such . . . denial" resides).

8. *See R.J. Reynolds*, 2024 WL 1945307, at *2–3 (per curiam) (Higginson, J., dissenting).

9. *See, e.g.*, *infra* note 269 and accompanying text (describing the effect of this precedent in a case arising under the general venue statute).

10. Order Granting Defendants' Motion To Transfer Venue at 3–4, *Space Expl. Techs. Corp. v. NLRB* (*SpaceX I*), No. 24-cv-00001, 2024 WL 974568, at *2–3 (S.D. Tex. Feb. 15, 2024), ECF No. 82.

11. Opinion & Order at 5–7, *Chamber of Com. of the U.S. v. CFPB*, No. 24-CV-00213, 2024 WL 1329959, at *3–4 (N.D. Tex. Mar. 28, 2024), ECF No. 67, *vacated*, *In re Fort Worth Chamber of Com.*, 100 F.4th 528, 531 (5th Cir. 2024).

12. *See infra* Section II.B.2.

associated with nationwide injunctions.[13] Under the present framework, litigants who seek to enjoin or entrench federal policy file their administrative challenges strategically in the courts they believe will be sympathetic to their case,[14] which can lead to competing injunctions and disparate restraints on administration in different circuits.[15] Scholars have proposed modifying venue rules to channel certain challenges to selected courts as one solution to this problem.[16]

These disputes and debates should destabilize any conception of venue as a strictly procedural issue pertaining to the location of adjudication.[17] The idea of channeling certain kinds of cases or requests for relief to an expert or authoritative forum highlights the interconnection between process and substance. And the strenuously contested litigation unfolding at the Supreme Court and in the courts of appeals over the proper interpretation of venue provisions shows that litigants believe the resolution of venue questions plays a determinative role in structuring the process of litigation and the actual availability of relief.

This recent attention to venue's substantive significance is well warranted and overdue. As this Article documents, Congress has repeatedly recognized and deployed venue's potential for substantive relevance in its legislative enactments over the past century. In particular, Congress has used the general venue statute and specialized venue rules to shape courts' Article III authority in order to achieve its legislative objectives and reinforce desired normative values.[18] One example of this practice is the inclusion of venue-channeling provisions in substantive

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13. Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1105 (2018); *see also* Ronald M. Levin, *Vacatur, Nationwide Injunctions, and the Evolving APA*, 98 NOTRE DAME L. REV. 1997, 2032 (2023) (collecting proposed solutions that alter venue rules). This Article is agnostic about whether nationwide injunctions constitute a problem. *See generally* Portia Pedro, *The Myth of the "Nationwide Injunction*,*"* 84 OHIO ST. L.J. 677 (2023) (suggesting that the category of "nationwide injunctions" is amorphous).

14. Developments in the Law — Court Reform, *District Court Reform: Nationwide Injunctions*, 137 HARV. L. REV. 1701, 1701–03, 1710 (2024).

15. *Id.* at 1702.

16. *See, e.g.*, Frost, *supra* note 13, at 1105; *see also* Zachary D. Clopton, *National Injunctions and Preclusion*, 118 MICH. L. REV. 1, 10 (2019); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 460–62 (2017); Kate Huddleston, *Nationwide Injunctions: Venue Considerations*, 127 YALE L.J.F. 242, 249 & n.30 (2017).

17. Armistead M. Dobie, *Venue in Civil Cases in the United States District Court*, 35 YALE L.J. 129, 129–30 (1925); *see also* Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 788 (1985); Alan M. Trammell, *Jurisdictional Sequencing*, 47 GA. L. REV. 1099, 1110–14 (2013); Ryan C. Williams, *Jurisdiction as Power*, 89 U. CHI. L. REV. 1719, 1751 (2022).

18. *See infra* Part I.

statutes.[19] The Clean Air Act, for example, channels review of nationally relevant policy into the D.C. Circuit and allows only purely local agency actions to be reviewed in the appropriate regional circuit.[20] At other times, Congress has used "venue-diffusing" provisions that expand the scope of proper venue beyond the limits of the general venue statute.[21]

Yet recent venue litigation has introduced a new complexity in the form of an emerging phenomenon that this Article calls "venue diversion." This refers to the development of atextual, self-aggrandizing circuit precedent and procedures that enable courts to exercise adjudicatory power over cases for which they are improper forums. This phenomenon represents more than just incorrect statutory interpretation. By violating legislatively enacted limits on the exercise of federal judicial power and arrogating power to themselves at the expense of proper forums, courts that engage in venue diversion also violate structural constitutional constraints on judicial authority.

This Article offers a first account and critical assessment of venue diversion. It proceeds in four parts. Part I constructs an original statutory history that shows how Congress uses venue provisions to shape federal courts' exercise of adjudicatory authority.[22] It both documents the legislative evolution of the general venue statute and constructs a representative history of the practices of "venue diffusion" and "venue channeling," through which Congress deviates from the default rule of venue to achieve legislative objectives. The discussion of venue channeling focuses in particular on the venue provision of the Clean Air Act and its concurrent yet divergent evolution alongside the nonchanneling venue provision of the Clean Water Act. The CAA's venue provision establishes a baseline of centralized judicial review of agency action under the Act to facilitate the development of expertise in the complex realm of air regulation, prevent duplicative proceedings and inconsistencies, and accelerate the final resolution of issues without Supreme Court involvement.

Building on Part I's statutory history, Part II develops a theory of venue diversion at both a theoretical level and through the use of two case studies. As this Article uses the term, venue diversion refers not just to judicial transgression of the constraints of a venue provision in a single case, but also to the development of circuit precedent that reinforces a court's capacity for venue diversion. Venue diversion can arise under

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19. *See* Adam S. Zimmerman, *The Class Appeal*, 89 U. CHI. L. REV. 1419, 1419, app. A (2022); *see generally* JONATHAN R. SIEGEL, ADMIN. CONF. OF THE U.S., THE ACUS SOURCEBOOK OF FEDERAL JUDICIAL REVIEW STATUTES (2022).

20. 42 U.S.C. § 7607(b)(1); *see infra* Section I.B.2.a.

21. *See infra* Section I.B.1.

22. Throughout this Article, "venue" is used as a shorthand to describe a forum of adjudication in trial or appellate courts, rather than in the strict sense of district court venue as defined in 28 U.S.C. § 1391.

venue-channeling statutes as well as under the general venue statute. Part II first examines the former through the lens of recent Clean Air Act litigation. It then explores venue diversion under the general venue statute with reference to the Fifth Circuit's expanding mandamus docket and recent litigation challenging labor enforcement by the NLRB and consumer finance regulation by the CFPB.

The final two Parts critically assess the implications of venue diversion at two different levels of granularity. Part III evaluates venue diversion's direct effects on administrative law and administration. It shows how venue diversion contributes to antiregulation, or an absence of controlling law, as well as deregulation, in which substantive statutes are underenforced or interpreted to authorize less stringent regulation. This Part also explains how venue diversion shifts power over administration from both Congress and the executive branch to the federal judiciary, which transgresses separation-of-powers principles and obstructs administrative accountability.

Part IV then examines how venue diversion influences, and is influenced by, broader structural phenomena currently affecting litigation and the legal system. In particular, this final Part examines how the mechanism of venue diversion permits courts to influence, and even determine, substantive outcomes behind the veneer of procedure. In this way, venue diversion implicates many of the same normative considerations as other phenomenon in which courts deploy ostensibly neutral procedures and doctrines to reinforce particular ideological goals. This Article contextualizes this attribute of venue diversion with reference to the proliferation of forum shopping for nationwide injunctions and the increasing structural significance of the Supreme Court's shadow docket.[23]

I. VENUE RULES AS CONGRESSIONAL POLICY

Although venue is sometimes relegated to the third tier of threshold procedural issues that control a litigant's ability to seek relief in the courts, it plays an important role in shaping how litigation unfolds.[24] Like jurisdictional rules, venue is subject to congressional oversight and

23. *See, e.g.*, STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC (2023); Sean H. Donahue & Megan M. Herzog, *The Bonfire of the Equities: Judicial Stays of Federal Environmental Regulations*, 62 HARV. J. ON LEG. 1 (2024); William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015).

24. Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 UCLA L. REV. 423, 444–47 (1992); Stein, *supra* note 17, at 793.

management.[25] Venue rules manifest "legislative choices about which courts have the authority to resolve a given lawsuit," "how to allocate judicial resources," and "how to adjust the relative power of the parties to select the forum."[26] They also influence litigants' choices about whether to bring suit in the first place,[27] determine which circuit law applies,[28] and may control the actual availability of relief.[29] Consequently, venue rules have the power not only to shape the path of litigation but also to determine which interpretations of a particular statutory scheme will prevail. These characteristics suggest—and ongoing litigation confirms[30]—that venue will be contested as vigorously as any other threshold procedural issue.

As this Part explores, the rules of venue have evolved over time in response to changing congressional priorities. In its earliest form, the general rule of venue reflected its common law origins as a privilege of the defendant. By the middle of the twentieth century, however, the general understanding of venue embraced by both courts and Congress had shifted from a defendant's privilege to a plaintiff's right to litigate in a chosen forum. Against this backdrop of transformation, Congress has also seen fit to adopt special venue provisions that deviate from the general rule as a way of shaping courts' exercise of the judicial power. Venue rules are permissible exercises of Congress's power to shape Article III adjudication[31] and also enable Congress to exert residual control over the administration of the underlying statutory scheme.

The phenomenon of venue diversion at the heart of this Article represents a judicial derogation of the venue framework established by Congress. To construct a theory of venue diversion, it is thus essential to understand how Congress enforces its legislative priorities through venue rules. This Part provides this necessary background. Section I.A provides an overview of the general venue statute and its evolution over time. Section I.B then considers two kinds of legislatively authorized deviations from the default rule of venue: venue diffusion and venue

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25. *Eastman Kodak Co. of N.Y. v. S. Photo Materials Co.*, 273 U.S. 359, 374 (1927); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850).

26. Stein, *supra* note 17, at 793.

27. Purcell, *supra* note 24, at 444–47.

28. Robert A. Ragazzo, *Transfer and Choice of Federal Law: The Appellate Model*, 93 MICH. L. REV. 703, 732 (1995); *see infra* notes 319–26.

29. *See* Jeffrey L. Rensberger, *The Metasplit: The Law Applied After Transfer in Federal Question Cases*, 2018 WIS. L. REV. 847, 883–84.

30. *See infra* Section II.B.

31. *Eastman Kodak Co. of N.Y. v. S. Photo Materials Co.*, 273 U.S. 359, 374 (1927); *cf. Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448–49 (1850) ("Congress, having the power to establish the courts, must define their respective jurisdictions."); *Bhd. of R.R. Trainmen, Enter. Lodge, No. 27 v. Toledo, Peoria & W.R.R.*, 321 U.S. 50, 63–64 (1944); Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 875 (2011).

channeling. Section I.C concludes by outlining the normative values implicated by Congress's use of venue rules as a tool for shaping Article III adjudication.

A. The General Venue Statute

Since 2011, the general venue statute, 28 U.S.C. § 1391, has authorized a litigant to bring a civil action in:

> (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;
> (2) a judicial district in which 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
> (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.[32]

The default rule for venue in suits against federal employees, officers, and agencies, which applies to many suits brought under the Administrative Procedure Act (APA),[33] is similar.[34] This framework "grants the plaintiff leeway" to select the forum in which to sue—the so-called "plaintiff's venue privilege."[35]

The modern conception of venue as a privilege for the plaintiff developed relatively recently. Reflecting venue's origins in English common law principles and practices relating to the fact-finding role of the jury and the location of the defendant,[36] early American venue rules focused on the defendant.[37] The earliest venue provisions of the U.S. Code provided for civil actions raising federal questions to be brought in

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32. 28 U.S.C. § 1391(b), *as amended by* Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 202, 125 Stat. 758, 763. Prior to 2011, and since 1990, the separate venue rules for diversity and federal question cases contained largely identical language. *See infra* notes 45, 54–55 and accompanying text.

33. *See infra* notes 138–39 and accompanying text.

34. *See* 28 U.S.C. § 1391(e). Subsection (e) is broader because it permits suit to be brought in the district in which a plaintiff resides.

35. Antony L. Ryan, *Principles of Forum Selection*, 103 W. VA. L. REV. 167, 170, 172 (2000).

36. Stein, *supra* note 17, at 798–99; John Bies, Comment, *Conditioning Forum Non Conveniens*, 67 U. CHI. L. REV. 489, 492 (2000); Roger S. Foster, *Place of Trial—Interstate Application of Intrastate Methods of Adjustment*, 44 HARV. L. REV. 41, 43 & n.2 (1930); Comment, *Progress in Interstate Adjustment of the Place of Trial of Civil Actions: I*, 45 YALE L.J. 1100, 1100 (1936).

37. Stein, *supra* note 17, at 799–800.

the district in which a defendant resided or where he could be found.[38] Amendments to the Judicial Code in the late nineteenth and early twentieth centuries largely maintained venue's focus on the location of the defendant in federal question cases,[39] while also establishing more specific rules for venue in other kinds of cases.[40] By 1925, "the practical effect of [the general venue statute] was that a civil suit could usually be brought only in the district in which the defendant resided."[41] As one commentator observed at the time, defining venue based on the defendant's location endowed defendants with a "personal privilege, the privilege (if the litigant cares to assert it) of being sued in a particular district or division."[42]

By the middle of the twentieth century, however, the defendant-focused understanding of venue had shifted. As discussed in greater detail in Section I.B.1, Congress began to incorporate specialized venue provisions into substantive statutes in the early twentieth century.[43] The purpose of these provisions was to bolster private enforcement of progressive legislation by making it easier for plaintiffs to file suit.[44] Empowering plaintiffs, and thereby limiting defendants' venue privilege, went hand in hand with the growth of private enforcement over the early to middle twentieth century.

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38. *See* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 79 ("[N]o civil suit shall be brought . . . against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant."); *accord* Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470, 470; Act of March 3, 1887, ch. 373, § 1, 24 Stat. 552, 552; Stein, *supra* note 17, at 800; *see* Roger S. Foster, *Place of Trial in Civil Actions*, 43 HARV. L. REV. 1217, 1217 (1930); Comment, *supra* note 36, at 1100–02.

39. *E.g.*, Judiciary Act of 1911, Pub. L. No. 61-475, § 51, 36 Stat. 1087, 1101; Act of Sept. 19, 1922, Pub. L. No. 67-311, § 51, 42 Stat. 849; Act of Apr. 16, 1936, Pub. L. No. 74-522, § 51, 49 Stat. 1213 (amending 28 U.S.C. § 112); *see also* Patrick Woolley, *Rediscovering the Limited Role of the Federal Rules in Regulating Personal Jurisdiction*, 56 HOUS. L. REV. 565, 574–75 (2019) (describing amendments).

40. Generally, these rules exhibit respect for the ideas that defendants should be tried in the location of alleged offenses, *e.g.*, Judiciary Act of 1911, §§ 40, 42 (providing for trial in the location of an offense), and trials held in the district where relevant facts are likely to be found, *e.g.*, *id.* §§ 43–48 (providing for penalty, tax, seizure, and forfeiture suits in the district where such issues arose).

41. *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 199 (2000).

42. Dobie, *supra* note 17, at 131; *see also Panama R.R. Co. v. Johnson*, 264 U.S. 375, 384–85 (1924) (describing venue as the defendant's privilege); *accord Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939) (quoting *Com. Cas. Ins. Co. v. Consol. Stone Co.*, 278 U.S. 177, 179 (1929)); Note, *Limitations on the Transfer of Actions Under the Judicial Code*, 64 HARV. L. REV. 1347, 1350–51 (1951) (noting that venue requirements "are intended for the convenience of the parties, particularly, the defendant").

43. *See infra* Section I.B.1.

44. *See infra* Section I.B.1.

The Judiciary Act of 1948, which created the modern venue statute, 28 U.S.C. § 1391, marked an inflection point in venue's evolution. While retaining the prior rule of proper venue where a defendant resided,[45] the 1948 Act introduced a separate venue provision for corporate defendants, § 1391(c), which authorized suit "in any judicial district in which [a corporate defendant] is incorporated or licensed to do business or *is doing business*."[46] This expansion of venue in suits against corporations entrenched venue's progression from a privilege of the defendant to a privilege of the plaintiff, which not even the simultaneous codification of § 1404, the change-of-venue statute,[47] could undermine. Although § 1404 gave corporate defendants a new mechanism to check plaintiffs' unjustified availment of their new power to determine venue,[48] it was intended only as a "federal judicial housekeeping measure" and not a device "to narrow the plaintiff's venue privilege."[49]

Subsequent amendments to § 1391 in the latter half of the twentieth century continued expanding plaintiffs' venue privilege. In the 1960s, Congress added subsection (e) to § 1391, which defines venue in civil actions against U.S. officials and agencies.[50] Subsection 1391(e) not only deemed venue proper where the federal defendant resides but also where "the cause of action arose."[51] The purpose of this addition was "to provide nationwide venue for the convenience of individual plaintiffs."[52] Soon thereafter, Congress added similar language authorizing venue where "the claim arose" to § 1391's general rule for venue in civil

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45. Judiciary Act of 1948, Pub. L. No. 80-773, § 1391(a)–(b), 62 Stat. 869, 935; *see also* H.R. REP. NO. 80-308, at A127 (1947) (House Committee on the Judiciary Report accompanying the Act). In its original form, § 1391 provided distinct venue rules for diversity and federal question cases. *See* Judiciary Act of 1948 § 1391(a)–(b).

46. Judiciary Act of 1948 § 1391(c) (emphasis added).

47. Section 1404 codified principles derived from the common law doctrine of forum non conveniens to "permit[] transfer to a more convenient forum, even though the venue [wa]s proper" in the original forum, provided the court "determine[d] that the transfer is necessary for the convenience of the parties and witnesses" and "in the interest of justice." H.R. REP. NO. 80-308, at A132. The 1948 Act also created § 1406, which "provide[d] statutory sanction for transfer instead of dismissal, where venue [wa]s improperly laid." *Id.*

48. *See* Stein, *supra* note 17, at 808.

49. *Van Dusen v. Barrack*, 376 U.S. 612, 635–36 (1964) (discussing venue privilege in transferred *diversity* cases). *But see* Rensberger, *supra* note 29, at 861 (noting the general rule among circuits that transferee courts under § 1404 and § 1407 apply their own law rather than the law of the transferor circuit); Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 720–21 (1984) (advocating for this practice).

50. Act of Oct. 5, 1962, Pub. L. No. 87-748, 76 Stat. 744 (adding 28 U.S.C. § 1391(e)).

51. *Id.*

52. *Stafford v. Briggs*, 444 U.S. 527, 542 (1980); *see also* Huddleston, *supra* note 16, at 245–46.

actions.[53] Congress amended this language in 1990 to be both more precise and expansive. Instead of limiting venue to the judicial district in which a *claim* arose, plaintiffs were empowered to file suit where "a substantial part of the events or omissions giving rise to the claim occurred."[54] The most recent amendments to § 1391 maintained this language,[55] resulting in today's relatively "liberalized" venue framework.[56]

B. Specialized Venue Statutes

Section 1391's default rule of venue can be displaced by more specific venue rules in other statutes, which Congress has seen fit to enact in myriad circumstances.[57] This section describes two categories of such specialized statutes: "venue-diffusing" provisions and "venue-channeling" provisions. As this Article defines it, "venue diffusion" refers to Congress's inclusion, in a substantive statute, of a venue provision that expands the scope of proper venue for challenges under that statute beyond what is clearly authorized by the general venue statute. The converse of venue diffusion is "venue channeling," or the practice of limiting the scope of courts in which venue is proper for challenges under a substantive statute or for particular types of challenges. Venue channeling is distinct from a restrictive or specialized grant of jurisdiction,[58] and a variety of statutes contain such venue-channeling provisions.[59]

This section provides an overview of the historical practice and legal significance of venue diffusion and venue channeling. Section I.B.1 begins with venue diffusion. Focusing on statutes enacted in the early

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53. Act of Nov. 2, 1966, Pub. L. No. 89-714, 80 Stat. 1111 (amending 28 U.S.C. § 1391(a)–(b) to authorize venue where "the claim arose").

54. Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 311(1)–(2), 104 Stat. 5089, 5114 (amending 28 U.S.C. § 1391(a)–(b)).

55. The 2011 amendments unified the general venue rule for diversity and federal question cases, *see* Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 202, 125 Stat. 758, 763, which had occupied distinct subsections of § 1391 since the 1948 Act, *see* Judiciary Act of 1948, Pub. L. No. 80-773, § 1391, 62 Stat. 869, 935.

56. Ryan, *supra*, note 35, at 170.

57. *See* sources cited *supra* note 19.

58. *E.g.*, 28 U.S.C. § 1295 (specifying jurisdiction of the U.S. Court of Appeals for the Federal Circuit); 28 U.S.C. § 1581 (same for the Court of International Trade); *see also* CONG. RSCH. SERV., R43746, CONGRESSIONAL POWER TO CREATE FEDERAL COURTS: A LEGAL OVERVIEW 7–9 (2015).

59. *See, e.g.*, 42 U.S.C § 6976(a)(1); 28 U.S.C. § 1400(b) (venue in patent suits); 12 U.S.C. § 94 (venue in suits against national banking associations). Some venue-channeling provisions exist within statutory provisions that also operate as grants of jurisdiction. *E.g.*, 42 U.S.C. § 7607(b)(1) (Clean Air Act); *see infra* note 99 and accompanying text.

twentieth century, when the general venue provision was much narrower than it is today, this section documents how Congress employed expansive venue provisions to further the substantive (progressive) aims of the underlying statutes. Section I.B.2 then considers venue channeling. It focuses on the venue provision of the Clean Air Act, which forms the basis of a case study in Part II's analysis of venue diversion, and compares the CAA's model of venue channeling to the venue provisions enacted in its contemporary landmark environmental statutes.

1. Venue Diffusion

Until the middle of the twentieth century, plaintiffs generally had to litigate in defendants' home districts.[60] However, early twentieth-century Progressives viewed the restrictiveness of the general venue rule as an obstacle to workers' and consumers' practical abilities to vindicate their rights under remedial statutes like the Federal Employers' Liability Act (FELA) and the Sherman Antitrust Act.[61] To ensure that labor and antitrust plaintiffs had practical rather than simply theoretical opportunities to secure relief under these statutes, Progressive legislators amended the original Acts to include expansive venue provisions.[62] As this section shows, these specialized venue provisions diffused venue beyond simply the district of a defendant's residence and also subjected antitrust and labor defendants to plaintiff-friendly processes and personal jurisdiction rules.

Congress enacted the Federal Employers' Liability Act in 1908 to provide a cause of action and damages remedy for injuries or death suffered by railroad workers.[63] Two years later, Congress amended the Act to include an expansive venue provision allowing FELA suits to be brought "in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action."[64] Before this amendment, FELA suits had been subject to the limitations of the general venue provision, and litigation commenced "promptly" after passage of the original Act had "disclosed what Congress considered deficiencies in such a limitation of the right of railroad employees to bring personal injury actions."[65] The

60. *See supra* notes 41–45.

61. *See infra* notes 63–67, 69–77 and accompanying text.

62. Purcell, *supra* note 24, at 471–72 (describing FELA); *see infra* notes 63–67, 73.

63. Federal Employers' Liability Act (FELA), Pub. L. No. 60-100, 35 Stat. 65 (1908).

64. Act of Apr. 5, 1910, Pub. L. No. 61-117, § 6, 36 Stat. 291, 291 (amending FELA).

65. *Balt. & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 49 (1941).

amendments responded directly to this perceived deficiency. As the report of the Judiciary Committee accompanying the amendments stated:

> The tremendous loss of life and limb on the railroads of this country is appalling. . . . It was the intention of Congress in the enactment of this law originally, and it may be presumed to be the intention of the present Congress to shift the burden of the loss resulting from these casualties from those least able to bear it, and place it upon those who can . . . "measurably control their causes." The passage of the original act and the perfection thereof by the amendments herein proposed, stand forth as a declaration of public policy to radically change as far as congressional power can extend, those [unjust] rules of the common law.[66]

With respect to the venue amendment, specifically, the report stated:

> This amendment is necessary in order to avoid great inconvenience to suitors and to make it unnecessary for an injured plaintiff to proceed only in the jurisdiction in which the defendant corporation is an "inhabitant." . . . No argument is necessary to convince that this [the default rule of venue] is a grave injustice to the plaintiff. Such an embarrassing situation ought not to be permitted to exist where any plaintiff is proceeding in a federal court on a right based on the law of the United States. But to permit it to be a practical barrier to the maintenance of an action for death or personal injuries of employees . . . would be an injustice too grave and serious to be longer permitted to exist.[67]

When a railroad defendant challenged a plaintiff's venue choice under the Act, arguing that the plaintiff's choice of an out-of-state forum was inconvenient and that justice would be better served in the plaintiff's home state, the Supreme Court rejected the railroad's argument by invoking the preemptive effect of the "privilege of venue" granted by FELA.[68]

Similar concerns about a plaintiff's practical capacity to sue informed the venue-expanding amendments Congress made to the

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66. S. REP. NO. 61-432, at 2 (1910) (quoting *St. Louis, Iron Mountain & S. Ry. Co. v. Taylor*, 210 U.S. 281, 296 (1908)) (cleaned up). This report was submitted to the Senate by Senator William Borah, a Progressive from Idaho. *See "Lion of Idaho" Laid To Rest*, U.S. SENATE (Jan. 22, 1940), https://www.senate.gov/artandhistory/history/minute/Lion_Laid_to_Rest.htm [https://perma.cc/Q2SC-SU77].

67. S. REP. NO. 61-432, at 4 (1910).

68. *Kepner*, 314 U.S. at 52–54 & n.21.

Sherman Antitrust Act just a few years later.[69] The original venue provision of the Sherman Act had already been more expansive than the general venue provision, authorizing suit "in the district in which the defendant resides or is found."[70] But, responding to concerns about potential limitations of the "is found" language[71] and seeking to "mak[e] the nation's antitrust policy more effective,"[72] the Clayton Act of 1914 went further and authorized suit "not only in the judicial district whereof [a defendant corporation] is an inhabitant, but also in any district wherein it may be found or transacts business."[73]

In enlarging the antitrust venue rule in this way, Congress sought to promote private enforcement of antitrust law[74] by "relieving the injured person from the necessity" of litigating in a distant judicial district where a defendant corporation was at home, and instead permitting the plaintiff to bring suit closer to home.[75] As the Court repeatedly observed, the original language of the Sherman Act had created an "often insuperable obstacle" to redressing harms that occurred in districts where corporate defendants operated but were not residents.[76] The Clayton Act thus sought to make "bringing suit and conducting trial . . . less inconvenient for plaintiffs" by granting them a right to choose a venue that was not only broader than originally available under the Sherman Act and the prevailing general venue statute, but also, according to the Supreme

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69. *See, e.g.*, 51 CONG. REC. 9416 (1914) (exchange between Rep. Charles Carlin and Rep. William Cullop) (noting intent to make it easier for plaintiffs to sue in their home district); *id.* at 9663 (statement of Rep. Cullop) ("The language of this [proposed Clayton Act] amendment is taken directly from the language of the amendment which was offered to the employers' liability act of 1910."); *see also id.* at 9608 (statement of Rep. Hatton Sumners) (posing a hypothetical about a corporate defendant seeking to escape justice).

70. Sherman Antitrust Act of 1890, ch. 647, § 7, 26 Stat. 209, 210.

71. *See* 51 CONG. REC. 9608 (1914) (statement of Rep. Sumners) (advocating for language to ensure venue is proper where the cause of action arises because to do otherwise could be "[un]fair or [un]just").

72. *United States v. Nat'l City Lines, Inc.* (*Nat'l City Lines I*), 334 U.S. 573, 581 (1948) (describing the Clayton Act, Pub. L. No. 63-212, 38 Stat. 730 (1914)); Jeremy C. Bates, Comment, *Home Is Where the Hurt Is: Forum Non Conveniens and Antitrust*, 2000 U. CHI. LEGAL F. 281, 285.

73. Clayton Act § 12 (amending Sherman Antitrust Act of 1890).

74. Bates, *supra* note 72, at 286.

75. *Nat'l City Lines I*, 334 U.S. at 579–80 (quoting *Eastman Kodak Co. of N.Y. v. S. Photo Materials Co.*, 273 U.S. 359, 373–74 (1927)).

76. *Eastman*, 273 U.S. at 374; *accord Nat'l City Lines I*, 334 U.S. at 579–80 (quoting *id.*); *United States v. Scophony Corp. of Am.*, 333 U.S. 795, 808 (1948) (quoting *Eastman*, 273 U.S. at 374).

Court, not amenable to displacement under the common law doctrine of forum non conveniens.[77]

Congress adopted an analogous venue-diffusing model for public enforcement of consumer protection laws in the Federal Trade Commission Act of 1914.[78] Although it granted exclusive jurisdiction over FTC Act enforcement actions to the circuit courts of appeals,[79] the Act's venue provision paralleled the venue provision applicable to private antitrust enforcement in the district courts: FTC "may apply . . . within any circuit where the method of [unfair] competition in question was used, or where such person, partnership, or corporation resides or carries on its business, for the enforcement of its order" to "cease and desist from using such method of competition."[80] The Act similarly authorized "[a]ny party required by such order of the commission to cease and desist from using such method of competition [to] obtain a review of such order in said circuit court of appeals."[81] The mechanism of direct review in the courts of appeals rather than the district courts was substituted by the conference committee to minimize delay, which supporters of the new law viewed as essential to its effectiveness.[82]

The venue-diffusing kind of judicial review provision included in the FTC Act, the Clayton Act, and the FELA provided a model for subsequent judicial review provisions in New Deal administrative statutes

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77. *Nat'l City Lines I*, 334 U.S. at 580–86. After the enactment of the Judiciary Act of 1948, the Court concluded that Congress's codification of venue transfer under § 1404 displaced the common law doctrine of forum non conveniens as applied to domestic lawsuits and that antitrust suits were within the ambit of the statutory law of transfer. *See United States v. Nat'l City Lines, Inc.* (*Nat'l City Lines II*), 337 U.S. 78, 79–82 (1949).

78. Federal Trade Commission Act, Pub. L. No. 63-203, § 5, 38 Stat. 717, 719–20 (1914).

79. Early versions of the bill allocated this power to the district courts. *Compare, e.g.*, H.R. REP. NO. 63-1142, at 4–5 (1914) (Conf. Rep.), *with id.* at 16 (Senate Bill).

80. Federal Trade Commission Act § 5. This model of judicial review of FTC orders was modeled on a similar provision of the Interstate Commerce Act of 1887. *See* Interstate Commerce Act of 1887, Pub. L. No. 49-104, § 16, 24 Stat. 379, 384–85; 51 CONG. REC. 14927 (1914) (statement of Rep. J. Harry Covington) (noting that the procedure for enforcement is "similar to the procedure now in force with respect to orders of the Interstate Commerce Commission").

81. Federal Trade Commission Act § 5.

82. H.R. REP. NO. 63-1142, at 19 (Conf. Rep.) ("In order to obtain the speediest settlement of disputed questions, it is provided that the commission shall apply for the enforcement of its orders directly to the circuit courts of appeals. The findings of the commission as to the facts are to be conclusive. The court's function is restricted to passing on questions of law."); *see also* 51 CONG. REC. 13050 (1914) (statement of Sen. Albert Cummins) (expressing concern about a model involving district court review).

and subsequent expansions of the administrative state.[83] Provisions authorizing public enforcement looked like section 5 of the FTC Act—allocating venue to the district or circuit in which a prohibited practice or statutory noncompliance was alleged to have occurred.[84] Provisions providing for private enforcement or challenges to administrative enforcement likewise enabled complainants to petition for review in the district or circuit in which they resided—while also, on occasion, identifying the D.C. Circuit as an additional proper venue.[85] Without this kind of specialized venue provision, challenges to agency action under the APA[86] were subject to the default rule of venue—under which venue was proper only where the government defendant resided—until the 1962 amendments to the U.S. Code expanded the options for venue in such suits.[87]

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83. Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 687, 764 (1989); *see also* Note, *Venue for Judicial Review of Administrative Actions: A New Approach*, 93 HARV. L. REV. 1735, 1736 (1980).

84. *E.g.*, National Labor Relations Act of 1935, Pub. L. No. 74-198, § 10(e), 49 Stat. 449, 454 ("The Board shall have the power to petition any circuit court of appeals . . . , or . . . any district court . . . , wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order . . . ."); Communications Act of 1934, Pub. L. No. 73-416, § 401(b), 48 Stat. 1064, 1092 ("If any person fails or neglects to obey any order of the Commission . . . the Commission . . . may apply to the appropriate district court of the United States for the enforcement of such order.").

85. *E.g.*, Fair Labor Standards Act, Pub. L. No. 75-718, § 10(a), 52 Stat. 1060, 1065 (1938) ("Any person aggrieved by an order of the Administrator . . . may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia . . . ."); Securities Act of 1933, Pub. L. No. 73-22, § 9(a), 48 Stat. 74, 80 (similar); Commodity Exchange Act, Pub. L. No. 74-675, sec. 9, § 6a(1), 49 Stat. 1491, 1499–1500 (1936) ("Any order of said commission . . . shall be reviewable by the circuit court of appeals for the circuit in which such association or corporation, or such board of trade, has its principal place of business . . . .").

86. *See* 5 U.S.C. § 703. This language has remained nearly constant since the APA was adopted in 1946. *See* Administrative Procedure Act, Pub. L. No. 79-404, § 10(b), 60 Stat. 237, 243 (1946).

87. *See supra* note 50 and accompanying text.

2. Venue Channeling

Early versions of the Clean Air Act (CAA)[88] and Clean Water Act (CWA)[89] largely followed the venue-diffusing model common to other administrative statutes containing specialized venue provisions: Suits by the United States to abate pollution could be brought in the district court where the pollution was occurring,[90] and when states were authorized to seek review of agency actions, the venue for such challenges was allocated to the region in which the state was located.[91] But when the statutes now referred to as the CAA and CWA replaced their early prototypes in 1970 and 1972, respectively, their approaches to venue diverged. Even as the CWA expanded the population of interested parties expressly authorized to seek review of EPA action under the Act,[92] the CWA maintained the venue-diffusing model for both public enforcement actions and petitions for review of administrative action. The CAA, on the other hand, retained the venue-diffusing model for public

88. The Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (amended 1990), commonly known as the Clean Air Act (CAA), replaced earlier attempts at improving national air quality. *See, e.g.*, Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (1963), *amended by* Pub. L. No. 89-272, 79 Stat. 992 (1965) *and* Pub. L. No. 90-148, 81 Stat. 485 (1967).

89. The Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, commonly known as the Clean Water Act (CWA), replaced an earlier act with a similar name. *See* Water Pollution Control Act, Pub. L. No. 80-845, 62 Stat. 1155 (1948), *amended by* Water Pollution Control Act Amendments of 1956, Pub. L. No. 84-660, 70 Stat. 498.

90. *See, e.g.*, Air Quality Act of 1967, Pub. L. No. 90-148, sec. 2, § 108(c)(4)(i), 81 Stat. 485, 493 (authorizing suit by the U.S. Attorney General "in the appropriate United States district court to secure abatement of the [air] pollution"); *accord* § 108(g), (k); Water Pollution Control Act § 2(d)(4)–(6) (authorizing suit "to secure abatement of the [water] pollution . . . in the judicial district in which any discharge caused by any of the defendants occurs").

91. Water Pollution Control Act Amendments of 1956 § 5(g)(2) ("If any State or any interstate agency is dissatisfied with the Surgeon General's action with respect to it under this subsection, it may appeal to the United States court of appeals for the circuit in which such State (or any of the member States, in the case of an interstate agency) is located.").

92. The CWA authorized the EPA administrator to seek injunctive relief against permit violators "in the district court . . . in which the defendant is located or resides or is doing business," Federal Water Pollution Control Act Amendments of 1972, sec. 2, § 309(b), and authorized "any interested person" to petition for review of certain enumerated EPA actions "in the Circuit Court of Appeals . . . for the Federal judicial district in which such person resides or transacts such business." Sec. 2, § 509(b)(1). Because section 509(b)(1) referred only to six kinds of enumerated actions, petitions challenging other types of EPA actions were held subject to review under the APA. *See infra* notes 137–39 and accompanying text.

enforcement actions[93] but adopted a new model in its authorization for judicial review of agency action: venue channeling. Now, some challenges to EPA action were authorized to be brought "*only* in the United States Court of Appeals for the appropriate Circuit," whereas other challenges were authorized "*only* in the United States Court of Appeals for the District of Columbia."[94]

Since its introduction in 1970, the CAA's venue-channeling provision has been revised to better effectuate the purpose it was originally intended to serve.[95] It has also served as a model for similar venue-channeling provisions in other statutes.[96] Understanding the evolution of the CAA venue-channeling provision and its sustained divergence from the CWA model is thus instructive for understanding the legislative objectives served by the venue channeling generally. In addition to this general benefit, understanding the particular purpose of the CAA's venue-channeling provision has taken on recent urgency in light of litigation.[97] Section I.B.2.a provides a history of the CAA's venue-channeling provision, beginning with its current form and working backwards as necessary to explain its evolution. Section I.B.2.b contrasts this history with the concurrent and contested non-evolution of the CWA's venue provision.

93. For example, the CAA authorized suits by the EPA administrator to enjoin violations of the Act "in the district court . . . in which the defendant is located or resides or is doing business." Clean Air Act Amendments of 1970, sec. 4(a), § 113(b); *see also* sec. 12(a), § 303 (authorizing the administrator to sue in the "appropriate . . . district court to immediately restrain any person causing or contributing" to pollution "presenting an imminent and substantial endangerment to the health of persons"); *cf.* sec. 12(a), § 304 (authorizing and giving district courts jurisdiction over citizen suits but not specifying venue for such suits, rendering them subject to the general venue rule). Similarly, venue in suits by manufacturers of automobile engines to challenge engine conformity tests was deemed proper in the "court of appeals for the circuit wherein such manufacturer resides or has his principal place of business." Sec. 8(a), § 206(b)(2)(B)(ii).

94. Clean Air Act Amendments of 1970, sec. 12(a), § 307(b)(1) (emphases added). Some earlier statutes had singled out the D.C. Circuit as a place for judicial review of agency action but had made venue there an additional option rather than the exclusive option. *See, e.g.*, statutes cited *supra* note 85.

95. *See infra* Section I.B.2.a.

96. For example, the Resource Conservation and Recovery Act bifurcates venue for review of agency action depending on the kind of action being challenged. Petitions challenging the promulgation of a rule or requirement or the denial of a petition to promulgate, amend, or repeal a rule "may be filed only in" the D.C. Circuit. 42 U.S.C. § 6976(a)(1).

97. *See infra* Section II.B.

a. The Clean Air Act

Section 307 of the Clean Air Act, codified at 42 U.S.C. § 7607(b), sets forth conditions for judicial review of agency actions under the Act.[98] This section acts as both a grant of jurisdiction to the courts of appeals and a rule for allocating venue between the different circuits.[99] Proper venue depends on the type of EPA action at issue:

> A petition for review of action of the Administrator in promulgating any [specifically enumerated national standard, requirement, determination, regulation], or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any [specifically enumerated approval, plan promulgation, order], or any other final action of the Administrator under this chapter . . . which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.[100]

Section 7607(b)(1) thus establishes a default rule of venue and an exception to that rule. Under the default rule, the proper venue for challenges to EPA action under the Clean Air Act is the D.C. Circuit. But for "locally or regionally applicable" actions that are not "based on a determination of nationwide scope or effect," the proper venue is the corresponding regional circuit.[101]

The legislative evolution of § 7607(b)(1) offers insight into why Congress chose to adopt this bifurcated model of venue. In its original form, § 7607(b)(1) lacked residual clauses and enumerated specific actions that "may only be filed" in the D.C. Circuit and other actions that "may only be filed in the United States Court of Appeals for the

98. *See* 42 U.S.C. § 7607 (which codified the Clean Air Act Amendments of 1970, sec. 12(a)).

99. *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 590 (1980); *see also Dalton Trucking, Inc. v. EPA*, 808 F.3d 875, 879 (D.C. Cir. 2015); *Texas v. EPA*, 829 F.3d 405, 418 (5th Cir. 2016).

100. 42 U.S.C. § 7607(b)(1).

101. *Id.*

appropriate circuit."[102] Consequently, the original provision neither established a default rule that petitions challenging "any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter" had to be filed in the D.C. Circuit, nor excluded from regional circuit review petitions challenging "locally or regionally applicable" actions that were "based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination."[103]

The Senate Report accompanying the bill that eventually became the CAA of 1970[104] explained that centralized review of many agency actions in the D.C. Circuit was necessary "[b]ecause many of these administrative actions are national in scope and require even and consistent national application."[105] In contrast, for agency actions affecting "only . . . one air quality control region," review was deemed appropriate in the relevant regional circuit.[106] But § 7607(b)(1)'s lack of a residual category posed problems for effectuating these goals.[107]

Responding to, but not resolving, the problems of noncomprehensive enumeration, Congress enacted minor amendments in 1974 that enumerated additional kinds of agency action for which judicial review was available.[108] Meanwhile, the absence of a national-policy exception to § 7607(b)(1)'s regional-circuit rule was made obvious by litigation challenging a nationally applicable EPA policy that concerned state implementation plans—channeled by the 1970 amendments to "the appropriate regional circuit"—in which the petitioners filed suit in the D.C. Circuit *and* all regional circuits.[109] Consequently, amidst larger debates over proposed substantive amendments to the CAA, the Ninety-Fourth and Ninety-Fifth Congresses also considered how to correct § 7607(b)(1)'s shortcomings.[110]

The eventual 1977 amendments to § 7607 reflect this lineage. The amended statute obviated the need to infer a presumption of judicial review for agency action under the CAA by adding residual clauses:

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102. *See* Clean Air Act Amendments of 1970, sec. 12(a), § 307(b)(1).

103. *Compare id.*, *with* 42 U.S.C. § 7607(b)(1).

104. As noted in the accompanying House Report, the provision providing for judicial review was introduced by the Senate. H.R. REP. NO. 91-1783, at 57 (1970) (Conf. Rep.).

105. S. REP. NO. 91-1196, at 41 (1970).

106. *Id.*

107. *See* Cris Ray, *Cleaning Up Venue:* Chevron *Deference and the Venue Provision of the Clean Air Act*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 751, 757–59 (2020) (describing these amendments).

108. Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, § 6, 88 Stat. 246, 259.

109. *See* Ray, *supra* note 107, at 757–59.

110. *See id.* at 759–61 (describing competing draft bills in 1976 and 1977 that contained provisions that would or would not have modified § 7607(b)(1)).

Judicial review was authorized for "any other nationally applicable regulations promulgated, or final action taken by, the Administrator under this Act" in the D.C. Circuit, and, generally, for review of "any other final action by the Administrator under this Act which is locally or regionally applicable" in an appropriate regional circuit.[111] At the same time, the 1977 Amendments added the nationwide-determination exception for judicial review of local or regional actions that are "based on a determination of nationwide scope or effect."[112] Under the amended statute, venue is proper in a regional circuit only for challenges to purely local actions; locally or regionally applicable actions informed by nationwide policy decisions must be challenged in the D.C. Circuit.

The House Committee Report accompanying the bill that became the 1977 amendments identifies the objective of these modifications.[113] As stated therein, the amendments "make[] it clear that any nationally applicable regulations . . . c[an] be reviewed only in [the D.C. Circuit]."[114] "[E]ssentially locally, statewide, or regionally applicable rules or orders," on the other hand, are "to be reviewed in the U.S. court of appeals for the circuit in which such locality, State, or region is located," "except as otherwise provided in paragraph (4)."[115] The explanation for paragraph (4), in turn, illustrates when the Committee expected the nationwide-policy exception to apply: "[I]f an action of the Administrator is *found by him* to be based on a determination of nationwide scope or effect (including a determination which has *scope or effect beyond a single judicial circuit*), then exclusive venue for review is in the" D.C. Circuit.[116]

In addition to describing the intended operation of the 1977 amendments to § 7607(b)(1), the House Report also explained the Committee's reasoning. First, the amendment "in large measure approv[ed] of the Administrative Conference of the United States recommendation section . . . that deals with venue,"[117] which simply observed that the "provisions for judicial review in the Clean Air Act

111. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, sec. 305(c), § 307(b)(1), 91 Stat. 685, 776.

112. *Id.*

113. Section 7607(b)(1)'s nationwide-policy exception first appeared in H.R. 10498, 94th Cong. § 305(c) (1975). However, the accompanying House Report did not address venue. *See* H.R. REP. NO. 94-1175, at 259–64 (1976). After H.R. 10498 could not be reconciled with the corresponding Senate bill during the 94th Congress, the language was reintroduced in H.R. 6161 in the 95th Congress. *See* Ray, *supra* note 107, at 759–60, 762–64.

114. H.R. REP. NO. 95-294, at 323 (1977).

115. *Id.* at 323–24.

116. *Id.* (emphasis added).

117. *Id.* at 324 (citing 41 Fed. Reg. 56767, 56767–69 (Dec. 30, 1976)). The Report specifically endorsed ACUS's recommendation A in § 305.76-4 and G. William Frick's recommendation (1). *Id.*

and the [Clean Water Act] . . . are in some respects inconsistent, incomplete, ambiguous and unsound."[118] But then, instead of endorsing suggestions from the Administrative Conference of the United States (ACUS) for remedying the focal issue,[119] the Report expressly rejected the vast majority of remedial actions recommended by ACUS in favor of "the comments, concerns, and recommendation . . . of G. William Frick, which accompanied the Administrative Conference's views."[120] Frick was EPA's General Counsel at the time,[121] and his recommendations likely reflected his firsthand experience with defending challenges to national and local policy choices.

The differences between Frick's and ACUS's suggested modifications are illuminating. Two of ACUS's recommendations—which the House Report rejected[122]—suggested modifying the CWA "to provide that review of regulations, standards, or determinations affecting single states or facilities be had in the circuit containing the state or facility" and the CAA "to make explicit that the Administrator's action in approving or promulgating state implementation plans is reviewable in the circuit containing the state whose plan is challenged."[123] Frick suggested "amend[ing]" both of these recommendations "to provide that where 'national issues' are involved they should be reviewed in the D.C. Circuit."[124] He further explained: "Although approval and promulgation of [SIPs] under the [CAA] usually involve issues peculiar to the affected States, such actions sometimes involve generic determinations of nationwide scope or effect. . . . We view such actions as virtually identical to the promulgation of 'national standards,'" for which review is recommended in the D.C. Circuit.[125]

In addition to offering this agency perspective on venue, Frick noted his recommendation's consistency with the original purpose of § 7607(b)(1). With the 1970 amendments, "Congress intended review in the D.C. Circuit of 'matters on which national uniformity is desirable.' Among the reasons for this are the D.C. Circuit's obvious expertise in administrative law matters and its sensitivity to Congressional

118. 41 Fed. Reg. at 56767.

119. ACUS proposed unifying the schemes for judicial review in the CAA and the CWA (then better known as the FWPCA, or Federal Water Pollution Control Act). *See id.* at 56767–69.

120. H.R. REP. NO. 95-294, at 324; *see also* 41 Fed. Reg. at 56768–69.

121. Ray, *supra* note 107, at 764.

122. H.R. REP. 95-294, at 324.

123. 41 Fed. Reg. at 56768 (ACUS Recommendation A.2.–3.).

124. *Id.* (G. William Frick Recommendation (1)).

125. *Id.* at 56768–69.

mandates."[126] But, in practice, too, "the D.C. Circuit has become thoroughly familiar with the Clean Air Act—a very complex statute—and with its equally complex legislative history."[127] Consequently, "centraliz[ing] review of 'national' SIP issues in the D.C. Circuit" would "tak[e] advantage of its administrative law expertise and facilitat[e] an orderly development of the basic law under the Act, rather than to have such issues decided separately by a number of courts, some of which would probably lack frequent exposure to the Act and its legislative history."[128] "Moreover," Frick noted, "the validity of a nationally applicable regulation will not turn on the particulars of its impacts within a given Circuit."[129]

b. Other Environmental Statutes

At the same time Congress was deliberating over what would become the 1977 amendments to the CAA, it was also considering substantive and procedural amendments to the CWA[130] and a series of bills that would become the Resource Conservation and Recovery Act (RCRA).[131] The idea of centralizing review of certain nationally relevant regulations in the D.C. Circuit was raised in each of these contexts, too. As noted previously, both ACUS and Frick recommended that Congress modify the CWA's venue provision to align with proposed revisions to the CAA's venue provision.[132] And the earliest drafts of the RCRA channeled review of national regulations to the D.C. Circuit.[133] However, although Congress ultimately—and seemingly uncontroversially[134]—

126. *Id.* at 56769 (quoting DAVID P. CURRIE, FINAL REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: JUDICIAL REVIEW UNDER THE CLEAN AIR ACT AND FEDERAL WATER POLLUTION CONTROL ACT 320–21 (1977), *reprinted in Clean Air Act Amendments of 1977: Hearing on S. 251, S. 252, and S. 253 Before the Subcomm. on Env't Pollution of the S. Comm. on Env't and Pub. Works*, 95th Cong. 253 (1977)). The Final Report of Professor David Currie described Senate Report 1196. *See generally* CURRIE, *supra* (discussing S. REP. NO. 91-1196 (1970)).

127. 41 Fed. Reg. at 56769.

128. *Id.*

129. *Id.*

130. *See, e.g.*, sources cited *infra* notes 145–51 and accompanying text.

131. *See* ENV'T & NAT. RES. POL'Y DIV., CONG. RSCH. SERV., 102D CONG., A LEGISLATIVE HISTORY OF THE SOLID WASTE DISPOSAL ACT, AS AMENDED (Comm. Print 1991); sources cited *infra* note 133.

132. *See supra* notes 117–21 and accompanying text.

133. *See, e.g.*, *The Need for a National Materials Policy*: *Hearings on S. 3560, S. 3549, S. 1086, S. 3277, and S. 3954 Before the Subcomm. on Env't Pollution of the S. Comm. on Pub. Works*, 93d Cong. 104–05 (1974) (draft of S. 3549); S. REP. 94-988, at 3622 (1976) (explaining that the venue-channeling provision of the RCRA was modeled on the CAA and the CWA provisions).

134. *Compare, e.g.*, sources cited *infra* note 145 and accompanying text, *with* sources cited *supra* note 133.

included a venue-channeling provision in the RCRA, it declined to adopt a venue-channeling amendment for the CWA in the 1977 amendments enacted just months after the 1977 amendments to the CAA. The contrasting approaches to venue in these environmental statutes provide insight into how Congress and interested parties understood venue channeling to operate in practice and in theory.

As noted earlier, the venue provision of the CWA largely adheres to the standard model that allocates venue to the residence of an affected party or location of a regulated source.[135] Specifically, for seven enumerated categories of EPA action, the CWA authorizes judicial review "by any interested person in the Circuit Court of Appeals . . . for the Federal judicial district in which such person resides or transacts business which is directly affected by such action."[136] Because the CWA—unlike the CAA[137]—lacks a residual clause, actions not enumerated must be challenged in federal district court, where judicial review proceeds under the APA.[138] Venue for challenges to these actions is thus proper in a district where the agency "resides" or where "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."[139]

This venue provision has changed little since its enactment in 1972[140] despite several amendments to the CWA, including those in 1977.[141] Notably, the original 1972 House bill that evolved into the inaugural version of § 1369 had provided for judicial review in the relevant district court, rather than the court of appeals.[142] The corresponding Senate bill, in contrast, had included a venue-channeling provision akin to that in the CAA, which provided for judicial review in the D.C. Circuit for certain "administrative actions [that] are national in scope and require even and consistent national application" while keeping "review of permits . . . and other actions which run only to one region . . . in the U.S. Court of Appeals for the Circuit in which the Affected State or

135. *See supra* notes 90–92 and accompanying text. As with the CAA, the CWA venue provision is also a jurisdictional provision. *See* 33 U.S.C. § 1369(b)(1).

136. § 1369(b)(1).

137. *See supra* note 111 and accompanying text.

138. *See Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 628 (2018).

139. 28 U.S.C. § 1391(b)(1)–(2); *see also Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 626 & n.3.

140. *Compare* Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 509(b)(1), 86 Stat. 816, 892, *with* 33 U.S.C. § 1369(b)(1).

141. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566; Water Quality Act of 1987, Pub. L. No. 100-4, sec. 505(b), § 509(b), 101 Stat. 7, 75–76 (amending § 1369(b)(1) to provide a randomized process for consolidating challenges to a single EPA action that were filed in multiple circuits), *repealed by* Act of Jan. 8, 1988, § 2, 101 Stat. 1731, 1732; *see also* H.R. REP. NO. 100-72, at 4 (1987).

142. *See* H.R. REP. NO. 92-911, at 136 (1972).

region . . . is located."[143] Although the Conference Report noted this discrepancy, it did not explain the rationale behind the somewhat Frankenstein-ish result ultimately enacted in the Federal Water Pollution Control Act Amendments of 1972.[144]

Amid debates over how to amend the CWA and CAA in the mid-1970s, EPA proposed an amendment to § 1369 that would have allocated review of regulations governing effluent limitations to the D.C. Circuit.[145] As hearing transcripts from the 94th and 95th Congresses indicate, this proposal proved controversial.[146] Electrical industry representatives, for example, argued that centralizing review of such regulations in a circuit with a busy docket would delay judicial review, eliminate the benefits of intercircuit disagreement and percolation, introduce inefficiencies and inequities because EPA was still in the process of implementing CWA programs authorized by the 1972 amendments, impair the capacity of regulated parties to challenge EPA regulations, and offend the dignity of the regional circuits.[147]

The EPA Administrator attempted to rebut such arguments by invoking the recent amendments to the CAA venue provision, noting that provision, in EPA's experience, "in no way deprive[s] individual citizens or firms of the opportunity to have standards and regulations applicable to them reviewed in a responsible and accessible manner."[148] The Administrator observed that:

> [T]he record . . . show[s] little correlation between the location of an industry and the courts to which various appeals have

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143. S. REP. NO. 92-414, at 85 (1971).

144. *See* S. REP. NO. 92-1146, at 147–48 (1972) (Conf. Rep).

145. *See, e.g.*, *To Amend the Federal Water Pollution Control Act: Hearings on H.R. 9560 Before the Subcomm. on Water Res. of the H. Comm. on Pub. Works & Transp.*, 94th Cong. 171 (1975) (Natural Resources Defense Council's answers to questions from the Subcommittee); *Federal Water Pollution Control Act Amendments of 1977: Hearings Before the Subcomm. on Env't Pollution of the S. Comm. on Env't & Pub. Works*, 95th Cong. 628 (1977) [hereinafter *1977 Subcomm. Hearings*] (statement of Thomas C. Jorling, Assistant Administrator, EPA); *Federal Water Pollution Control Act Amendments: Hearings on H.R. 3199 Before the H. Comm. on Pub. Works & Transp.*, 95th Cong. 872–73 (1977) [hereinafter *1977 Comm. Hearings*] (letter from Edison Electric Institute to Rep. Ray Roberts, Chairman, H. Subcomm. on Water Res.).

146. *1977 Comm. Hearings*, *supra* note 145, at 144–45 (statement of Douglas M. Costle, Administrator, EPA) (noting the "considerable controversy").

147. *1977 Subcomm. Hearings*, *supra* note 145, at 16–19 (letter from George C. Freeman on behalf of Edison Electric Institute to Sen. Edmund Muskie, supplementing testimony of Donald G. Allen, Vice President, New England Electric System, Edison Electric Institute); *1977 Comm. Hearings*, *supra* note 145, at 872–73 (letter from Edison Electric Institute to Rep. Ray Roberts, Chairman, H. Subcomm. on Water Res.); *see also id.* at 502 (statement of Alan G. Kirk II, Vice President & General Counsel, PEPCO).

148. *1977 Comm. Hearings*, *supra* note 145, at 145 (statement of Douglas M. Costle, Administrator, EPA).

> been made. Furthermore, the overwhelming tendency has been for appeals of national standards to be made either by very large corporations with plants in numerous sections of the country, or by trade associations . . . .[149]

In response to questions, EPA emphasized that this proposal would apply only to "national promulgations, not those activities that affect an individual, a single plant"—not "enforcement" or "those actions which we take that relate to a specific" entity.[150] Ultimately, however, Congress made no change to the CWA's venue provision.[151]

The mid-1970s controversy over centralizing review of certain nationally applicable CWA regulations is surprising in light of the recency with which Congress had, apparently uncontroversially, included similar provisions in both the CAA[152] and RCRA.[153] As others have pointed out, it is difficult and potentially inadvisable to try to infer from this history Congress's purpose in *not* amending the CWA venue provision.[154] Nevertheless, the discussions about venue channeling in congressional debates over the CAA and other environmental statutes illuminate the concerns and justifications underlying the use of venue-channeling provisions generally, and in the specific context of the CAA.

C. Legislative Objectives of Venue Rules

The preceding sections document how Congress has used venue rules to shape the exercise of federal judicial power. This section considers the normative values inherent in each of these approaches and their implications for venue as a tool of legislative policy.

Historically, expanding venue beyond the district of a defendant's residence served to expand plaintiffs' ability to bring suit. Expansive venue rules—including the modern general venue statute as well as venue-diffusing specialized provisions—can thus reinforce access-to-justice values.[155] A countervailing consideration is the defendant's desire to not be forced to defend frivolous claims or in inconvenient forums that

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149. *Id.*

150. *Id.* at 193 (statement of Thomas C. Jorling, Assistant Administrator for Water & Hazardous Materials, EPA).

151. *See generally* Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566.

152. *See supra* notes 115–20 and accompanying text.

153. *See* sources cited *supra* note 133.

154. *See* Allison LaPlante & Lia Comerford, *On Judicial Review Under the Clean Water Act in the Wake of* Decker v. Northwest Environmental Defense Center*: What We Now Know and What We Have Yet To Find Out*, 43 ENV'T L. 767, 778–79 (2013).

155. *See* Huddleston, *supra* note 16, at 245–46, 250; Stowell R.R. Kelner, Note, *"Adrift on an Uncharted Sea": A Survey of Section 1404(a) Transfer in the Federal System*, 67 N.Y.U. L. REV. 612, 639 (1992).

lack a nexus to the dispute. The due process backstop of personal jurisdiction[156] and § 1404's authorization for transfer from one proper forum to another when the interests of justice so require[157] mediate these competing interests, although the extent to which § 1404 preserves a plaintiff's venue privilege remains an open question.[158]

Venue diffusion may also contribute to the development of diverse solutions to difficult legal questions.[159] Even if all plaintiffs exercise their venue privilege to sue where they expect to achieve the most favorable result, different plaintiffs will weigh relevant factors differently and possess different expectations about their likelihood of success. The ensuing percolation of ideas throughout the judicial system can lead to better interpretations of the law[160] while also curtailing the negative impact of poorly reasoned decisions.[161]

Despite these theoretical benefits, expansive notions of venue can create problems. In practice, the purported benefits of percolation are curtailed by the widespread availability of nationwide injunctions.[162] And, even on a theoretical level, the costs of duplicative or similar proceedings may outweigh the purported benefits of diffuse adjudication. From a purely financial perspective, the value of the benefit attained relative to the resources expended across duplicative proceedings may be lower than the relative benefit that could have been achieved in a single, universally binding proceeding.[163] From a social welfare perspective, on the other hand, the social cost of diffuse proceedings might simply be too high. Some statutory schemes are exceedingly complex, concerned with urgent problems, or both, and the most socially efficient means of

156. *See* Ryan, *supra* note 35, at 178–79.

157. 28 U.S.C. § 1404(a); *see* Rensberger, *supra* note 29, at 853–54 ("The purpose of § 1404 is to 'prevent the waste of time, energy and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense.'" (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964))).

158. *See* Rensberger, *supra* note 29, at 851, 861–69; Marcus, *supra* note 49, at 720. *But see* Thomas B. Bennett, *There Is No Such Thing as Circuit Law*, 107 MINN. L. REV. 1681, 1714–23 (2023).

159. *See* Martha Dragich, *Uniformity, Inferiority, and the Law of the Circuit Doctrine*, 56 LOY. L. REV. 535, 554–56 (2010) (summarizing this argument); Marcus, *supra* note 49, at 690. *But see* Michael Coenen & Seth Davis, *Percolation's Value*, 73 STAN. L. REV. 363, 387–88 (2021).

160. Dragich, *supra* note 159, at 554–55 (quoting John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 183 (1982)). *But see* Spencer E. Amdur & David Hausman, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. F. 49, 52 (2017) (noting the lack of evidence of the benefits of percolation).

161. *See* David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 69–70 (1975) (suggesting that venue diffusion can reduce "the potential of a single wrong decision to harm an administrative program or those subject to it").

162. *See* Clopton, *supra* note 16, at 10; Bray, *supra* note 16, at 461–62.

163. *See* Coenen & Davis, *supra* note 159, at 388–89.

resolving disputes under such statutes may be by channeling all such disputes to a single circuit.

To start, channeling venue to a particular court should prevent inefficient duplicative proceedings and ensure uniform resolution of pending legal questions.[164] A statutory venue-channeling provision is not the only way to do this: Generally applicable statutes authorize such consolidation in the case of multiple petitions challenging the same agency action[165] and for pretrial proceedings in cases involving common questions of fact (*e.g.*, MDLs).[166] But unlike these processes, venue channeling involves a venue allocation to a particular circuit, and this specificity produces additional benefits beyond what could be achieved under a general, randomized process.

Perhaps the most significant benefit of venue channeling is its facilitation of the development of statutory expertise within a court,[167] which can lead to better reasoned decisions. After all, some statutes are technically complex and difficult to parse.[168] Developing the requisite understanding of technical statutory terms, processes, and implementation to render a careful, well-reasoned decision about the meaning of such a statute might require more time than is allowed by the institutional constraints of federal judging.[169] Facing the tradeoff of clearing one's docket in a timely fashion versus delving into the particular nuances of administering the CAA's regime for regulating National Ambient Air Quality Standards (NAAQS), for example, a judge who encounters the CAA only once a decade has less incentive to devote the requisite time to understanding NAAQS than a judge who expects to

164. *See* Jeffrey C. Dobbins, *Structure and Precedent*, 108 MICH. L. REV. 1453, 1467 (2010); SIEGEL, *supra* note 19, at 55; Cass R. Sunstein, *Participation, Public Law, and Venue Reform*, 49 U. CHI. L. REV. 976, 997 (1982).

165. 28 U.S.C. § 2112(a).

166. § 1407(a).

167. By "statutory expertise," I do not mean expertise with respect to the subject matter of a statute, which is the provenance of agencies and not courts, but rather a court's familiarity and facility with a given statutory scheme, including how different statutory provisions work together and in conjunction with agency administration of the statute. *See supra* notes 127–28 and accompanying text.

168. The Clean Air Act and its amendments, for example, have been described as "a lengthy, technical, complex, and comprehensive response to a major social issue." *Chevron U.S.A. Inc. v. Nat. Res. Def. Council., Inc.*, 467 U.S. 837, 848 (1984).

169. *See* Gil Seinfeld, *The Federal Courts as a Franchise: Rethinking the Justifications for Federal Question Jurisdiction*, 97 CALIF. L. REV. 95, 130–31, 130 n.112 (2009); *see also* Chad M. Oldfather, *Judging, Expertise, and the Rule of Law*, 89 WASH. U. L. REV. 847, 893–94 (2012); Samir D. Parikh, *Bankruptcy Tourism and the European Union's Corporate Restructuring Quandary: The Cathedral in Another Light*, 42 U. PA. J. INT'L L. 205, 259–60 (2020).

engage with the CAA on a regular basis.[170] Venue channeling for complicated statutes, like the CAA, can thus encourage more thoughtful judicial inquiry—and better interpretive outcomes—by endowing particular courts with exclusive interpretive responsibility and realigning those judges' short- and long-term incentives.[171]

The benefit of expertise produces ancillary benefits. As a chosen court becomes more familiar with a particular statute, its judges' interpretive facility and efficiency with that statute will improve, equipping the court to respond more expediently to cases arising under that statute. This efficiency-improving feature of venue channeling may be particularly important for statutes designed to resolve urgent problems for which incremental adjudication and resolution of interpretive conflicts would be detrimental. Without the opportunity for percolation and the need to resolve differing opinions, the final resolution of contested questions can occur more promptly.[172]

Without the opportunity to forum shop to circuits with more favorable law, moreover, venue channeling reduces the likelihood that nationally applicable remedial statutes will be interpreted by different circuits to provide differing levels of protection to residents of different regions of the country.[173] Similarly, venue channeling could alleviate the forum shopping concerns related to nationwide injunctions by precluding litigants from petitioning for relief in circuits selected for perceived favorability to their interests.[174] Instead, all such petitions would have to be filed in the chosen circuit.

Of course, advocates on both sides of an issue might prefer the opportunity for disparate applications of the law rather than a single, unfavorable interpretation,[175] and might correspondingly perceive venue channeling's tendency towards uniformity as undesirable. The concentration of power in a single circuit, subject only to discretionary appeal at the Supreme Court, might pose another concern, especially for highly contested issues[176] and those affecting less legally sophisticated or

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170. *See generally* 42 U.S.C. § 7408; *Am. Trucking Ass'ns, Inc. v. EPA*, 283 F.3d 355 (D.C. Cir. 2002), *on remand sub nom. from Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001).

171. *See supra* note 128 and accompanying text.

172. *See* Currie & Goodman, *supra* note 161, at 69 (suggesting that the benefits of dispersion depend on the "prompt[] resol[ution]" of intercircuit conflicts); Dragich, *supra* note 159, at 555.

173. *See* Frost, *supra* note 13, at 1105; *see also* Estreicher & Revesz, *supra* note 83, at 687; Dobbins, *supra* note 164, at 1470.

174. Frost, *supra* note 13, at 1105; *see also* Bray, *supra* note 16, at 460.

175. *See, e.g.*, Zimmerman, *supra* note 19, at 1420; Jeffrey L. Fisher, *A Clinic's Place in the Supreme Court Bar*, 65 STAN. L. REV. 137, 192 (2013) (discussing the risk of universalizing law unfavorable to some clients when appealing an issue).

176. *See, e.g.*, Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 ALA. L. REV. 1, 63 (2019).

less resourced parties.[177] But rather than discounting venue channeling in general, weighing these concerns and the aforementioned benefits and drawbacks of the venue-diffusing and venue-channeling models suggests a rule of thumb. Venue channeling is best suited for statutory schemes that structure the implementation of nationwide policy, rather than statutes concerned with individualized adjudications.[178] Moreover, given its status as the home of most administrative agencies, relative lack of homegrown interests, and existing expertise with administrative law,[179] venue channeling is likely to be most effective if the chosen target is the D.C. Circuit.[180]

The Clean Air Act is arguably one such statute, and these concerns were indeed cited by Congress in incorporating its venue-channeling provision.[181] Regardless of the theoretical match between the CAA's purpose and the normative values advanced by venue channeling, however, the most important feature of the CAA's venue-channeling provision is that it exists and does so to (1) develop and take advantage of judicial expertise with the CAA and (2) centralize review of issues of nationwide relevance and effect so as to ensure uniformity and efficiency of adjudication.[182] Venue channeling, after all, is within Congress's plenary authority over the competence of federal courts.

II. VENUE DIVERSION

As Part I described, Congress uses different kinds of venue provisions to achieve and reinforce different substantive aims and normative principles. Through the conditions they impose on a court's exercise of Article III power, both default and specialized venue

177. *See* Zimmerman, *supra* note 19, at 1420; Huddleston, *supra* note 16, at 253.

178. *See* Sunstein, *supra* note 164, at 997.

179. Eric M. Fraser, David K. Kessler, Matthew J.B. Lawrence & Stephen A. Calhoun, *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J.L. & PUB. POL'Y 131, 145–47 (2013).

180. *See* Note, *supra* note 83, at 1755–56. Of course, the general venue statute already establishes that venue is proper in the D.C. Circuit for administrative challenges. 28 U.S.C. § 1391(e). But venue channeling represents a displacement of the default, and a specialized venue-channeling provision would render the D.C. Circuit the *only* proper venue for a class of challenges. A recent ACUS report discusses alternatives to channeling venue to the D.C. Circuit for administrative challenges. JOSEPH W. MEAD, REPORT FOR THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: CHOICE OF FORUM FOR JUDICIAL REVIEW OF AGENCY RULES 55–56 (2024).

181. *See supra* text accompanying notes 112–29.

182. *See supra* text accompanying notes 122–29; *see also Nat'l Env't Dev. Ass'n's Clean Air Project v. EPA*, 891 F.3d 1041, 1049 (D.C. Cir. 2018) (noting that Congress adopted venue channeling to "curb inconsistencies with respect to nationally applicable" actions while leaving "purely 'locally or regionally applicable'" actions subject to regional adjudication).

provisions effect a congressional judgment about the proper exercise of that power. This Part examines the circumstances under which judicial interpretations of venue provisions transgress their legislatively defined boundaries. Section II.A develops a theory of "venue diversion" that characterizes both a court's improper exercise of adjudicatory authority over a case for which it is an improper forum, and the creation of circuit precedent that reinforces the court's capacity to engage in such behavior. As this section explains, venue diversion is not merely incorrect statutory interpretation; it represents a judicial incursion beyond the limits on Article III authority prescribed by Congress. Section II.B then illustrates how this theory of venue diversion plays out in practice through the lens of two case studies involving different venue provisions—the CAA venue provision and the general venue statute, respectively.

A. Defining Venue Diversion

Venue statutes represent legislative judgments about the proper location of adjudication. Whenever a petitioner invokes a court's authority under a particular venue statute,[183] the relevant statutory scheme dictates whether that court is a proper forum for that dispute. And even though proper venue need not be exclusive,[184] the question of whether venue is proper for a given claim and chosen forum is, at least in theory, a binary question whose answer derives from the statutory framework. This remains true even though the nature of venue means that courts will not always be called upon to decide this question.

Petitioners, of course, have the privilege to choose their preferred proper forum when more than one exists,[185] and their exercise of this privilege generally will not create genuine venue disputes.[186] But some petitioners may sue in improper forums. They might do so for benign reasons, such as a misreading or misinterpretation of the relevant substantive statute or venue provision; or they might do so for strategic reasons, such as a desire to litigate before a preferred judge, court, or circuit.[187] Since venue is waivable, filing a case in an improper forum only creates a genuine venue dispute when the respondent objects.[188] In other words, courts can exercise adjudicatory power over cases for which they are improper forums as long as the respondent fails to exercise *its*

183. This Article uses "petitioner" to refer to plaintiffs, complainants, and petitioners, and "respondent" to refer to defendants and respondents.

184. *See* Ryan, *supra* note 35, at 170.

185. *See supra* Section I.A.

186. *But see supra* note 47 and accompanying text (discussing permissive transfer under 28 U.S.C. § 1404 when the interest of justice requires and mandatory transfer under § 1406 when "venue is improperly laid").

187. *See infra* Section IV.A.

188. *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939).

privilege to enforce a transfer.[189] When a respondent contests a petitioner's invocation of an improper forum, however, a genuine venue dispute arises, and the forum court must determine whether its retention of the case is authorized by the invoked venue provision.

This inquiry involves interpretation, or an inquiry to identify the congressionally defined objective and appropriate application of a venue statute to the claims at hand.[190] Because interpretation necessarily involves inference,[191] a court's interpretation of a statutory provision's meaning and application may deviate from its true, or congressionally intended, meaning.[192] We can understand these deviations as the misinterpretation, or misapplication, of the statutory provision. When this misinterpretation occurs in the venue context, a court will retain adjudicatory power over a case despite being an improper forum. This unjustified retention abrogates Congress's design for the pattern and process of adjudication, as manifested in the statutory scheme. It also accretes adjudicatory power in the diverting court at the expense of the proper forums.

This kind of statutory misinterpretation is concerning from the perspective of legislative supremacy.[193] It is also troubling for those who believe that judicial arrogations of power violate structural constitutional

189. *Id.*

190. *See* Mark Greenberg, *Legal Interpretation and Natural Law*, 89 FORDHAM L. REV. 109, 111, 127 (2020); Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 1024–25 (2017); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 432–34 (2005).

191. *See, e.g.*, Jesse M. Cross, *Where Is Statutory Law?*, 108 CORNELL L. REV. 1041, 1045–46 (2023); Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 NW. U. L. REV. 269, 276 (2019).

192. I do not intend to suggest that, in general, a statutory provision can have only *one* meaning. Instead, I claim only that the inferential nature of statutory interpretation may result in a judicial construction that differs from the *set* of congressionally intended results. *See* Ryan D. Doerfler, *Late-Stage Textualism*, 2021 SUP. CT. REV. 267, 290 ("Construing statutory language in any case in which Congress's written instruction [is] less than 'clear' [i]s, accordingly, an unavoidably 'creative' endeavor." (quoting Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 534, 545 (1983)).

193. *See, e.g.*, Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1887 (2008) ("Textualists insist that in interpreting statutes, courts should act as faithful agents of Congress, treating the language of the statute as the legislative instructions that they are bound to follow. Any other approach to interpretation, they assert, undermines the rule of law and legislative supremacy."); John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 120 ("Rooted in requirements of legislative supremacy derived from the U.S. Constitution, the traditional version of purposivism holds that judges must implement, as accurately as possible, the directives that Congress embeds in statutes.").

constraints.[194] But because the inferential nature of statutory interpretation nearly guarantees some degree of occasional misinterpretation as a byproduct of judicial inquiry,[195] any theory of impermissible misinterpretation must leave room for some interpretive error. At the same time, not all statutory misinterpretation arises from innocuous error, and the structural significance of misinterpretation in the venue context is especially severe. Such misinterpretation not only supplants legislative objectives with incorrect judicial approximation, but also directly subverts legislatively defined constraints on the exercise of federal judicial power in favor of expansive judicial assertions of that power. Thus, any attempt at characterizing constitutionally problematic misinterpretations of venue provisions must account for both statutory interpretation's inherent approximative-ness and venue's structural significance.

This Article uses the term "venue diversion" to describe statutory misinterpretation of venue provisions that transgresses structural constitutional principles. A necessary condition for venue diversion is the deviation of a court's subjective interpretation and application of a venue provision from the legislatively intended application of that provision. But venue diversion requires something more to distinguish it from mistaken interpretation that nevertheless falls within the reasonable margin of interpretive error. In particular, this Article suggests that outcome-motivated reasoning and intentional self-aggrandizement transform venue diversion from innocuous statutory misinterpretation to structural transgression. After all, regardless of a court's motivation, statutory misinterpretation of a venue provision aggrandizes that court by increasing its adjudicatory power at the expense of other courts' power. When courts engage in this behavior for the purpose of accumulating and exercising adjudicatory power that Congress has determined should be exercised elsewhere, they not only violate duly enacted statutory limits but also arrogate power to themselves in direct repudiation of congressional authority over Article III adjudication.[196]

Venue diversion can arise under the general venue statute and under specialized venue provisions. Regardless of the context, venue diversion manifests in interpretive choices that lack statutory or doctrinal support and increase the likelihood that a court will find itself to be a proper forum. However, self-aggrandizing interpretations and practices may

194. *See Loving v. United States*, 517 U.S. 748, 757 (1996) ("[I]t remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another.").

195. *See supra* notes 190–92.

196. *Cf. Buckley v. Valeo*, 424 U.S. 1, 129 (1976) (describing self-aggrandizement of one branch of government at the expense of the others); *Loving*, 517 U.S. at 757 (describing self-aggrandizement as the "arrogat[ion of] power" to one branch).

take different forms in the context of the general venue statute versus specialized venue statutes.

Since the general venue statute is generally venue diffusing[197] and permits petitioners to file suit in any district where a "substantial part of events . . . giving rise to a claim occurred,"[198] courts have wide latitude to exercise adjudicatory authority over cases filed in their district. At the same time, the "substantial" qualifier must be given meaning, and 28 U.S.C. § 1406 empowers respondents to contest, and courts to police, unsubstantiated invocations of the statute. Thus, in the § 1391 context, self-aggrandizement may take the forum of onerous procedures that attach to motions to transfer venue, or expansive interpretations of "substantial" that strain a reasonable person's interpretation.

Some of these concerns will also be relevant to identifying venue diversion in the context of venue-channeling statutes. There, however, additional concerns may also be relevant. In the case of the CAA, for example, venue diversion arises when a court fails to give effect to Congress's decision to channel certain kinds of nationally relevant cases to the D.C. Circuit.[199] In this context, narrow interpretations of "nationally applicable" or "nationwide scope or effect" and presumptions that make it easier for a regional circuit to retain adjudicatory authority will also contribute to venue diversion.

B. Case Studies of Venue Diversion

Having articulated a theory of venue diversion, this section uses two cases studies to explore how venue diversion appears in practice. It begins with a case study of recent litigation involving the CAA's venue channeling provision. It shows how some circuits' frameworks for adjudicating motions to transfer venue under that provision are characterized by narrowing interpretations of key statutory terms and the adoption of interpretive presumptions, which collectively impede venue channeling to the D.C. Circuit and reinforce those circuits' power to adjudicate petitions challenging agency action under the CAA. Next, it examines recent litigation in the Fifth Circuit in which the court not only adopted expansive interpretations of the general venue provision but also employed unusual procedures to prevent district courts in the circuit from granting motions to transfer cases outside the circuit. These case studies illuminate the different ways courts can engage in venue diversion, through the use of presumptions, framing devices, characterizations, and decisions about the standard of review.

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197. *See supra* Section I.A.
198. 28 U.S.C. § 1391(e)(1)(B).
199. *See infra* Section II.B.1.

1. The Clean Air Act's Venue-Channeling Provision

The CAA represents a delicate balancing of federal and state concerns and authorities,[200] and its venue-channeling provision reflects these nuances.[201] To facilitate the development of a uniform body of caselaw interpreting the complex statute in the circuit with existing expertise in implementing such statutes, and to ensure the consistent enforcement of national policies across the different circuits, § 7067(b)(1) requires petitions challenging nationally applicable or nationally relevant agency actions to be filed in the D.C. Circuit.[202] Purely local agency actions, which do not implicate the same interests, can be challenged in the regional circuits.[203]

Section 7607(b)(1)'s proper interpretation is currently before the Supreme Court.[204] Among the courts of appeals that have opined on the issue, [205] four circuits have adopted the same process for distinguishing between "nationally applicable" and "locally or regionally applicable" agency actions: "look[ing] only to the face of the action, not its practical effects or the scope of the petitioner's challenge."[206] Two other circuits—the Fourth and the Fifth—have recently developed different tests.[207] Relative to the consensus interpretation, the Fourth and Fifth Circuit

200. *See Ohio v. EPA*, 144 S. Ct. 2040, 2048 (2024); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 434 (1998); William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1565 (2007).

201. The concerns that informed the construction of the CAA's venue provision also animated the inclusion of similar venue-channeling provisions in other statutes that regulate issues of shared federal and state interest, rendering the CAA a useful case study of venue channeling. *See supra* notes 130–32 and accompanying text.

202. *See supra* text accompanying notes 111–16 and 126–29.

203. *See supra* text accompanying notes 111–13.

204. *See supra* notes 1–4.

205. As of July 2024, the Fourth, Fifth, Seventh, Tenth, Eleventh, and D.C. Circuits have articulated principles or adopted tests for distinguishing the different kinds of petitions identified in § 7607(b)(1) for purposes of *venue*. *See infra* notes 206–07 and accompanying text. Other courts that have cited § 7607(b)(1) to support proper venue in their circuit have done so without elaboration. *See, e.g.*, *United Ref. Co. v. EPA*, 64 F.4th 448, 456 (3d Cir. 2023); *Nat'l Parks Conservation Ass'n v. McCarthy*, 816 F.3d 989, 993 (8th Cir. 2016). In addition, the Sixth Circuit referenced the Fifth Circuit standard in an unpublished 2023 order. *See Kentucky v. EPA*, No. 23-3216, 2023 WL 11871967, at *4 (6th Cir. July 25, 2023); *id.* at *5 (Cole, J., dissenting).

206. *Oklahoma v. EPA*, 93 F.4th 1262, 1266 (10th Cir. 2024); *accord RMS of Ga., LLC v. EPA*, 64 F.4th 1368, 1372–73 (11th Cir. 2023); *S. Ill. Power Coop. v. EPA*, 863 F.3d 666, 671 (7th Cir. 2017); *Am. Rd. & Transp. Builders Ass'n v. EPA*, 705 F.3d 453, 456 (D.C. Cir. 2013).

207. *See infra* Section II.B.1.b (discussing *West Virginia v. EPA*, 90 F.4th 323 (4th Cir. 2024) and *Calumet Shreveport Refin., L.L.C. v. EPA*, 86 F.4th 1121 (5th Cir. 2023)).

interpretations of § 7607(b)(1) are suggestive of venue diversion and the development of venue diverting circuit precedent.

In the CAA context, venue diversion occurs when a court wrongly concludes that a nationally applicable action is purely local, or that a locally applicable action that was informed by a determination of nationwide scope and effect was not so informed, causing the court to deny a motion to transfer venue to the D.C. Circuit, the only proper forum for challenges to such actions. Interpretive choices that lack statutory justification and facilitate such conclusions contribute to the development of venue-diverting precedent. This section contends that the Fourth and Fifth Circuit frameworks reflect these kinds of interpretive choices and predispose their analyses of motions to transfer venue in favor of denial and the retention of cases within the circuit.

a. Consensus Interpretation

The consensus circuits have strenuously objected to petitioners' attempts to frame the inquiry around their conception of the action, rather than its facial nature.[208] Instead, to identify national applicability from the face of the action, these circuits have looked to the breadth of regulated entities affected by EPA's action and to the nationwide relevance of EPA's stated legal authority and justification for the action. For example, actions that apply to multiple entities across multiple states, especially when the states or entities lack connections to each other, have been held to be nationally applicable.[209] Similarly, courts applying this framework have cited the application of a consistent statutory interpretation, uniform process, and analytic framework to a multistate group of regulated entities as important indicia of an action's national applicability.[210]

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208. *See, e.g.*, *S. Ill. Power Coop.*, 863 F.3d at 671–74 (overruling precedent on which petitioners relied to support their "petition-focused approach to the venue question"); *see also RMS of Ga.*, 64 F.4th at 1373; *Hunt Ref. Co. v. EPA*, 90 F.4th 1107, 1110, 1112 (11th Cir. 2024); *Oklahoma*, 93 F.4th at 1267.

209. *See Hunt Ref. Co.*, 90 F.4th at 1110 (describing the "nationwide scope" of two EPA actions "den[ying] 105 petitions from refineries across the country" as "a 'strong indicator' of their national applicability"); *ATK Launch Sys., Inc. v. EPA*, 651 F.3d 1194, 1197 (10th Cir. 2011) (reasoning that a rule assigning "nonattainment designations . . . to thirty-one areas across the country . . . which include portions of states with no local or regional connection to one another" and which "reaches geographic areas from coast to coast and beyond is, *at a minimum*, a strong indicator that the regulation is nationally applicable" (emphasis added)); *S. Ill. Power Coop.*, 863 F.3d at 671 (holding a rule that "cover[ed] 61 geographic areas across 24 states" was nationally applicable).

210. *See Hunt Ref. Co.*, 90 F.4th at 1111 (noting the challenged action was "based on a new statutory interpretation and analytical framework that is applicable to all small refineries no matter their location or market"); *Oklahoma*, 93 F.4th at 1266 ("EPA

Locally or regionally applicable actions lack these characteristics on their face. For example, EPA actions relating to a single, discrete source—such as the renewal of "a single permit for a single plant located in a single state,"[211] a letter "set[ting] forth views pertaining to [two oil] platforms in particular,"[212] or rules that "on their face apply only to [two cities]"[213]—have been deemed locally rather than nationally applicable by the D.C. Circuit.[214] The D.C. Circuit has also distinguished between an action's facial national applicability and its potential legal effects, explaining that "a challenged action [that] 'applies a broad regulation to a specific context' and 'may set a precedent for future proceedings' does not make it nationally applicable'" when the action "speaks in localized terms" and is "confined . . . to the specific, local circumstances under which it arose."[215]

The consensus circuits have not coalesced around a uniform standard for the second-stage inquiry—that is, for determining whether a challenge to a "locally or regionally applicable" action nevertheless belongs in the D.C. Circuit because the action was based on a determination of nationwide scope or effect. But the D.C. Circuit has offered some guidance for this stage.[216] In particular, it has held that EPA's decision to publish that an action is based on a determination of nationwide scope or effect is discretionary and thus unreviewable.[217] And, although the published notice must affirmatively state that the action was based on a determination of "nationwide scope or effect,"[218] it is acceptable for EPA to "publish[] findings that a final action was both

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applied a uniform statutory interpretation and common analytical methods, which required the agency to examine the overlapping and interwoven linkages between upwind and downwind states in a consistent manner."); *ATK Launch Sys.*, 651 F.3d at 1197 ("EPA . . . applie[d] a uniform process and standard across the country."); *S. Ill. Power Coop.*, 863 F.3d at 671 (holding a rule "promulgated pursuant to a common, nationwide analytical method" was nationally applicable).

211. *Sierra Club v. EPA* (*Sierra Club 2019*), 926 F.3d 844, 849 (D.C. Cir. 2019).

212. *Chevron U.S.A. Inc. v. EPA*, 45 F.4th 380, 386 (D.C. Cir. 2022).

213. *Sierra Club v. EPA* (*Sierra Club 2022*), 47 F.4th 738, 743 (D.C. Cir. 2022).

214. *Sierra Club 2019*, 926 F.3d at 849; *Chevron*, 45 F.4th at 388; *Sierra Club 2022*, 47 F.4th at 744.

215. *Chevron*, 45 F.4th at 387–88 (quoting *Am. Rd. & Transp. Builders Ass'n v. EPA*, 705 F.3d 453, 456 (D.C. Cir. 2013)) (cleaned up).

216. The Eighth Circuit has not conclusively confronted the first stage, *see Nat'l Parks Conservation Ass'n v. McCarthy*, 816 F.3d 989, 993–94 (8th Cir. 2016), but has nevertheless opined at the second stage that EPA must "public[ly] distribut[e]" its determination, rather than making it available only to a petitioner. *Lion Oil Co. v. EPA*, 792 F.3d 978, 982 (8th Cir. 2015).

217. *Sierra Club 2022*, 47 F.4th at 745.

218. *Dalton Trucking, Inc. v. EPA*, 808 F.3d 875, 880–82 (D.C. Cir. 2015); *see also Sierra Club 2019*, 926 F.3d at 850.

'nationally applicable' *and* based on a determination of 'nationwide scope or effect.'"[219]

b. Other Interpretations

In two recent cases, the Fourth and Fifth Circuits adopted frameworks for determining proper venue under § 7607(b)(1) that diverge from the consensus model.[220] While interpretive divergence is not inherently concerning,[221] the particularities of these circuits' frameworks predispose them to finding venue proper in their own circuit. Relative to the consensus interpretation, these divergent interpretations thus make it more likely that petitions challenging EPA action will remain in the regional circuit, instead of being transferred to the D.C. Circuit, in response to an EPA motion to transfer venue. This feature of Fourth and Fifth Circuit doctrine arises in part because of interpretive choices—different in their details, but similar in effect—made at both stages of the inquiry that artificially constrain the courts' delineation of the scope of the action.[222]

At the first stage, both circuits adopted constrained frameworks for assessing the "applicability" of the challenged action. In *West Virginia v. EPA*,[223] the Fourth Circuit understood the case as challenging EPA's State Implementation Plan (SIP) denial action as applied only to West Virginia,[224] instead of viewing the petition as challenging EPA's denial *action*—which applied to twenty-one states[225]—in its entirety. But

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219. *Dalton Trucking, Inc.*, 808 F.3d at 882 (emphasis added).

220. *See West Virginia v. EPA*, 90 F.4th 323 (4th Cir. 2024); *Calumet Shreveport Refin., L.L.C. v. EPA*, 86 F.4th 1121 (5th Cir. 2023).

221. *See* sources cited *supra* note 159.

222. A fundamental problem with the *West Virginia* majority's reasoning is its conflation of a "nationally applicable" action with an action that is "locally or regionally applicable" but "based on a determination of nationwide scope or effect." *West Virginia*, 90 F.4th at 332 (Thacker, J., dissenting); *see infra* note 235. This conflation is problematic as a matter of statutory interpretation but does not itself constitute venue diversion.

223. 90 F.4th 323 (4th Cir. 2024).

224. *See id.* at 333–34 (Thacker, J., dissenting).

225. The procedural history is complicated and largely beyond the scope of this discussion. In short, in 2023, EPA denied twenty-one state implementation plans (SIPs) for ozone in a single consolidated action pursuant to the CAA's Good Neighbor provision. *Id.* at 334 (Thacker, J., dissenting); *Ohio v. EPA*, 144 S. Ct. 2040, 2049–51 (2024). The 2023 denial and ensuing promulgation of a federal implementation plan (FIP) to replace the denied SIPs mirrored the practice EPA had used to implement the Good Neighbor Provision for decades. *Compare* 87 Fed. Reg. 9463–878 (Feb. 22, 2022) (denying multiple state SIPS), *and* 87 Fed. Reg. 20036–216 (Apr. 6, 2022) (promulgating Good Neighbor Plan), *with* 70 Fed. Reg. 25162–405 (May 12, 2005) (denying SIPs and promulgating Clean Air Interstate Rule), *and* 76 Fed. Reg. 48208–483 (Aug. 8, 2011) (denying SIPs and promulgating Cross-State Air Pollution Rule (CSAPR)). *See also EPA*

delineating the scope of an action in this way rather than considering its facial applicability necessarily predisposes a court to conclude that the action is purely local rather than nationally appliable. This predisposition is a consequence of federal standing doctrine, which requires a petitioner to challenge the particularized application of an agency action rather than its general effects.[226] To get into court, a petitioner affected by a multistate SIP denial must frame their challenge as concerned with the denial's specific effects on the petitioner rather than as simply a challenge to the broader effects of the action. But mere framing cannot render an otherwise nationally applicable action purely local. Although SIPs are often described as classic examples of local actions,[227] EPA decisions about SIPs can involve both nationwide determinations *and* determinations about individual states and regions, in which case they are considered nationally applicable to the same extent as regulations.[228]

In *Calumet*,[229] the Fifth Circuit adopted a "legal effects" test to determine national applicability: Instead of looking to the face of the challenged action, the court considers its "legal," rather than "practical," effects.[230] But, as Judge Patrick Higginbotham explained in a vigorous dissent, "[n]owhere does the text of the statute reference or suggest that Congress intended to distinguish between 'legal' and 'practical' effects. Indeed, this part of the statute does not refer to 'effects' at all. The question is one of 'national applicability.'"[231] The majority's legal-effects test "reads words into the statute that are not there," "elide[s] . . . the plain meaning of the term 'nationwide,'" and produces results that "def[y] common sense."[232] Under the majority's reasoning, an EPA adjudication that affected entities in every state would not qualify as nationally applicable because the resulting action would lack binding legal effect on future actions.[233] By "remov[ing] *all* 'adjudications' from the ambit of § 7607(b)(1), contrary to the plain text of the statute," Judge

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v. EME Homer City Generation, 572 U.S. 489 (2014) (upholding CSAPR); *infra* Section IV.B; *Air Transport Rules History: Cross-State Air Pollution Rule/Good Neighbor Rule*, HARV. ENV'T & ENERGY L. PROG., https://eelp.law.harvard.edu/tracker/cross-state-air-pollution-rule-history/ [https://perma.cc/MB5U-KMB7] (Jan. 13, 2025).

226. *See Gill v. Whitford*, 585 U.S. 48, 65 (2018).

227. *Am. Rd. & Transp. Builders Ass'n v. EPA*, 705 F.3d 453, 455 (D.C. Cir. 2013).

228. *See supra* note 125 and accompanying text.

229. *Calumet Shreveport Refin., L.L.C. v. EPA*, 86 F.4th 1121 (2023). *Calumet* involved challenges to two EPA actions denying several small refineries' petitions for exemptions under the Renewable Fuel Standards program. *Id.* at 1129.

230. *Id.* at 1131.

231. *Id.* at 1143 (Higginbotham, J., dissenting).

232. *Id.* at 1143–44 (Higginbotham, J., dissenting).

233. *Id.* at 1144 (Higginbotham, J., dissenting).

Higginbotham accused the majority of "do[ing] violence to the structure and language of the statute."[234]

In addition to imposing restrictive parameters on "national applicability" at stage one, both circuits made choices that make it more difficult to conclude at the second stage that a locally applicable action was based on a determination of "nationwide scope or effect." In *West Virginia*, after reasonably identifying "geographical reach" as the relevant locus of inquiry for both the first and second stages of the inquiry,[235] the majority proceeded to adopt an illogically strict rule that effectively precludes *any* local or regional factors from entering EPA's calculus in setting national policy or taking nationally relevant actions.[236]

According to the Fourth Circuit, an action or determination "is local or regional if it assesses and analyzes local or regional circumstances that are distinct from the circumstances in other localities or regions . . . . A determination would be national in scope and effect if it addressed and analyzed circumstances common to all regions in the Nation."[237] Because EPA based its action in part on "local and regional circumstances of each of the 21 States . . . , even though some of the individual reasons overlapped," and not simply on "circumstances common to all States," the majority held that EPA's action was purely locally applicable.[238] In so holding, the majority read additional, restrictive language into § 7607(b)(1) that subverts the effect of the statute's nationwide-determination exception for locally applicable actions. Under the statutory default, an otherwise locally applicable action becomes subject to suit only in the D.C. Circuit if it incorporates a determination of nationwide scope or effect. *West Virginia* subverts this default, suggesting instead that the consideration of *any* local factors renders an action subject to suit only in the corresponding regional circuit. Petitioners who seek to challenge EPA action in the Fourth Circuit rather than D.C. Circuit can easily satisfy this standard by identifying a single localized consideration that informed EPA's action.

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234. *Id.* (Higginbotham, J., dissenting) (cleaned up) (quoting *Smith v. United States*, 508 U.S. 223, 240 (1993)).

235. *West Virginia v. EPA*, 90 F.4th 323, 328 (4th Cir. 2024). Despite distinguishing between the two stages of the inquiry—(1) national versus local applicability and (2) whether a locally applicable action relied on a nationwide determination—and deeming geographical reach the relevant consideration at both stages, the court considered only the geographical reach of the underlying *determination* and bypassed inquiry into the geographic applicability of the action. *See id.*

236. *See id.*

237. *Id.*

238. *Id.* at 330 (emphasis omitted). Because it conflated the two steps of the inquiry, the majority did not separately address § 7607(b)(1)'s exception that requires locally applicable actions based on nationwide determinations to be challenged in the D.C. Circuit. But the court's assertion that a determination of nationwide scope and effect cannot incorporate local circumstances would seem to preclude the exception.

Two different but similarly consequential choices characterize the *Calumet* majority's second-stage inquiry. First, the court asserted the existence of a presumption at the second stage that venue is proper in the regional circuit for actions deemed locally applicable.[239] In the court's formulation, this presumption operates as an interpretive premise or default rule: Unless it determines that a condition applies, venue will remain proper in the Fifth Circuit.[240] By establishing a default presumption that favors the status quo, the court both increased the likelihood that motions to transfer venue will be denied and allocated the burden of justifying transfer to EPA.[241] But nothing in the text of § 7607(b)(1) suggests that "locally applicable" actions should be viewed as more likely to be based on purely local determinations than on determinations of nationwide scope or effect. Moreover, the history of that provision indicates that the language requiring "a locally or regionally applicable" action to be "filed only in the [D.C. Circuit] if such action is based on a determination of nationwide scope or effect" was added to clarify that seemingly local actions can in fact constitute nationwide policy for which review must occur in the D.C. Circuit and to make it easier for such review to be obtained.[242] By reading this presumption into the statute, *Calumet* thus frustrates the structure and plan of the 1977 CAA amendments.

Second, the Fifth Circuit asserted its power to decide the second-stage question de novo,[243] rather than under the deferential arbitrary and capricious standard that governs judicial review of agency policymaking and factfinding.[244] The court justified this standard of review by describing the inquiry as "controll[ing] to the role of the court" rather than the agency.[245] But the relevant sentence of § 7607(b)(1) speaks of "a *determination* of nationwide scope or effect" that the EPA "Administrator *finds*," on which a challenged agency "action is

239. *Calumet*, 86 F.4th at 1131 (relying on similar language in *Texas v. EPA*, 829 F.3d 405, 419 (5th Cir. 2016)).

240. *Id.* ("To overcome that default presumption, . . . we must determine that . . . the . . . action 'is based on a determination of nationwide scope and effect' . . . .").

241. An alternative default presumption would have required petitioners to demonstrate that the locally applicable action they challenged was *not* based on a determination of nationwide scope and effect.

242. *See supra* text accompanying notes 112–29.

243. *Calumet*, 86 F.4th at 1132; *Texas*, 829 F.3d at 421; *see also Nat'l Env't Dev. Ass'n's Clean Air Project v. EPA*, 891 F.3d 1041, 1053 (D.C. Cir. 2018) (Silberman, J., concurring).

244. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2261 (2024) ("Section 706 . . . mandate[s] that judicial review of agency policymaking and factfinding be deferential." (citing 5 U.S.C. § 706(2)(A), (E))).

245. *Texas*, 829 F.3d at 421.

based."[246] And, as the Supreme Court has observed, "determinations of *fact*" have long been treated as the province of agencies, with the judicial role in reviewing such determinations being largely limited to ensuring they are supported by evidence.[247] Thus, at minimum, § 7607(b)(1)'s references to "find[ing]s" and "determination[s]" suggests that the role of a reviewing court is limited to ensuring the EPA Administrator's decision was not arbitrary and capricious or an abuse of discretion. This reading is not only most consistent with the practice of judicial review under the APA, but it is also most consistent with the statutory plan. Within the overall structure of § 7607(b)(1), the nationwide-determination exception serves to restrain regional circuits' assertion of adjudicatory authority over petitions that should otherwise be channeled to the D.C. Circuit. Interpretations of § 7607(b)(1) that invert this statutory function by making it easier for regional circuits to retain adjudicatory power should thus be treated as inherently suspect. Legislative history also supports this understanding.[248] Congress "delegat[ed this] unusual authority to control . . . venue"[249] to EPA to minimize opportunities to challenge nationwide implementation of the CAA outside of the D.C. Circuit.[250] The Fifth Circuit's adoption of de novo rather than arbitrary and capricious review impedes this objective.

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Contrasting the consensus interpretation of the CAA's venue-channeling provision with the recent approaches of the Fourth and Fifth Circuits sheds light on how venue diversion can arise. Both the Fourth and Fifth Circuits made interpretive choices in construing § 7607(b)(1) that make it more difficult for EPA to prevail on motions to transfer venue in administrative challenges filed in their circuits. This doctrinal characteristic defines venue diversion because it reinforces the diverting circuits' adjudicatory capacity and propensity to deem themselves proper forums for such challenges in the future.

The consequences of venue diversion extend beyond the immediate effects in the cases described above. The accumulation of venue diverting doctrine in regional circuits is likely to embolden petitioners seeking to enjoin EPA's enforcement of the CAA to seek out review in other favorable circuits. As more venue diversion occurs, the benefits of venue channeling will be diminished and the efficient enforcement of the statutory scheme obstructed. This process has already begun. Within

246. 42 U.S.C. § 7607(b)(1) (emphases added).

247. *Loper Bright*, 144 S. Ct. at 2258, 2263.

248. *See supra* note 116; *see also Clean Air Project*, 891 F.3d at 1053 (Silberman, J., concurring).

249. *Clean Air Project*, 891 F.3d at 1053 (Silberman, J., concurring).

250. *See supra* notes 124–28 and accompanying text.

months of the decisions in *West Virginia* and *Calumet*, for example, two petitions challenging EPA action were filed in a different regional circuit—the Eighth—that advocated even more expansive, and facially inaccurate, interpretations of § 7607(b)(1).[251] The petitions' blatant misreading of the relevant venue-channeling provision forced EPA to litigate the venue issue anew in the Eighth Circuit.

2. The General Venue Statute

The general venue statute permits plaintiffs to select a forum from among the set of courts in which venue is proper.[252] For example, petitioners who seek to enjoin administrative action are not always constrained to sue the government in Washington, D.C., and absent a specialized venue provision, can also invoke 28 U.S.C. § 1391(e)(1)(B) to sue where "a substantial part of the events or omissions giving rise to the claim occurred."[253] So too can it be used against private litigants. But as litigants increasingly seek to stretch § 1391(e)(1)(B)'s definition of "substantial" in an effort to secure the most favorable forum,[254] respondents are increasingly likely to seek to transfer cases under § 1404(a) or § 1406(a).[255] And venue diversion can arise in this context, too. Most obviously, venue diversion occurs when a court adopts an overly expansive interpretation of § 1391(e)(1)(B) and concludes venue is proper when it should not, thereby denying a motion to transfer. But an appellate court's development of doctrine and deployment of procedures that constrain a lower court's consideration of motions to transfer venue can also constitute venue diversion, when those doctrines and procedures ensure that the lower court's decisions are more likely to deviate from the objectively correct application of a venue statute.[256] Recent litigation in the Fifth Circuit—in particular, a case involving labor standards enforcement by the NLRB and another involving consumer

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251. *See* Petition for Review at 2, *Cleveland-Cliffs, Inc. v. EPA*, No. 24-1951 (8th Cir. May 3, 2024) (challenging a *regulation* as "locally or regionally applicable" because "[a]ll [covered] facilities affected by the Final Rule are in" the Eighth Circuit); *accord* Petition for Review at 2, *U.S. Steel Corp. v. EPA*, No. 24-1946 (8th Cir. May 3, 2024).

252. *See* Ryan, *supra* note 35, at 170.

253. 28 U.S.C. § 1391(e)(1)(B).

254. *See infra* notes 258–59, 267–69 and accompanying text.

255. Section 1404(a) *allows* a district court to transfer a case "[f]or the convenience of parties and witnesses, in the interest of justice, . . . to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). Section 1406(a) *requires* a district court to dismiss a case that "la[id] venue in the wrong division . . . , or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." § 1406(a). *See also supra* notes 47 and 49.

256. *See supra* Section II.A.

finance regulation by the CFPB[257]—illustrates these mechanisms of venue diversion in the context of the general venue statute.

In the first case, filed in January 2024, SpaceX sued the NLRB in the Southern District of Texas, seeking to enjoin an enforcement proceeding the NLRB initiated against SpaceX in the Central District of California.[258] In a motion to transfer venue under § 1406(a), the NLRB contested SpaceX's invocation of § 1391(e)(1)(B)—which requires that "a substantial part of the events or omissions giving rise to the claim occurred" in the forum—because the events giving rise to the proceeding that SpaceX sought to enjoin occurred entirely at SpaceX's California headquarters.[259] The district court agreed with the NLRB and granted the motion, finding that the events cited by SpaceX were merely "the resulting effects of the[] events" that gave rise to the NLRB's action.[260] Moreover, even if such resulting effects could provide a basis for venue under the text of § 1391(e)(1)(B), the court reasoned that they were "insubstantial in number compared to the totality of those giving rise to Plaintiff's claim and far less significant than those occurring in California."[261]

The next day, SpaceX filed a petition in the Fifth Circuit "seek[ing] an emergency writ of mandamus ordering the district court to immediately request this case back from the Central District of California so the district court can timely rule on the preliminary injunction motion."[262] Although the court of appeals eventually denied the petition—and a subsequent petition for rehearing en banc—without explanation, both denials provoked dissents criticizing the district court's interpretation of § 1391(e)(1)(B).[263] According to the dissenters, "[t]he plain text of the statute . . . requires that the events (or omissions) in the

257. My discussion of these cases is necessarily brief and limited to the facts and procedural history required to understand their implications for venue diversion. For more detail, see Chris Geidner's informative reporting, *e.g.*, Chris Geidner, *The Fifth Circuit's Lawlessness Is Now Spreading from California to D.C.*, LAW DORK (Apr. 7, 2024), https://www.lawdork.com/p/fifth-circuit-venue-nlrb-spacex-cfpb-chamber [https://perma.cc/GWX9-7TQN].

258. Order Granting Defendants' Motion To Transfer Venue at 1, *Space Expl. Techs. Corp. v. NLRB* (*SpaceX I*), No. 24-cv-00001, 2024 WL 974568, at *1 (S.D. Tex. Feb. 15, 2024), ECF No. 82.

259. Motion of Defendants To Transfer Venue Pursuant to 28 U.S.C. § 1406(a) & § 1404(a) & Brief in Support at 5, *SpaceX I*, No. 24-cv-0001, 2024 WL 974568 (S.D. Tex. Jan. 11, 2024), ECF No. 29.

260. Order Granting Defendants' Motion To Transfer Venue, *supra* note 258, at 3.

261. *Id.*

262. Emergency Petition for Writ of Mandamus, *In re Space Expl. Techs. Corp.* (*SpaceX II*), 96 F.4th 733 (5th Cir. 2024) (No. 24-40103), ECF No. 2.

263. *See SpaceX II*, 96 F.4th 733 (5th Cir. 2024) (per curiam) (denying petition for a writ of mandamus); *In re Space Expl. Techs. Corp.* (*SpaceX III*), 99 F.4th 233, 234 (5th Cir. 2024) (per curiam) (denying petition for rehearing en banc).

Southern District were '*a* substantial part,' not the *most* substantial part, of the events giving rise to the claim."[264] Because the district court discussed alleged events in the original and transferee forums in a purportedly comparative way, the dissenters argued that it improperly applied a "most substantial" standard, thereby meriting the extraordinary remedy of mandamus.[265]

In the second case,[266] the U.S. Chamber of Commerce and local Chamber affiliates (the "Chamber") challenged the CFPB's junk credit card fee rule in the Northern District of Texas[267] and sought expedited briefing on a preliminary injunction.[268] In opposing the preliminary injunction and in a subsequent motion, the CFPB disputed the Chamber's invocation of venue under § 1391(e)(1)(B) for lack of substantiality, as well as under § 1391(e)(1)(C)—which authorizes suit in the district where the plaintiff "resides"—because, in the CFPB's estimation, no plaintiff with standing actually "reside[d]" in the District.[269]

As briefing on the injunction and venue proceeded, the case was twice reassigned.[270] Seven business days after the second reassignment,[271] the Chamber filed an interlocutory appeal of the district court's "effective denial" of their motion to the Fifth Circuit.[272] While that appeal was

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264. *SpaceX II*, 96 F.4th at 735 (Jones, J., dissenting); *SpaceX III*, 99 F.4th at 233–34 (Jones, Smith, Elrod, Duncan, Engelhardt & Oldham, JJ., dissenting) (adopting Judge Jones's original dissent in *SpaceX II*).

265. *See* sources cited *supra* note 264.

266. This case was filed two days after the original (panel) denial of mandamus in the SpaceX case.

267. Complaint at 1, *Chamber of Com. of the U.S. v. CFPB*, No. 24-CV-00213 (N.D. Tex. Mar. 28, 2024), ECF No. 1.

268. Plaintiffs' Motion for Preliminary Injunction at 1–2, *Chamber of Com. of the U.S. v. CFPB*, No. 24-cv-00213 (N.D. Tex. Mar. 7, 2024), ECF No. 3; Plaintiffs' Motion for Expedited Briefing at 1–3, *Chamber of Com. of the U.S. v. CFPB*, No. 24-cv-00213 (N.D. Tex. Mar. 7, 2024), ECF No. 6.

269. Brief in Support of Defendants' Opposition to Plaintiffs' Motion for a Preliminary Injunction at 10, 12–13, *Chamber of Com. of the U.S. v. CFPB*, No. 24-cv-213 (N.D. Tex. Mar. 12, 2024), ECF No. 23. Specifically, the CFPB argued that the lawsuit "seeks to protect . . . the interest of a large, out-of-state card issuer to charge high late fees with impunity," which "is not 'germane' to the Fort Worth Chamber of Commerce's interest in 'cultivat[ing] a thriving business climate in [ ] Fort Worth.'" *Id.* at 12.

270. Order for Reassignment at 1, *Chamber of Com. of the U.S. v. CFPB*, No. 24-cv-00213 (N.D. Tex. Mar. 7, 2024), ECF No. 9; Court Request for Recusal at 1, *Chamber of Com. of the U.S. v. CFPB*, No. 24-cv-00213 (N.D. Tex. Mar. 14, 2024), ECF No. 39.

271. *See* Geidner, *supra* note 257.

272. *See* Order at 1, *Chamber of Com. of the U.S. v. CFPB*, No. 24-CV-00213, 2024 WL 2104522, at *1 (N.D. Tex. Mar. 20, 2024), ECF No. 51 (denying the Chamber's motion for expedited consideration of its motion to transfer); Notice of Appeal, *In re Fort Worth Chamber of Com.*, No. 24-10248 (5th Cir. Mar. 25, 2024), ECF No. 1.

pending, however, the district court granted the CFPB's motion to transfer the case to the District of Columbia.[273] This led the Chamber to file a new case seeking an emergency writ of mandamus and administrative stay,[274] which a split Fifth Circuit panel granted just days later.[275] Concluding that the district court effectively denied the preliminary injunction motion by failing to rule promptly on it, and implicitly reasoning that this effective denial constituted an appealable order, the majority held that the filing of the notice of appeal "divest[ed] the district court of jurisdiction."[276] It thus vacated the transfer order and ordered the district court "to reopen the case and to give notice to [the D.C. District Court] that its transfer was without jurisdiction and should be disregarded."[277]

Even with the case back at the district court, the Fifth Circuit continued to intervene in case management. The day after the district court granted the CFPB's unopposed request for more time to respond,[278] the same Fifth Circuit panel issued an order in the Chamber's original appeal "vacat[ing] the district court's effective denial of the motion for preliminary injunction and remand[ing] with instructions that the district court rule on [the motion] by May 10, 2024" while also retaining jurisdiction over the appeal.[279] And when the district court eventually granted the preliminary injunction,[280] the Fifth Circuit nevertheless

273. Opinion & Order at 7, *Chamber of Com. of the U.S. v. CFPB*, No. 24-cv-00213, 2024 WL 1329959, at *4 (N.D. Tex. Mar. 28, 2024), ECF No. 67. The docket reflects that a case was opened in the U.S. District Court for the District of Columbia on March 29, 2024. *See In re: Chamber of Commerce*, No. 24-10266 (5th Cir. Mar. 29, 2024).

274. Emergency Petition for Writ of Mandamus & Administrative Stay, *In re Fort Worth Chamber of Com.*, No. 24-10266 (5th Cir. Mar. 28, 2024), ECF No. 4. The Chamber also sought and received a stay in its original case. *In re Fort Worth Chamber of Com.*, No. 24-10248, 2024 WL 1366312, at *1 (5th Cir. Mar. 25, 2024), ECF No. 30.

275. *In re Fort Worth Chamber of Com.*, 98 F.4th 265, 268–69 (5th Cir. 2024), *withdrawn and superseded by* 100 F.4th 528 (5th Cir. 2024).

276. *Id.* at 272–73.

277. *Id.* at 274. The district judge assigned to the case in D.D.C. terminated the case without prejudice on April 10. *See* Notice, *Chamber of Com. of the U.S. v. CFPB*, No. 24-cv-00213 (N.D. Tex. Apr. 24, 2024), ECF No. 74.

278. Order, *Chamber of Com. of the U.S. v. CFPB*, No. 24-cv-00213 (N.D. Tex. Apr. 29, 2024), ECF No. 76.

279. Order, *In re Fort Worth Chamber of Com.*, No. 24-10248 (5th Cir. Apr. 30, 2024) (per curiam), ECF No. 61. The panel emphasized that the district court should "make particularized findings on" the preliminary injunction factors. *Id.*

280. *Chamber of Com. of the U.S. v. CFPB*, 733 F. Supp. 3d 558, 559 (N.D. Tex. 2024).

sought to retain jurisdiction over the appeal by deferring issuance of mandate, which issued only after the CFPB filed two separate motions.[281]

But, despite the preliminary injunction, the case was not over. On May 28, the district court granted the CFPB's new motion to transfer venue and explained why it deemed transfer appropriate under 28 U.S.C. § 1404(a):

> Venue is not a continental breakfast; you cannot pick and choose on a Plaintiffs' whim where and when a lawsuit is filed. Indeed, this is why § 1391(e)(1)(B) has the "substantial" qualification as one of the factors in deciding venue. . . . An easy way for Plaintiffs to guarantee proper venue is to bring cases in jurisdictions where the impact is *uniquely* and *particularly* felt, and where a *substantial* part of the events occurred. Here, there is no unique or particular impact felt in the Northern District of Texas and little if any of the events surrounding the Final Rule have occurred here. In fact, as far as this Court can discern, not one of the member banks or credit card companies directly affected by the Final Rule is located in [this] Division.[282]

Like clockwork, the Chamber promptly filed a new petition for mandamus,[283] the Fifth Circuit issued an administrative stay before the transferee court docketed the case,[284] and an appellate panel granted the petition on June 18.[285] The panel found that the district court "clearly abused" its discretion in applying the circuit's eight-factor test for "good cause" to transfer.[286] And mandamus was warranted because "the issues implicate not only these parties' interests, but the interests of all parties who litigate against government defendants located in D.C. and seek to

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281. *See* Appellees' Opposed Suggestion of Mootness & Motion To Dismiss, *In re Fort Worth Chamber of Com.*, No. 24-10248 (5th Cir. May 15, 2024), ECF No. 66; Order, *In re Fort Worth Chamber of Com.*, No. 24-10248 (5th Cir. May 17, 2024) (per curiam), ECF No. 69; Appellees' Motion for Immediate Issuance of the Mandate, *In re Fort Worth Chamber of Com.*, No. 24-10248 (5th Cir. May 20, 2024), ECF No. 70; Order, *In re Fort Worth Chamber of Com.*, No. 24-10248 (5th Cir. May 24, 2024) (per curiam), ECF No. 71.

282. *Chamber of Com. of the U.S. v. CFPB*, 735 F. Supp. 3d 731, 740–41 (N.D. Tex. 2024) (citation omitted), *vacated*, 2024 WL 5052377, at *1 (N.D. Tex. July 16, 2024).

283. Emergency Petition for Writ of Mandamus & Administrative Stay of Transfer, *In re Chamber of Com. of the U.S.*, No. 24-10463 (5th Cir. May 28, 2024), ECF No. 2.

284. Order, *In re Chamber of Com. of the U.S.*, No. 24-10463 (5th Cir. May 29, 2024) (per curiam), ECF No. 6; *see also In re Chamber of Com. of the U.S.*, 105 F.4th 297, 300 n.2 (5th Cir. 2024).

285. *In re Chamber of Com. of the U.S.*, 105 F.4th at 300.

286. *Id.* at 304, 310–11.

have their cases heard by judges and juries outside the nation's capital."[287] The district court in the Northern District reopened the case on July 16.[288]

The mandamus practices in the SpaceX and CFPB junk-fee cases built on a series of Fifth Circuit cases that have read an exception into the jurisdictional requirement of the All Writs Act.[289] Under that Act, courts have authority to issue writs of mandamus only "*in aid of their respective jurisdictions* and agreeable to the usages and principles of law."[290] When a district court denies a motion to transfer venue, the case remains within the circuit in which it was filed, and the court of appeals has authority to issue writs of mandamus in the aid of its appellate jurisdiction.[291] But transferring a case to another circuit removes any basis for appellate jurisdiction in the original circuit.[292] Clearly, the court of appeals of the original circuit "lacks[s] jurisdiction to order the transferee district court to return the case,"[293] and any authority to issue writs of mandamus within its circuit is nonobvious, at best.[294] In *In re Red Barn Motors, Inc.*,[295] however, the Fifth Circuit recognized an exception to the All Writs Act's jurisdictional requirement: In "'very extreme case[s],'" the court of appeals has the power to "direct[ ] the transferor district court to request that the transferee district court return the case."[296]

Defense Distributed v. Bruck[297] was the first case deemed to warrant this extraordinary intervention.[298] There, a panel majority determined that the jurisdictional exception in *Red Barn Motors* was implicated because "the notice of appeal was filed the day after the district court's

287. *Id.* at 312.

288. Order, *Chamber of Com. of the U.S. v. CFPB*, No. 24-cv-00213, 2024 WL 5052377, at *1 (N.D. Tex. July 16, 2024), ECF No. 104.

289. 28 U.S.C. § 1651.

290. *Id.* (emphasis added).

291. *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943); *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 309 (5th Cir. 2008).

292. *In re Red Barn Motors, Inc.*, 794 F.3d 481, 484 (5th Cir. 2015). As such, transferred cases do not fall within the exception recognized in *Roche* for "cases which are within [a court's] appellate jurisdiction although no appeal has been perfected." *Roche*, 319 U.S. at 25.

293. *Red Barn Motors*, 794 F.3d at 484.

294. *Id.* Even *Red Barn Motors* acknowledged that "[i]t seems uncontroversial . . . that a transfer to another circuit removes the case from our jurisdiction." *Id.*

295. 794 F.3d 481 (5th Cir. 2015).

296. *Id.* at 484 (quoting *In re Sw. Mobile Homes, Inc.*, 317 F.2d 65, 66 (5th Cir. 1963) (per curiam)). *Red Barn Motors* did not warrant such an order because the late filing of the petition constituted lack of diligence. *Id.* at 485.

297. 30 F.4th 414 (5th Cir. 2022).

298. *Id.* at 424–25.

order and mandamus relief formally sought within thirty-nine days while briefing was underway."[299] And the substantive relief of mandamus[300]—a "'drastic and extraordinary' remedy 'reserved for really extraordinary cases'"[301]—was deemed appropriate because the district court committed legal and factual errors in its analyses of severance and of the transfer factors.[302] The Fifth Circuit issued a writ of mandamus ordering the district court to "[v]acate" its sever-and-transfer order, "[r]equest" the return of the case, and "reconsolidate" the cases after the return.[303] Despite the Fifth Circuit's grant of this extraordinary remedy, however, *Defense Distributed* did not return to Texas because the New Jersey court declined to retransfer it.[304] In subsequent opinions, multiple Fifth Circuit judges alternated between "respectfully ask[ing] the District of New Jersey to honor our decision in *Defense Distributed* and grant the request to return the case"[305] and criticizing the New Jersey court's "unprecedented" decision not to do so.[306] These judges argued that the "judiciary's longstanding tradition of comity" essentially required retransfer.[307] According to them, the practice of "circuit courts direct[ing] 'the transferor district court to request that the transferee district court return the case' . . . neatly balances the jurisdictional powers of the separate circuits with a culture of mutual respect between the sister circuits."[308]

Several characteristics of the Fifth Circuit's invocation of mandamus to resolve venue disputes appear noteworthy through the lens of venue diversion. Mandamus, after all, is an extraordinary remedy reserved for extraordinary cases where the petitioner has a "clear and indisputable" right to the remedy and lacks "other adequate means to attain the

299. *Id.* at 424.

300. *See infra* note 309 and accompanying text.

301. *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380–81 (2004) (quoting *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947)); *Def. Distributed*, 30 F.4th at 426.

302. *Def. Distributed*, 30 F.4th at 433–36. As the dissent pointed out, "severance is not only discretionary and tied to case management prerogatives, but it is not itself subject to review through a writ of mandamus. At all." *Id.* at 438 (Higginson, J., dissenting).

303. *Id.* at 436–37.

304. *Def. Distributed v. Platkin* (*Platkin I*), 617 F. Supp. 3d 213, 220 (D.N.J. 2022).

305. *Def. Distributed v. Platkin* (*Platkin II*), 48 F.4th 607, 607 (5th Cir. 2022) (Ho, J., concurring).

306. *Def. Distributed v. Platkin* (*Platkin III*), 55 F.4th 486, 496 (5th Cir. 2022).

307. *Platkin II*, 48 F.4th at 607.

308. *Platkin III*, 55 F.4th at 496 (quoting *Def. Distributed v. Bruck*, 30 F.4th 414, 424 (5th Cir. 2022)). One member of the merits panel concurred in the judgment only. *Id.* at 488 n.1.

relief."[309] "'[O]nly exceptional circumstances amounting to a judicial usurpation of power' or a 'clear abuse of discretion' 'will justify the invocation of this extraordinary remedy.'"[310] The Fifth Circuit's increasing willingness to both invoke and expand the scope of its mandamus jurisdiction falls short of this standard. And in exercising this authority, the court has increased its oversight of district court transfer decisions in a way that makes it more difficult for respondents to prevail on motions to transfer venue.

When the circuit first recognized the *Red Barn Motors* exception to transfer's jurisdiction-negating effects, its test for whether mandamus was appropriate aligned with limited precedent in other circuits.[311] But subsequent decisions have dramatically expanded the scope and application of the exception. Other circuits previously held that mandamus review of transfer orders was permissible when the district court stayed its transfer order pending appellate review, transferred the case to an improper forum, or weighed outside or incomplete factors.[312] But in *Defense Distributed*, the Fifth Circuit objected to *how* the district court weighed the transfer factors, rather than *whether* it did so.[313] In so doing, the court not only expanded the scope of the appellate court's abuse-of-discretion inquiry beyond the frontier established by other circuits but also limited the trial court's ability to exercise discretion in the first place. This curtailment is problematic because adjudicating a § 1404(a) motion entails the exercise of discretion.[314] And because the need for decision-making flexibility increases as the complexity of multi-factor tests increases,[315] this limitation of discretion is likely to be especially obstructive for a district court's ability to correctly apply the

309. *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380–81 (2004) (quoting *Kerr v. U.S. Dist. Ct. for N. Dist. of Cal.*, 426 U.S. 394, 403 (1976)). The court must also determine that "the writ is appropriate under the circumstances." *Id.* at 381.

310. *Id.* at 380 (first quoting *Will v. United States*, 398 U.S. 90, 95 (1967); then quoting *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953); and then quoting *Will*, 389 U.S. at 95).

311. 794 F.3d at 484 & n.6.

312. *In re Warrick*, 70 F.3d 736, 740 (2d Cir. 1995) (failure to consider all required factors of 28 U.S.C. § 1404(a)); *In re Scott*, 709 F.2d 717, 719 (D.C. Cir. 1983) (transfer to improper forum or improper factor); *In re Nine Mile Ltd.*, 673 F.2d 242, 243 (8th Cir. 1982) (review of transfer order permitted if order is stayed pending appeal).

313. *Def. Distributed v. Bruck*, 30 F.4th 414, 434–36 (5th Cir. 2022).

314. *Stewart Org. v. Ricoh Corp.,* 487 U.S. 22, 29 (1988) ("Section 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer according to an 'individualized, case-by-case consideration of convenience and fairness.'" (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964))).

315. *See* Anita S. Krishnakumar, *The Anti-Messiness Principle in Statutory Interpretation*, 87 NOTRE DAME L. REV. 1465, 1469 (2012).

Fifth Circuit's eight-factor test for transfer under § 1404(a). Subsequent decisions have doubled down on this curtailment of discretion.[316]

This relaxation of the standards for mandamus and creation of precedent that facilitates appellate oversight of venue-transfer motions constitutes venue diversion. In expanding its mandamus jurisdiction over venue transfers, the Fifth Circuit has amassed adjudicatory authority for itself at the expense of all other courts. Moreover, the court's uneven application of this new doctrine in a way that appears to disfavor government respondents[317] and its unintentionally ironic invocation of comity as a justification for self-aggrandizing behavior[318] suggests that it may exercise its accumulated authority to reach venue transfer decisions with which appellate judges have substantive rather than procedural disagreements.

III. DIVERTING ADMINISTRATION

Part II's description of the mechanics of venue diversion, in theory and in practice, alludes to some of the phenomenon's ramifications for administrative law and administration. This Part addresses these consequences head on. In particular, it explains how venue diversion obstructs the development of substantive law surrounding an administrative statute, leading to the absence of controlling law interpreting that statute—a phenomenon this Article calls antiregulation. Venue diversion also constitutes and contributes to deregulation, or the development of substantive and administrative law favoring less regulation. In practice, this less stringent regulation leads to socially undesirable outcomes, including more air pollution and fewer protections for consumers and workers. By imposing these direct restraints on administration, moreover, venue diversion also creates an accountability gap, whereby the chosen policies of the democratically accountable executive branch are encumbered by the exercise of unaccountable judicial power.

A. Antiregulation

The incorporation of a venue-channeling or venue-diffusing provision into a statutory scheme, whether by specialized venue provision or statutory default, represents a congressional determination

316. *See supra* notes 270–72.

317. *Compare, e.g.*, *In re TikTok, Inc.*, 85 F.4th 352, 357 (5th Cir. 2023) (invoking mandamus jurisdiction to transfer suit involving private defendants), *with In re Clarke*, 94 F.4th 502, 507 (5th Cir. 2024) (invoking mandamus jurisdiction to undo transfer in a suit against the CFTC).

318. *See supra* notes 305–08 and accompanying text.

about the policy necessity of uniform versus potentially divergent circuit law and, consequently, the appropriate balance of adjudicatory power between circuits. This Article uses "circuit law" to refer to the controlling interpretations of substantive and procedural federal law that govern within each circuit.[319] As scholars have documented, both the regional structure of the federal courts and decision-making within circuits reinforce their capacities to produce, and reinforce, divergent interpretations of federal law.[320] Their tendency to favor "regional over national concerns" and "intracircuit consistency over national uniformity"[321] produces circuit law that may or may not align with the federal law that governs in other circuits.[322] Although this law is liminal,[323] the discretionary and limited nature of the Supreme Court's docket means that, for many legal questions, the ultimate governing law will be the law of the circuit in which the question is raised.[324]

By aggrandizing the courts that engage in it,[325] venue diversion disrupts the intercircuit balance of adjudicatory power legislated by Congress. Instead of diffuse adjudication that permits the development of varied interpretations throughout the country (in the case of venue-diffusing frameworks), or concentrated adjudication that facilitates the development of a single, comprehensive body of statutory expertise (in the case of venue-channeling frameworks),[326] venue diversion concentrates adjudication in the venue-diverting circuit. Regardless of the substantive content of the law in the diverting circuit, the fact of diversion disrupts implementation of the statutory scheme. In addition, the

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319. *See* Dragich, *supra* note 159, at 537–39; Bennett, *supra* note 158, at 1685–86 (rejecting the label "circuit law" but describing this as "circuit precedent").

320. Dragich, *supra* note 159, at 566–67; Bennett, *supra* note 158, at 1691–97; *see also* Stefanie A. Lindquist, *Bureaucratization and Balkanization: The Origins and Effects of Decision-Making Norms in the Federal Appellate Courts*, 41 U. RICH. L. REV. 659 (2007) (describing intercircuit variation in norms).

321. Dragich, *supra* note 159, at 537–39.

322. *See United States v. Mendoza*, 464 U.S. 154, 160 (1984); *Mast, Foos & Co. v. Stover Mfg. Co.,* 177 U.S. 485, 488–89 (1900); Frost, *supra* note 13, at 1611–16; Dragich, *supra* note 159, at 537–39.

323. The Supreme Court retains supersessive authority over the meaning of federal law and can ultimately reject or adopt a particular circuit's interpretation. *But see* Ryan D. Doerfler & Samuel Moyn, *After Courts: Democratizing Statutory Law*, 123 MICH. L. REV. (forthcoming 2025) (manuscript at 45–47); Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2108–10 (2022).

324. Dragich, *supra* note 159, at 538-39.

325. *See supra* text accompanying note 196.

326. *See supra* note 128 and accompanying text; SIEGEL, *supra* note 19, at 55; *cf.* Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 14, 37 n.12, 52 (1989) (describing the Federal Circuit's exclusive jurisdiction over patent appeals as intended to promote the development of a uniform, predictable law).

development of venue-diverting doctrine exacerbates this disruption by buttressing the legal justifications for future venue diversion.

The concentration of adjudication in a venue-diverting circuit creates *antiregulation*—a void of substantive law surrounding administrative statutes. Administrative statutes are those like the Clean Air Act that establish statutory regimes requiring implementation by administrative agencies;[327] they are the substantive laws whose implementation according to largely trans-substantive principles occupies the focus and practice of administrative law.[328] For statutory schemes containing venue-channeling provisions, venue diversion concentrates the development of substantive law outside of the circuit chosen to "facilitat[e] the orderly development of the basic law" because of its administrative expertise and "frequent exposure to the [statute] and its legislative history."[329] Instead of the uniform, comprehensive body of substantive law a properly implemented venue-channeling provision would create, venue diversion creates a void of controlling substantive law in the chosen circuit. An analogous effect arises in the context of statutory schemes governed by venue-diffusing provisions. Instead of fostering the development of multiple interpretations of a statutory scheme across the circuits, venue diversion consolidates interpretation in a single circuit. The absence of multiple competing interpretations of the substantive statute removes the benefits of percolation that would have accrued to administration of the statutory scheme under a venue-diffusing framework.[330]

B. Deregulation

Deregulation takes many forms.[331] A judicial interpretation of a substantive statute that limits the scope of possible regulation under that statute is one example.[332] Agencies themselves can also produce deregulation when they refrain from acting due to substatutory or

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327. I use the term "administrative statute" to encompass both organic statutes, which create agencies and may simultaneously establish administrative schemes for those agencies to administer, *e.g.*, An Act To Establish a National Park Service, ch. 408, § 1, 39 Stat. 535, 535 (1916) (current version at 16 U.S.C. § 1), and programmatic statutes that establish or amend statutory schemes for which administration is delegated to specific agencies, *e.g.*, Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676.

328. *See* Jerry L. Mashaw, *The American Model of Administrative Law: Remembering the First One Hundred Years*, 78 GEO. WASH. L. REV. 975, 981–82 (2010).

329. 41 Fed. Reg. at 56769; *see supra* notes 125–29 and accompanying text.

330. *See supra* notes 159–61 and accompanying text.

331. *See generally* Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585 (2021).

332. *See, e.g.*, *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024); Courtlyn G. Roser-Jones, *The Roberts Court and the Unraveling of Labor Law*, 108 MINN. L. REV. 1407, 1487 (2024).

perceived constraints on their regulatory capacity[333] or the deregulatory policy preferences of the administration.[334] And another example, at a higher level of generality, is judicial gloss on the substance of administrative law—meaning the doctrines, standards of review, and interpretive presumptions that attach to judicial review under the APA and comprise the stuff of trans-substantive administrative law—that tends to limit agencies' regulatory capacities.[335] Venue diversion can lead to all of these kinds of deregulation.

Most clearly, venue diversion will lead to substantive statutory deregulation when the circuits that engage in venue diversion are more likely to adopt deregulatory interpretations of the underlying statute. As scholars have documented, some circuits tend towards skepticism of environmental regulation or consumer and worker protection.[336] Other circuits are more or less deferential toward agency action, regardless of the pro- or deregulatory nature of that action.[337] In the case studies presented in Part II, for example, the circuits that engaged in venue diversion also adopted or advocated deregulatory interpretations of the administrative statutes at issue. In *Calumet*, the Fifth Circuit held that EPA's denial of exemptions from the Renewable Fuel Standard program was unlawful and vacated the decision.[338] And in the *SpaceX* and *Chamber of Commerce* challenges, the same court strongly criticized the NLRB and CFPB's efforts to enforce labor standards and protect consumers from junk credit card fees.[339] Although these cases are ongoing, the preliminary opinions suggest that the end result will be

333. Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 26–27 (2008).

334. Freeman & Jacobs, *supra* note 331, at 610–11.

335. *See, e.g.*, Christopher S. Havasy, *Radical Administrative Law*, 77 VAND. L. REV. 647, 660 (2024); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1023 (2023); Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 360 (2019).

336. *See, e.g.*, David E. Adelman & Robert L. Glicksman, *Presidential and Judicial Politics in Environmental Litigation*, 50 ARIZ. ST. L.J. 3, 21–22, 22 n.96 (2018) (summarizing scholarly findings); *see also* David E. Adelman & Robert L. Glicksman, *Judicial Ideology as a Check on Executive Power*, 81 OHIO ST. L.J. 175, 233 (2020) [hereinafter, Adelman & Glicksman, *Judicial Ideology*].

337. Kent Barnett & Christopher J. Walker, *Chevron Step Two's Domain*, 93 NOTRE DAME L. REV. 1441, 1460 (2018) (comparing rates at which different circuits upheld agency action with and without *Chevron* deference).

338. *Calumet Shreveport Refin., L.L.C. v. EPA*, 86 F.4th 1121, 1142 (5th Cir. 2023).

339. *SpaceX III*, 99 F.4th 233, 236–37 (5th Cir. 2024) (per curiam) (denying petition for rehearing en banc) (Jones, Smith, Elrod, Duncan, Engelhardt & Oldham, JJ., dissenting); *In re Fort Worth Chamber of Com.*, 98 F.4th 265, 271 (5th Cir. 2024).

substantive deregulation via judicially imposed restraints on agency enforcement capacity.[340]

Venue diversion also leads to deregulation at the agency level. In particular, when agencies are forced to litigate venue disputes, they must reallocate resources away from activities supporting substantive regulation towards minimizing the disruptive potential of venue diversion. At the outset of an agency process, as the agency considers whether and how to regulate in a particular area, the risk of venue diversion may affect its decision to proceed by rulemaking or adjudication.[341] Venue diversion thus not only creates an additional, resource-intensive step in administrative policymaking, but also represents a judicial constraint on an agency's choice of policy tool.[342] And venue diversion continues to influence an agency's allocation of resources even after the agency has acted. For agency policymaking that occurs in the context of a venue-channeling provision, venue diversion prevents the agency from engaging in a repeated, incremental dialogue with a predetermined circuit.[343] And for policymaking under a statutory scheme that incorporates venue diffusion, venue diversion will impede the agency's ability to pursue its policy objectives through intercircuit nonacquiescence.[344] Due to agency resource constraints, this reallocation of resources towards nonsubstantive activity produces less substantive regulation,[345] a deregulatory outcome.

Besides its suppressive effects on an agency's internal decision-making processes, the act of venue diversion is itself deregulatory. Venue diversion occurs when courts make self-aggrandizing interpretive choices or overextend their adjudicatory power in ways that make it more difficult for agencies to prevail on motions to transfer venue. In practice, this means interpretive choices that allocate interpretive authority to courts at the expense of agencies, and the invocation of extraordinary process to the detriment of agencies. For example, even though the Clean Air Act endows the EPA Administrator with the power to determine

340. In theory, just as the filing of deregulatory challenges in deregulatory circuits can contribute to venue diversion in those courts, challenges to agency deregulation filed in pro-regulatory circuits could lead to venue diversion in pro-regulatory circuits. But when the Supreme Court is deregulatory, *see* Jonathan S. Masur, Relentless *as Entrenchment*, 31 GEO. MASON L. REV. 573, 574–79 (2024), as its conservative supermajority suggests it will be for the next several decades, venue diversion that arises from pro-regulatory precedent will have a shorter life span than venue diversion that accompanies deregulatory interpretation. Therefore, over at least the medium-term horizon, venue diversion will be associated with deregulation.

341. *See supra* note 234 and accompanying text.

342. *Contra SEC v. Chenery Corp.* (*Chenery II*), 332 U.S. 194, 208–09 (1947).

343. *See* Blake Emerson, *The Binary Executive*, 132 YALE L.J.F. 756, 770 (2022).

344. Estreicher & Revesz, *supra* note 83, at 687–88, 719–20.

345. *See* Biber, *supra* note 333, at 27–28.

when a locally or regionally applicable action is informed by a determination of nationwide scope or effect, the Fifth Circuit has usurped that power for itself.[346] And the Fifth Circuit has more readily exercised its mandamus jurisdiction to retain adjudicatory power over cases involving challenges to federal agencies.[347] These are deregulatory interpretations because they directly reduce agency authority to regulate.

Finally, venue diversion can also cause structural statutory deregulation by disrupting the proper functioning of a statute.[348] This kind of deregulation is distinct from the statutory deregulation that arises when a court interprets a particular statutory provision in a deregulatory way. Instead, structural statutory deregulation arises when the practice of venue diversion produces simultaneous, competing adjudications of an underlying statute, and the existence of multiple concurrent disputes influences the ultimate resolution of the underlying substantive questions in a deregulatory manner. The Supreme Court's recent decision *Ohio v. EPA*[349] is a good illustration of how this occurs in a specific context and is discussed in greater detail in Section IV.B.

C. Judicial Administration

Through its disruptive and deregulatory effects on administration, venue diversion shifts power over the implementation of administrative statutes from federal agencies to the federal judiciary. And because the act of venue diversion transgresses legislatively enacted constraints on adjudication of administrative disputes, venue diversion also abridges congressional control of administration. Although separation of powers countenances some degree of interbranch competition,[350] the accrual of administrative authority in the judiciary through venue diversion crosses the line separating permissible interbranch checking from unjustified judicial aggrandizement.[351] In particular, the interpretive choices and procedural mechanisms that constitute venue diversion are characterized

346. *See supra* notes 243–50 and accompanying text.

347. *See supra* note 317 and accompanying text.

348. *See supra* notes 24–31 and accompanying text; *see also* Roser-Jones, *supra* note 332, at 1486–87.

349. 144 S. Ct. 2040 (2024).

350. Emerson, *supra* note 343, at 759–60.

351. *See* Josh Chafetz, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 110 GEO. L.J. 125, 128 (2021); Allen C. Sumrall & Beau J. Baumann, *Clarifying Judicial Aggrandizement*, 172 U. PA. L. REV. ONLINE 24, 38 (2023); Allen C. Sumrall, *Nondelegation and Judicial Aggrandizement*, 15 ELON L. REV. 1, 7 (2023).

by both juristocratic[352] and imperial[353] reasoning—attributes that not only aggrandize the judiciary but constrain the other branches.

The premise that administration is a shared responsibility across our tripartite government is not novel.[354] Scholars have documented how the three branches compete for administrative primacy and identified the tools with which each branch exerts authority over administration.[355] Congress, of course, controls the scope of the delegation of lawmaking authority to the administrative state and sets forth the principles that govern agencies' implementation of statutory directives.[356] Congress's main tool of administration is legislation, but it also exercises oversight over the execution of laws through, among other things, hearings, appropriations, and reporting requirements.[357] For its part, the executive branch, via the President, possesses formal authority over the execution of laws, and can triage enforcement priorities within the limits established and policed by the other branches.[358] The President exercises authority over administration by appointing political heads of agencies, directing agencies to engage in policymaking, and overseeing the incorporation of administration priorities into those policies.[359] And the Supreme Court and lower federal courts wield the power of judicial review to declare administrative delegations unconstitutional or exercises of delegated authority unlawful under the Constitution, the relevant programmatic statute, or the APA.[360] The judiciary exerts its power over administration directly, in deciding individual cases and issuing binding judgments, and indirectly via the development of standards of review,

352. *See* Bowie & Renan, *supra* note 323, at 2024–25 (defining juristocratic separation of powers as the idea that the Supreme Court is best situated to interpret and enforce "each branch's implied constitutional prerogatives").

353. *See* Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 97–99 (2022) ("[T]he Court has begun to implement the policy preferences of its conservative majority in a new and troubling way: by simultaneously stripping power from every political entity *except* the Supreme Court itself.").

354. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001).

355. *See, e.g.*, *id.*; Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 69 (2006); Bijal Shah, *Judicial Administration*, 11 UC IRVINE L. REV. 1119, 1122 (2021); Emerson, *supra* note 343, at 770.

356. Beermann, *supra* note 355, at 69, 71–72.

357. *See id.* at 69, 71, 84, 106, 121 (enumerating Congress's tools of oversight).

358. *See* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 125–26 (2015).

359. *See* Kagan, *supra* note 354, at 2281–303.

360. *See generally* Shah, *supra* note 355. *But cf.* Bowie & Renan, *supra* note 323, at 2028, 2030 (questioning the necessity and wisdom of exclusive judicial control over interbranch conflict).

canons of construction, and deference doctrines that influence agency and congressional behavior.[361]

The traditional conception of administrative law viewed each branch's tools as generally sufficient to maintain its institutional share of authority over administration, leading to a kind of dynamic equilibrium in which the competing branches effectively checked each other.[362] But recent scholarship has described how the increasingly conservative Roberts Court, relying on decades of anti-administrativist scholarship, has moved quickly to upset this balance and aggrandize itself through the adoption of anti-deference doctrines and juristocratic reasoning.[363] Venue diversion aggrandizes the judiciary in a similar fashion because it undermines the effectiveness of the tools through which the political branches engage in interbranch checking while asserting new authority over administration for the courts.

From the legislative perspective, the different venue frameworks that attach to different statutory schemes represent a congressional pronouncement about where dispute adjudication should occur and thus where substantive law pertaining to a statute's administration can develop.[364] Venue-diffusing statutes authorize multiple courts to exercise adjudicatory power over cases, provided they have jurisdiction. Conversely, venue-channeling rules restrict the exercise of certain courts' adjudicatory power regardless of jurisdiction. Both kinds of rules enable Congress to control, to some degree, how courts adjudicate disputes; they are a mechanism through which Congress exercises control over adjudication. By definition, venue diversion subverts this framework.[365] In so doing, courts not only vitiate a tool of congressional oversight but also claim new power to shape the process and outcomes of Article III adjudication.[366]

On the executive side, venue diversion can constitute, and concretize, judicial incursions into areas of executive competence. Historically, both the judicial and executive branches have claimed competence in interpreting statutes, and their competing statutory interpretations represent a kind of interbranch checking.[367] Agencies,

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361. *See, e.g.*, *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2267 (2024).

362. *See* Emerson, *supra* note 343, at 759–60 (describing this traditional conception of administrative law).

363. *See* Bowie & Renan, *supra* note 323, at 2024–25; Lemley, *supra* note 353, at 99; Emerson, *supra* note 343, at 760–63; Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 3 (2017).

364. *See supra* notes 24–29 and accompanying text.

365. *See supra* text accompanying note 196.

366. *See* Chafetz, *supra* note 351, at 150.

367. *See* Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722, 1730 (2011); Emerson, *supra* note 343, at 770.

however, have long been understood to exercise singular authority over fact-finding.[368] And although *Loper Bright* complicated the picture of competing statutory interpretation as interbranch contestation,[369] it reaffirmed agencies' unique competence for fact-finding.[370] Venue diversion poses an obvious separation-of-powers problem when it goes beyond the substitution of judicial statutory interpretation for executive branch statutory interpretation and instead enables the substitution of judicial fact-finding for executive branch fact-finding. A good illustration of this comes from the Clean Air Act litigation, described *supra* Section II.B.1.b, in which a court read a statutory provision authorizing the EPA Administrator "to find[] and publish[]" that an action was "based on a determination of nationwide scope or effect"[371] to empower the court, rather than the Administrator, to decide the content of this finding.[372] This interpretation represents a significant extension of judicial authority into a sphere usually characterized by deferential review to agency fact-finding.[373] Its expansiveness is even more concerning in light of legislative materials that affirmatively state Congress's intention for the Administrator to have final and exclusive authority to make this finding.[374] By adopting this reaching interpretation, the court claimed new authority for itself while simultaneously disempowering the executive branch.

IV. CONTEXTUALIZING VENUE DIVERSION

The story of venue diversion told in the preceding Parts is a story of courts developing doctrines and procedures—rules of decision[375]—to resolve a seemingly procedural question—proper venue—in a manner that determines substantive outcomes. Part of this story is this Article's claim that venue is not, in fact, a purely procedural issue: Congress has long used venue rules to reinforce substantive legislative objectives.[376] But the crux of the argument is that venue-diverting courts have failed to grapple with venue's inherent substantivity and instead treated it as a

368. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2258 (2024).

369. *See id.* at 2266 (suggesting that courts, and not agencies, "have . . . special competence in resolving statutory ambiguities").

370. *See id.* at 2258.

371. 42 U.S.C. § 7607(b)(1).

372. *See supra* notes 243–45 and accompanying text.

373. *See supra* notes 244–47 and accompanying text.

374. *See supra* notes 116, 248–50 and accompanying text.

375. Woolley, *supra* note 39, at 612–13, 613 n.181.

376. *See supra* Part I.

purely procedural issue,[377] even as their engagement with venue has been conducted to achieve desired outcomes. In this respect, the story of venue diversion is neither new nor unique. Recent scholarship has highlighted emerging ways in which courts' deployments of ostensibly neutral procedures,[378] modes of reasonings,[379] and doctrines[380] nevertheless possess a partisan valence, thereby reinforcing substantive outcomes favored by that ideology's adherents.

This Part situates venue diversion within this broader literature. To do so, it focuses on parallels between venue diversion and two recent objects of academic and public attention: the increasing frequency and politicization of nationwide injunctions, and the expansion of the Supreme Court's shadow docket. These phenomena share certain structural characteristics with venue diversion and thus provide useful comparators for evaluating venue diversion's structural significance.[381] At the same time, this Article's theory of venue diversion has implications for how scholars, litigators, judges, and lawmakers understand and respond to the increased salience of both forum shopping for nationwide injunctions and the rise of the shadow docket.

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377. *See* Jay Tidmarsh, *Procedure, Substance, and* Erie, 64 VAND. L. REV. 877, 888 (2011) ("[S]ubstantive law—and important changes to that law—emerge against a procedural backdrop that is often taken for granted.").

378. *See, e.g.*, Developments in the Law, *supra* note 14, at 1709–10 (nationwide injunctions); Steven I. Vladeck, *A Court of First View*, 138 HARV. L. REV. 534, 539 (2024) (shadow docket); Zachary D. Clopton, *Catch and Kill Jurisdiction*, 121 MICH. L. REV. 171, 174–75, 205–09 (2022) (describing the "judge-made expansion of court access in federal courts in order to 'catch' more state court cases, followed by the use of federal-court doctrines to 'kill' those cases with a dismissal").

379. *See, e.g.*, Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1132 (2023) (originalism in constitutional interpretation); Brian Galle & Stephen Shay, *Admin Law and the Crisis of Tax Administration*, 101 N.C. L. REV. 1645, 1650–51 (2023) (procedural formalism in tax); Doerfler, *supra* note 192, at 313 (interpretative canons); *see generally* Anya Bernstein & Glen Staszewski, *Populist Constitutionalism*, 101 N.C. L. REV. 1763 (2023).

380. *See, e.g.*, Deacon & Litman, *supra* note 335, at 1056 (major questions doctrine); Katherine Mims Crocker, *Constitutional Rights and Remedial Consistency*, 110 VA. L. REV. 521, 567–69 (2024) (political question doctrine).

381. In many ways, the best comparator for venue diversion is the phenomenon of catch-and-kill jurisdiction identified by Zachary Clopton, in which courts deploy procedure and develop doctrine to siphon jurisdiction away from state courts and then dismiss siphoned cases before they reach the merits stage. *See generally* Clopton, *supra* note 378. Venue diversion involves a similar siphoning process, but focuses on the intercircuit allocation of cases, as determined by venue rules, rather than the federal-state allocation, as determined by jurisdictional rules.

A. Forum Shopping and Nationwide Injunctions

For several years, scholars and practitioners have debated the constitutionality and consequences of "nationwide" injunctions: Injunctions "that prevent[] the government from implementing a challenged law, regulation, or other policy with respect to all persons and entities, even those not before the court in the litigation."[382] One problem associated with the remedy, by critics on both sides, is its incentivization of forum shopping and the consequent nationwide power wielded by individual district judges.[383] When nationwide injunctions are widely available and the ideological leanings of judges are both known[384] and unevenly distributed throughout the district courts,[385] litigants who seek to enjoin or entrench agency action can secure nationwide injunctive relief relatively easily by filing their administrative petition in a district whose judges are known to share their ideological leanings.[386] This situation can foster a race to the courthouse, as litigants on both sides of a partisan topic seek competing injunctions, which may produce disparate restraints on administrative policy in different circuits.[387]

One of the normative issues with this kind of forum shopping is its perceived unfairness, which manifests in two ways. A due process critique rejects the suggestion that nationwide injunctions can bind parties

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382. JOANNA R. LAMPE, CONG. RSCH. SERV., LSB10664, NATIONWIDE INJUNCTIONS: RECENT LEGAL DEVELOPMENTS 1–2 (2021) (emphasis omitted); *see also* Developments in the Law, *supra* note 14, at 1703–04 & nn.24–26 (collecting scholarship); sources cited *supra* notes 13, 16.

383. *See, e.g.*, *Labrador v. Poe*, 144 S. Ct. 921 (2024) (conservative Justices criticizing preliminary injunction entered against enforcement of Idaho's ban on gender-affirming care); Developments in the Law, *supra* note 14, at 1701–02 (describing progressive objections to stay against FDA's approval of mifepristone); *see also* Elysa M. Dishman, *Generals of the Resistance: Multistate Actions and Nationwide Injunctions*, 54 ARIZ. ST. L.J. 359, 411–12 (2022); Pedro, *supra* note 13, at 698 & n.109.

384. *See Conference Acts To Promote Random Case Assignment*, U.S. CTS. (Mar. 12, 2024), https://www.uscourts.gov/news/2024/03/12/conference-acts-promote-random-case-assignment [https://perma.cc/9K37-CM23] (noting that some local case assignment plans assign all cases filed in single-judge divisions to that single judge, rather than distributing them throughout the district).

385. *See* David Zaring, *The Organization Judge*, U. CHI. L. REV. ONLINE 1, 4–5 (2020) (documenting that "the resumes of the new [Trump-appointed] federal appellate judiciary looks less cautious Burkean conservative and more organization-judge conservative, and the organization looks a lot like the Republican Party"); *see also* Brandon Hasbrouck, *Movement Judges*, 97 N.Y.U. L. REV. 631, 634–35 (2022) (describing the progressive counterweight to ideologically motivated conservative judges). *But see* Adelman & Glicksman, *Judicial Ideology*, *supra* note 336, at 233 (suggesting that the political controversy over appointments overemphasizes the significance of a judge's ideology to case outcomes).

386. *See* Frost, *supra* note 13, at 1105; Levin, *supra* note 13, at 2033–34.

387. *See generally* Developments in the Law, *supra* note 14.

not properly before the court.[388] According to this perspective, nationwide injunctions "allow plaintiffs to hijack the rights of third parties, without their knowledge or consent and potentially against their will, for the purpose of obtaining broader relief than is necessary to enforce those plaintiffs' rights."[389] Another critique, grounded in democratic and separation-of-powers principles, objects to a process that enables unelected judges to dismantle the policy decisions of more democratically accountable actors.[390]

Venue reform has been proposed as one way to mitigate these normatively undesirable consequences of forum shopping for nationwide injunctions.[391] Top-down, statutory models of reform include an expanded lottery model[392] and some version of venue channeling.[393] The former would expand the extant procedure that applies to challenges to certain agency actions, in which two or more petitions for review filed in courts of appeals are consolidated and transferred to a single circuit in a process overseen by the Judicial Panel on Multidistrict Litigation.[394] Since many administrative challenges originate in district court and involve challenges to agency enforcement actions as well as rules, an expanded lottery would need to grapple with the distinctions between these kinds of action and strike an appropriate balance between review in trial versus appellate courts.[395] Removing from individual district and

388. *E.g.*, Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J.L. & PUB. POL'Y 487, 528–31 (2016). *But see* Pedro, *supra* note 13, at 693–94 (suggesting that nationwide injunctions do not implicate the due process rights of nonparties).

389. Morley, *supra* note 388, at 531.

390. *E.g.*, Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1, 74 (2022); Mila Sohoni, *The Power To Vacate a Rule*, 88 GEO. WASH. L. REV. 1121, 1126, 1127 n.20 (2020); Developments in the Law, *supra* note 14, at 1712; Dishman, *supra* note 383, at 411. *But see* Z. Payvand Ahdout, *Enforcement Lawmaking and Judicial Review*, 135 HARV. L. REV. 937, 994 (2022) (observing that courts use nationwide injunctions to police separation-of-powers violations by the executive branch).

391. *See, e.g.*, Levin, *supra* note 13, at 2032.

392. MEAD, *supra* note 180, at 56.

393. *See, e.g.*, Developments in the Law, *supra* note 14, at 1722–23. Two variations of what are essentially a venue-channeling model include the creation of a specialized court for challenging agency regulation, *see* MEAD, *supra* note 180, at 47, 55, and the limitation to certain courts of the authority to issue nationwide relief, Howard M. Wasserman, *Congress and Universal Injunctions*, 2021 CARDOZO L. REV. DE NOVO 187, 199–200; Bradford Mank & Michael E. Solimine, *State Standing and National Injunctions*, 94 NOTRE DAME L. REV. 1955, 1978 (2019).

394. 28 U.S.C. § 2112.

395. ACUS has recently proposed that "[w]hen drafting a statute that provides for judicial review of agency rules, Congress ordinarily should provide that rules promulgated using notice-and-comment procedures are subject to direct review by a court

circuit courts the opportunity to construe and apply venue provisions in particular administrative challenges would mitigate some of the problems of venue diversion by removing the question of proper venue entirely from their cognizance.[396] But moving to circuit randomization would also eliminate the benefits of venue-channeling where Congress has deemed them important to the statutory scheme.[397]

A model of venue reform designed around venue channeling to either a new, specialized court or the D.C. Circuit would reinforce that court's statutory and administrative expertise[398] and mitigate concerns about individual judges wielding significant power over administration.[399] But there are obstacles to effectively implementing this kind of reform. The literature on specialized courts suggests that they do not live up to their potential and can create more problems than they solve.[400] And despite congressional recognition and reinforcement of its place as the administrative court, many elected officials, litigants, and even judges criticize the D.C. Circuit's preeminent role in administrative law and administration.[401] This Article has highlighted yet another previously unrecognized impediment to a venue-channeling solution to the nationwide injunction problem: venue diversion. The frequency with which courts already construe venue provisions expansively and deploy extraordinary procedures to retain adjudicatory authority over improperly filed cases suggests that including venue-channeling provisions in new or controversial statutes is not likely to resolve the issue of forum shopping for nationwide injunctions. If anything, such efforts might increase courts' latent tendencies toward venue diversion. In disputes over ideologically charged cases, individual judges and panels will have greater incentive to deploy venue diverting reasoning to retain adjudicatory authority to resolve the case according to their personal ideologies.

Venue channeling will not be able to solve the problem of forum shopping for nationwide injunctions as long as venue diversion exists, because venue diversion produces many of the same normative problems as forum shopping. It is even possible to understand venue diversion as

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of appeals." ADMIN. CONF. OF THE U.S., RECOMMENDATION 2024-1, CHOICE OF FORUM FOR JUDICIAL REVIEW OF AGENCY RULES 4 (2024).

396. Of course, if the randomization only includes circuits in which administrative challenges are filed, the ideology-neutralizing benefits of randomization will not accrue. *See supra* notes 336–37 and accompanying text.

397. *See supra* notes 159–61 and accompanying text.

398. *See supra* note 167 and accompanying text.

399. MEAD, *supra* note 180, at 49–50.

400. *See* Paul R. Gugliuzza, *Rethinking Federal Circuit Jurisdiction*, 100 GEO. L.J. 1437, 1449–50 (2012) (recounting some of this debate).

401. *See, e.g.*, *In re Chamber of Comm. of the U.S.*, 105 F.4th 297, 307, 309, 312 (5th Cir. 2024).

a judicial analogue of forum shopping. Litigants forum shop by seeking out favorable forums—courts in which they expect the application of substantive law by forum judges to be favorable for their case. In many cases, litigants are able to substantially predetermine the substantive outcome based on the seemingly procedural choice of venue. Venue diversion unfolds in an analogous way. The development of venue-diverting doctrine enables courts to choose when to retain adjudicatory authority over cases, and when to transfer those cases out of circuit. By clothing the adjudication of motions to transfer venue in the procedural guise of rule- and standard-based doctrine and multi-factor inquiries, courts obfuscate the discretionary components of their analysis and the substantive implications of their conclusion. The result—venue-diverting doctrine—is characterized by its capacity for both arbitrariness and the substitution of judicial preference for executive branch policy. In this way, venue diversion presents its own problems for due process and democratic accountability.[402]

B. The Rise of the Shadow Docket

Like nationwide injunctions, the Supreme Court's shadow docket has generated significant scholarly attention in recent years.[403] The shadow docket is generally understood to encompass the "range of orders and summary decisions that defy [the Court's] normal procedural regularity."[404] This includes summary reversals of lower court decisions,[405] granting petitions for certiorari before judgment,[406] and the issuance or denial of emergency and extraordinary relief without argument or on expedited timelines.[407] While shadow procedures have a long history at the Supreme Court, especially in capital cases,[408] scholars contend that "there has been a radical shift in how (and how often) the Justices use the shadow docket—not just to manage their workload, but to change the law both on the ground and on the books."[409] Shadow

402. *See County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998).

403. *E.g.*, sources cited *supra* note 23; *see also* Vladeck, *supra* note 378; Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123 (2019).

404. Baude, *supra* note 23, at 1.

405. *See generally id.*; Edward A. Hartnett, *Summary Reversals in the Roberts Court*, 38 CARDOZO L. REV. 591, 591–92, 597–98 (2016).

406. Vladeck, *supra* note 403, at 134.

407. *See generally id.*

408. *E.g.*, Madalyn K. Wasilczuk, *Killing Stays*, 2024 WIS. L. REV. 859; Greg Goelzhauser, *The Applications Docket*, 58 GA. L. REV. 97, 118 (2023); VLADECK, *supra* note 23, at 93.

409. Stephen I. Vladeck, *Putting the "Shadow Docket" in Perspective*, 17 HARV. L. & POL'Y REV. 289, 291 (2023).

docket cases "increasingly concern not merely procedural issues like stays but also full rulings on extremely important and controverted issues."[410] During the acute phase of the COVID-19 pandemic, for example, the Court used its shadow docket to curtail the federal government's capacity to implement emergency measures to protect human health and welfare.[411] And scholars and litigators have documented the growth in shadow-docket resolution of challenges to federal environmental regulation and enforcement.[412]

Recent scholarly and judicial criticism has identified a variety of normative problems with the rise of the shadow docket. One issue is transparency: Because shadow docket orders generally lack reasoned explanations, affected parties, like federal agencies, can only attempt to infer the legal justifications underlying the order. The corresponding absence of law development both destabilizes the rule of law and detracts from the legitimacy of the judicial process.[413] Another issue is presented by the frequently emergent posture of shadow docket petitions—whether real or manufactured. By short-circuiting litigation in lower courts, the Court deprives itself and litigants of the opportunity to fully develop and contest the full spectrum of legal issues.[414] Finally, perhaps the most significant critique of the shadow docket is that it provides a procedural backdoor through which ideologically motivated Justices can produce desired substantive outcomes without subjecting their decision-making and persons to adequate scrutiny or process.[415] Due to the Court's strong conservative majority, the shadow docket's selection bias produces policy outcomes favored by conservatives while entrenching the obstruction of progressive administrative.[416]

This Article's study of venue diversion is informative for understanding the normative implications of the shadow docket in at least two ways. First, the process through which courts engage in venue diversion encompasses the kinds of shadow procedures that make up the Supreme Court's shadow docket, namely administrative stays and the

410. Lemley, *supra* note 353, at 106.

411. Brandon L. Garrett & Lee Kovarsky, *Viral Injustice*, 110 CALIF. L. REV. 117, 121 (2022).

412. *E.g.*, Donahue & Herzog, *supra* note 23 (Good Neighbor Rule); Richard J. Pierce, Jr., *The Supreme Court Should Eliminate Its Lawless Shadow Docket*, 74 ADMIN. L. REV. 1, 3–5 (2022) (Clean Power Plan).

413. *See* Pierce, *supra* note 412, at 4–6; VLADECK, *supra* note 23, at 206–07; *cf.* Tejas N. Narechania, *Certiorari in Important Cases*, 122 COLUM. L. REV. 923, 987–88 (2022) (noting the importance of reason-giving for judicial legitimacy).

414. *See* Andrew J. Wistrich, *Secret Shoals of the Shadow Docket*, 23 NEV. L.J. 863, 869–71 (2023); Lisa Schultz Bressman, *The Rise and Fall of the Self-Regulatory Court*, 101 TEX. L. REV. 1, 78 (2022).

415. *E.g.*, VLADECK, *supra* note 23, at 67–92.

416. *Id.* at 178–204.

expanded use and scope of mandamus review.[417] Second, the practice of venue diversion in lower courts can actually facilitate the ideological exploitation of the shadow docket at the Supreme Court, as illustrated by a recent, high-profile shadow docket dispute involving EPA's authority to enforce the Clean Air Act's Good Neighbor provision.[418]

Ohio v. EPA involved the same EPA action challenged in *West Virginia v. EPA*: EPA's simultaneous denial of twenty-one state implementation plans (SIPs) for ozone reduction and subsequent implementation of a federal implementation plan (FIP)—the Good Neighbor Plan—in their stead.[419] Unlike *West Virginia*, *Ohio* was originally filed in the D.C. Circuit,[420] so venue was not contested.[421] But, in addition to *West Virginia*, states filed administrative challenges to the Good Neighbor Plan in several regional courts of appeals. Seven of those circuits issued administrative stays preventing EPA from implementing the Plan with respect to at least ten states,[422] *even though* EPA contested those circuits' exercise of adjudicatory authority over the petitions under the CAA's venue-channeling provision.[423] And when Supreme Court issued its opinion in *Ohio* and enjoined EPA from implementing the Good Neighbor Plan pending resolution of the underlying appeal, its evaluation of the merits of the application turned entirely on the existence of administrative stays in the other regional circuits.[424]

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417. *See supra* Part II; *see also* Hayley Stillwell, *Shadow Dockets Lite*, 99 DENV. L. REV. 361 (2022) (describing how lower federal courts and state supreme courts decide cases via their own shadow dockets).

418. *See Ohio v. EPA*, 144 S. Ct. 2040 (2024). Deviating from usual practice, the Court responded to four emergency applications for a stay of the Good Neighbor Rule pending appeal by setting the case for argument. Steve Vladeck, *Making Sense of the "Good Neighbor" Applications*, ONE FIRST (Feb. 19, 2024), https://www.stevevladeck.com/p/67-making-sense-of-the-good-neighbor [https://perma.cc/YN4F-8KVL]. Despite the "emergency" posture of the petition, however, the Court did not issue its decision in *Ohio v. EPA* until four months after argument. *Ohio*, 144 S. Ct. 2040.

419. *Ohio*, 144 S. Ct. at 2051–52; *West Virginia v. EPA*, 90 F.4th 323, 326 (4th Cir. 2024); *see also supra* Section II.B (analyzing *West Virginia*).

420. EPA believes all administrative challenges to the Good Neighbor Plan should be filed in the D.C. Circuit. *See West Virginia*, 90 F.4th at 325, 327.

421. *Ohio*, 144 S. Ct. at 2051 n.6.

422. *Id.* at 2051–52.

423. *See, e.g.*, Brief for Federal Respondents at 12–13, *Oklahoma v. EPA*, Nos. 23-1067, 23-1068 (U.S. Jan. 17, 2025) (noting that EPA filed, and several regional circuits rejected or deferred decision on, motions to transfer administrative challenges to EPA's SIP disapprovals from the regional circuits in which they were filed to the D.C. Circuit).

424. *See Ohio*, 144 S. Ct. at 2051–52, 2054 (noting that, because of the administrative stays issued by regional circuits, EPA could not apply its FIP to half of the covered states, which prompted several remaining (covered) states to challenge EPA's application of the FIP to them as arbitrary and capricious—a challenge on which the Court ultimately deemed the petitioners likely to prevail).

As Justice Barrett pointed out in dissent, however, these stays are both temporary and possibly wrong.[425] Moreover, they exist only because the proper interpretation of 42 U.S.C. § 7607(b)(1) is contested and certain courts have engaged in venue diversion.[426] If EPA is correct that venue for such challenges is proper only in the D.C. Circuit, the courts that issued the stays that proved determinative in *Ohio* will have exercised adjudicatory authority outside the constraints of the CAA's venue framework.[427] Yet, because the Supreme Court chose to decide *Ohio v. EPA* before the underlying venue issue was resolved, the issuance of the stays will impair EPA's ability to enforce the Clean Air Act. After all, even if the stays are eventually overturned, *Ohio* will have stayed the Good Neighbor Plan for the duration of the merits litigation, and the temporary stay in *Ohio* might influence subsequent adjudication of the merits.[428]

Ohio illustrates how the phenomena of venue diversion and the shadow docket can combine to complicate the resolution of important questions of administrative and environmental law, and thereby obstruct enforcement of the underlying statute. But the substance of this critique is wholly absent from the Court's description of the underlying merits dispute in *Ohio* because the case appeared before the Court on an emergency application for a stay. The Court's decision to resolve *Ohio* through its shadow docket thus played a critical role in determining its substantive conclusion.

CONCLUSION

This Article has sought to identify and critique an emerging practice in the federal judiciary through which courts interpret venue provisions in a way that aggrandizes their own adjudicatory power at the expense of other courts. By defining the phenomenon of venue diversion and locating the statutory and constitutional guardrails that separate permissible statutory interpretation from ultra vires venue diversion, this Article seeks to provide regulators, litigators, and judges with a framework for ensuring the adjudication of venue disputes conforms with statutory and constitutional requirements. Despite its procedural guise, venue diversion has the potential to significantly disrupt lawful administration. Minimizing opportunities for venue diversion should thus be of paramount concern to federal legislators, regulators, and judges.

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425. *Ohio*, 144 S. Ct. at 2058–59 (Barrett, J., dissenting).
426. *See supra* II.B (describing *West Virginia*).
427. *See supra* Section II.B.1.
428. *See* Pierce, *supra* note 412, at 2.