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Nationwide Injunctions: Venue Considerations

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ABSTRACT. A criticism of nationwide injunctions is that they engender forum shopping, with litigants seeking out a court more likely to be favorable to them in order to obtain sweeping relief. This picture, though, oversimplifies the relationship between venue and the scope of injunctive relief, particularly for lawsuits against federal actors. Cabining nationwide injunctions would shift the incentives for litigant venue choice. Limitations on nationwide injunctions would place increased weight on early lawsuits in forums in which venue is proper based on the characteristics of the defendant, because any similarly situated litigant can bring suit there. Section 1391(e) of Title 28, the statutory provision for venue against federal actors, provides for broad scope for venue, including permitting venue based on the plaintiff's place of residence. Such limitations would lead to distortions in incentives for venue choice contrary to the purposes underlying the enactment of § 1391(e) as well as systematically disadvantage less well-resourced litigants. The debate over nationwide injunctions must take into account the effects of changes to the scope of injunctive relief on the venue choice architecture, and consider both venue and the scope of injunctive relief concomitantly in the institutional design of federal litigation.

A great deal of recent scholarship focuses on the legal propriety and normative desirability of nationwide injunctions[1] against federal agencies and officers.[2] Much of that scholarship centers on reduced litigant venue choice as

1. For simplicity, this Essay uses the popular term "nationwide injunctions" to describe injunctions that bar federal actors from implementing a policy or rule or otherwise taking an action affecting any individual, including beyond the named plaintiffs. Howard Wasserman has persuasively suggested that a more accurate descriptor would be "universal injunction," as the court bars enforcement by the government against any individual, anywhere. Howard Wasserman, *Problems of Scope and Nomenclature in Nationwide Injunctions*, PRAWFSBLAWG (Apr. 26, 2017), http://prawfsblawg.blogs.com/prawfsblawg/2017/04/problems-of-scope-and-nomenclature-in-nationwide-injunctions.html [http://perma.cc/9FAA-8TDJ].

2. *E.g.*, Samuel Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. (forthcoming 2017-18); Maureen Carroll, *Aggregation for Me, but Not for Thee: The Rise of Common Claims in Non-Class Litigation*, 36 CARDOZO L. REV. 2017, 2030-34 (2015) (analyzing remedial scope in the context of litigants' choices in litigation with an "inherently aggregate

one benefit of restricted availability of nationwide injunctive relief.[3] This Essay in part responds to recent high-profile nationwide injunctions of executive branch actions by courts perceived as favoring litigants opposed to the relevant administration's policies. During the Obama Administration, most notably, the Fifth Circuit upheld the Southern District of Texas's nationwide preliminary injunction of the President's expansion of the Deferred Action for Childhood Arrivals (DACA) program.[4] The Northern District of Texas also preliminarily enjoined nationwide enforcement of the Department of Education guidance regarding transgender students' access to bathrooms.[5] In 2017, the Ninth Circuit declined to stay the Western District of Washington's temporary restraining order barring enforcement of the Trump Administration's ban on travel to the United States by refugees and individuals from seven Muslim-majority countries.[6] It likewise upheld the District of Hawai'i's nationwide preliminary injunction of the revised ban, pared down to six countries.[7] The stereotypes of the Fifth Circuit as "conservative" and the Ninth Circuit as "liberal" are familiar.[8]

In the context of litigation against federal actors, the concern is that the availability of nationwide injunctive relief structures litigant choice to favor "forum shopping"—with plaintiffs seeking to bring cases in forums with greater odds of favorable rulings that will then apply universally—in courts with a particular perceived political valence. If such disparate odds in fact exist, the litigant's forum choice can make obtaining a nationwide injunction more likely.

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dimension"); Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615 (2017); Zayn Siddique, *Nationwide Injunctions*, 118 COLUM. L. REV. (forthcoming 2017-18); Getzel Berger, Note, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 93 N.Y.U. L. REV. (forthcoming 2017-18).

3. Bray, *supra* note 2, at 8-11; Siddique, *supra* note 2, at 42; Berger, *supra* note 2, at 4.

4. United States v. Texas, 809 F.3d 134 (5th Cir. 2015), *as revised* (Nov. 25, 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016).

5. *See* Berger, *supra* note 2, at 11; Noam Scheiber & Barry Meier, *Overtime Rule Is but the Latest Obama Initiative To End in Texas Court*, N.Y. TIMES (Nov. 23, 2016), http://www.nytimes.com/2016/11/23/business/overtime-rule-is-but-the-latest-obama-initiative-to-end-in-texas-court.html [http://perma.cc/XMF3-VN7Y] (focusing on an injunction preliminarily enjoining enforcement of a Department of Labor rule increasing the salary ceiling for automatic overtime); Nevada v. United States Dep't of Labor, 218 F. Supp. 3d 520 (E.D. Tex. 2016).

6. Washington v. Trump, 847 F.3d 1151, 1157 (9th Cir. 2017)

7. Hawaii v. Trump, 859 F.3d 741 (9th Cir. 2017).

8. *See, e.g.*, Bray, *supra* note 2, at 8-11.

But the premise that nationwide injunctions engender forum shopping deserves further interrogation, not solely from the perspective of the availability of the scope of injunctive relief but from the perspective of forum choice under the federal venue statutes. A closer examination of the venue system with respect to federal actors indicates that limitations on the availability of nationwide injunctions may change the incentive structure but will not necessarily reduce incentives for litigants to choose particular forums. Rather, the significance of forum choice will shift from having great weight in the first lawsuit in each circuit to instead mattering a great deal in each lawsuit filed—particularly if the first ruling in a circuit where venue is proper due to the defendant's residence or the grounds of the suit is a grant of injunctive relief. Section 1391(e) of Title 28, which delineates proper venue in civil litigation in which the United States or a federal officer or employee is a defendant, provides the individual litigant with multiple potential forums—to a greater extent than the general venue provisions, because under § 1391(e), venue is also typically appropriate where the *plaintiff* resides.[9]

To the extent that proposals for the cabining of nationwide injunctive relief are animated by a functional concern about forum shopping, that calculus is mistaken—or better expressed as concern with forum shopping in a single case with widespread repercussions. Moreover, the absence of nationwide injunctions has the potential to cut against the policies underlying the broader scope for proper venue in matters against the federal government under § 1391(e). Limitations on nationwide injunctions, in conjunction with litigants' incentives to choose particular forums based on prior favorable judgments, might lead to a heavier caseload for and greater importance for the decisions of the D.C. Circuit, as well as differential access to favorable judgments based on litigant resources. These are precisely the outcomes that § 1391(e)'s broader venue choice for litigants suing federal actors sought to avoid.

Part I of this Essay explicates the venue rules under § 1391(e) for suits in which the defendant is the United States or a federal actor, and outlines the policy concerns that led to the creation of broader venue vis-à-vis federal actors. Part II describes the potential consequences of those venue provisions for litigant choice in a system without nationwide injunctions. Part III explains how the venue provisions of § 1391(e) in such a system give rise to concerns about differential access to justice based on litigant resources and the overcrowding of the D.C. Circuit's docket—precisely the concerns that motivated the enactment of § 1391(e). The Essay, ultimately, seeks to foreground venue considerations in discussions of how the available scope of injunctive relief in-

9. 28 U.S.C. § 1391(e)(1)(C) (2012) (providing for proper venue where "the plaintiff resides if no real property is involved in the action").

fluences litigant choice of forum—and to suggest that the debate over nationwide injunctions must concomitantly consider the structure of the federal venue statutes, particularly § 1391(e).

I. VENUE IN SUITS AGAINST FEDERAL ACTORS: SECTION 1391(E)

Under the federal statute delineating proper venue, 28 U.S.C. § 1391, the plaintiff typically has more forum choices where the United States or its officer or employee is a defendant than where the defendant is a private party. The general venue provision, 28 U.S.C. § 1391(b), provides that venue is proper where "any defendant resides, *if* all defendants are residents of" the forum state or in a district "in which a substantial part of the events or omissions giving rise to the claim occurred."[10] Section 1391(e), the venue provision specific to the United States, its agencies, officers, and employees, makes venue proper, additionally, in a district in which the *plaintiff* resides, and it does not require that all defendants be residents of the forum state for venue to be proper where a defendant resides.[11] Section 1391(e)(1)(A) provides for proper venue in a district in which a defendant resides; § 1391(e)(1)(B), in a district in which "a substantial part of the events or omissions giving rise to the claim occurred," or where a substantial part of property at issue is located; and § 1391(e)(1)(C), in a district in which "the plaintiff resides if no real property is involved."[12]

Section 1391(e)'s broader venue provision is the result of Congress's choice in 1962 to decrease practical barriers to litigation against the federal government.[13] Previously, those suing a federal officer for declaratory or injunctive relief typically had to do so in the District of Columbia, where such officers generally resided for legal purposes.[14] The House and Senate Reports for the Mandamus and Venue Act of 1962 justified the change to broader venue provisions with the following rationale: "[W]here a citizen lives thousands of miles from Washington . . . to require that the action be brought in Washington is to tailor our judicial processes to the convenience of the Government rather than

10. *Id.* § 1391(b)(1), (2) (emphasis added). Section 1391(b) also provides for proper venue where personal jurisdiction is available if there is otherwise no jurisdiction in which venue is proper. *Id.* § 1391(b)(3).

11. *Id.* § 1391(e).

12. *Id.*

13. Mandamus and Venue Act of 1962, Pub. L. No. 87-748, 76 Stat. 744 (1962) (codified as amended at 28 U.S.C. § 1391(e)).

14. Stafford v. Briggs, 444 U.S. 527, 534 (1980) (describing this "legal fiction").

to provide readily available, inexpensive judicial remedies for the citizen."[15] As the Supreme Court subsequently explained in construing § 1391(e), the prior limitation led to "significant expense and inconvenience" for those plaintiffs located far from Washington, D.C.[16] With § 1391(e), Chief Justice Burger wrote for the Court, "the Congress intended . . . to provide nationwide venue for the convenience of individual plaintiffs."[17] That interpretation meshes with the language of the committee reports. And, in addition to the emphasis on access to justice, the institutional design of the federal courts also animated § 1391(e): Congress expressed an intent to decrease the number of actions litigated in the "already heavily burdened" District Court for the District of Columbia, and to provide for venue where judges might have greater expertise in localized issues, such as grazing permits or water rights.[18] The two overarching concerns that led to broadening venue against federal actors in § 1391(e), then, were litigant access to justice and the dispersion of litigation beyond the D.C. Circuit.

II. IMPLICATIONS OF CABINING NATIONWIDE INJUNCTIONS FOR LITIGANTS' CHOICE OF VENUE

In a system without nationwide injunctions, the choice architecture created by venue statutes still matters to individual litigants' choice of forum. In such a system, the policy rationales underlying § 1391(e) risk distortion. Of course, a single federal action or policy often affects many similarly situated individuals. The fallout in January 2017 from President Trump's executive orders barring refugees and individuals from seven Muslim-majority countries from entry into the United States dramatically illustrated this point: hundreds of people were detained or turned back at the U.S. border, and the Administration

15. H.R. Rep. No. 87-536, at 3 (1961); S. Rep. No. 87-1992, at 3 (1961).

16. *Id.*; *see also* Clark Byse & Joseph V. Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308, 308-09 (1967) (also describing those concerns as animating the Mandamus and Venue Act of 1962).

17. *Stafford*, 444 U.S. at 542; *see also* Schlanger v. Seamans, 401 U.S. 487, 490 n.4 (1971) (characterizing § 1391(e) as "enacted to broaden the venue of civil actions which could previously have been brought only in the District of Columbia").

18. H.R. Rep. No. 87-536, at 3; S. Rep. No. 87-1992, at 3; *see also* Cass R. Sunstein, *Participation, Public Law, and Venue Reform*, 49 U. CHI. L. REV. 976, 984 (1982) (describing factors that may make a civil action in the District of Columbia "quite burdensome" to the plaintiff, including counsel's residence far from the District of Columbia; the plaintiff's need to travel in order to witness the proceedings; and circumstances in which the parties must be present to supplement the record).

deemed thousands of visas cancelled.[19] Limitations on injunctive relief that exclude at least some similarly-situated individuals require those individuals to bring separate lawsuits to seek relief. And the structure of the federal courts incentivizes those other individuals to seek out forums with a prior favorable ruling on the same issue.

Under existing doctrine, non-mutual offensive issue preclusion is not available against the federal government—that is, a plaintiff cannot invoke a favorable judgment against the government in past proceedings to which the plaintiff was not a party.[20] Consequently, in litigation against federal actors, circuit precedent becomes particularly important to subsequent plaintiffs. Though issue preclusion is not available, subsequent decisions in the circuit will in all likelihood follow that decision.[21] A later plaintiff therefore has incentives, where multiple forums are available, to choose one in which the question has already been decided in a prior, similarly-situated plaintiff's favor.

On a systemic level, this incentive structure creates the possibility of repeated litigation of the same issue against the same federal actors in circuits with early decisions in plaintiffs' favor—including where the relevant district courts have decided for the plaintiffs, but most especially where the court of appeals for that circuit has done so. While not all plaintiffs may have access to forums based on their own residence, all plaintiffs will have access to those forums where venue is proper based on the defendant's characteristics—that is, where venue is proper under § 1391(e)(1)(A) or (B).[22] Consequently, the unavailability of a nationwide injunction in circumstances in which many litigants may

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19. Washington v. Trump, 847 F.3d 1151, 1156 (9th Cir. 2017) (describing the "immediate and widespread" effects of the issuance of the executive order, including "report[s] that thousands of visas were immediately cancelled" and that "hundreds of travelers with such visas were prevented from boarding airplanes . . . or denied entry"); Glenn Kessler, *The Number of People Affected by Trump's Travel Ban: About 90,000*, WASH. POST (Jan. 30, 2017), http://www.washingtonpost.com/news/fact-checker/wp/2017/01/30/the-number-of-people-affected-by-trumps-travel-ban-about-90000 [http://perma.cc/D8ND-Q8CK] (reporting that at least 940 people were denied boarding following the issuance of the first executive order and quoting from a State Department announcement that roughly 60,000 valid 2016 visas were affected by the travel ban).

20. United States v. Mendoza, 464 U.S. 154, 162-63 (1984) (justifying the absence of non-mutual offensive issue preclusion against the federal government as "better allow[ing] thorough development of legal doctrine by allowing litigation in multiple forums").

21. *But see* Michael Duvall, *Resolving Intra-Circuit Splits in the Federal Courts of Appeal*, 3 FED. CTS. L. REV. 17, 17-19 (2009) (noting that subsequent panels in the same circuit may reach differing conclusions due to intervening legal developments and that certain circuits have other narrow points of departure in which a subsequent panel may overturn a prior panel decision). Such circumstances, however, are rare. *Id.* at 19-20.

22. 28 U.S.C. § 1391(e)(1).

bring similar claims is likely to place particular pressure on decisions in circuits where venue is proper against federal government actors due to the nature of the claim or the residence of the defendant. Most notably, such a system would place pressure on the D.C. Circuit due to the frequent availability of venue against federal actors there.[23] Venue is often proper in the District of Columbia pursuant to § 1391(e) due to legal residence of federal defendants or the making of policy decisions there.[24]

This insight about the relationship between plaintiff-friendly judgments in the D.C. Circuit and litigant choice of venue is not new. Nor is the idea that the relationship has implications for the scope of injunctive relief. In *National Mining Association v. United States Army Corps of Engineers*, a decision permanently enjoining nationwide the enforcement of an Army Corps of Engineers rule that defined "discharge of dredged material," the D.C. Circuit characterized its decision regarding injunctive scope as pragmatic.[25] Given proper venue pursuant to § 1391(e)(1)(A) and (B) in the District of the District of Columbia, the injunction was designed to limit "a flood of duplicative litigation."[26] As Judge Williams, writing for a unanimous panel, explained, all those affected by the rule "with enough at stake and with astute enough lawyers" would bring actions in the District and achieve the same result as the original plaintiffs.[27] Subsequent decisions by district courts within the D.C. Circuit have relied on *National Mining* to affirm the circuit's power to implement a nationwide injunction in invalidation of an agency rule.[28]

A system without, or with more limited, nationwide injunctions does not definitively end forum shopping. As the D.C. Circuit's reasoning in *National Mining* indicates, limits on nationwide injunctive relief may mean the end of formal but not functional nationwide injunctions, because sophisticated liti-

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23. *See* Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 138 (2003) (noting that "the D.C. Circuit remains the court of choice for litigation against administrative agencies"); Sunstein, *supra* note 18, at 979.

24. 28 U.S.C. § 1391(e)(1).

25. 145 F.3d 1399, 1409 (D.C Cir. 1998).

26. *Id.*

27. *Id.*

28. Doe v. Rumsfeld, 341 F. Supp. 2d 1, 18 (D.D.C. 2004) (relying in part on *Nat'l Mining* in issuing a final injunction barring the government from requiring military personnel to receive anthrax vaccinations, but finding that, where agency regulations are invalidated, a nationwide injunction is not *required*); Am. Lands Alliance v. Norton, No. Civ. A 00-2339(RBW), 2004 WL 3246687, at *3 (D.D.C. June 2, 2004); United States Ass'n of Reptile Keepers, Inc. v. Jewell, 106 F. Supp. 3d 125, 128 (D.D.C. 2015) (cabining *National Mining* to the context of a permanent, not a preliminary, injunction, on the grounds that only then has the court "finally determined that the rule is unlawful"); *see also* Siddique, *supra* note 2, at 25 (noting *National Mining*'s argument).

gants may still be able to choose a forum where they can access a favorable prior judgment. In the absence of available nationwide injunctive relief, the significance of a single plaintiff-friendly ruling depends not on a judicial determination of the scope of relief but rather on the precedential or persuasive strength of the ruling. Such a system displaces the significance of forum choice from initial, high-profile lawsuits to each lawsuit by an affected litigant (because the forum determines the relevant precedent). In this displacement, the absence of nationwide injunctions together with the current venue regime may pose challenges to the structure of litigant venue choice along both policy dimensions that Congress sought to address with § 1391(e): pressure on the D.C. Circuit and litigant access to justice.

III. SYSTEMIC EFFECTS OF CABINING NATIONWIDE INJUNCTIVE RELIEF ON VENUE CHOICE

The unavailability of nationwide injunctions in some or all circumstances implicates the precise concerns that animated expansion of venue beyond the D.C. Circuit against federal actors in the Mandamus and Venue Act of 1962. First, where the precedential strength of plaintiff-friendly rulings in forums in which venue is proper based on the characteristics of the defendant becomes more important, the jurisprudential or ideological valence[29] of such forums likewise acquires greater significance. One of the factors animating arguments for cabining nationwide injunctions is the perceived ideological valence of the Fifth and Ninth Circuits.[30] Whatever the underlying truth of the perceptions that the Fifth Circuit rules in favor of "conservative" arguments and the Ninth in favor of "liberal" ones,[31] concern that formal nationwide injunctions lead litigants toward judges that tilt in a particular direction would not necessarily be ameliorated with an end to more broadly sweeping injunctive relief.

Instead, the ideological valence of those circuits in which venue is proper based on defendants' characteristics—in which all plaintiffs can bring suit—

29. By "ideological," I mean a perception that judges have policy preferences that may be coded as liberal or conservative that, then, influence their decisions.

30. *See, e.g.*, Bray, *supra* note 2, at 9 (describing injunctions issued by the Fifth Circuit against Obama administration actions and then going on to describe injunctions issued by the Ninth Circuit against Bush and Trump administration actions with the observation, "[t]he shoe also fits the other partisan foot").

31. For example, legal and political science scholars dispute the accuracy of the trope that the Ninth Circuit is particularly liberal. *See, e.g.*, John Schwartz, N.Y. TIMES, *'Liberal' Reputation Precedes Ninth Circuit* (Apr. 24, 2010), http://www.nytimes.com/2010/04/25/us/25sfninth.html [http://perma.cc/LT3F-SFES].

would correspondingly increase in significance. While the D.C. Circuit today is not typically viewed as having as strong an ideological valence as some other circuits,[32] historically that has not always been the case: in 1985, the *Washington Post* termed it "once the most progressive court in the nation."[33] If the D.C. Circuit became a particularly amenable forum for environmental groups or businesses seeking relief from labor regulations, for example, then only the set of litigants privileged by that valence would be able to access the functional equivalent of a nationwide injunction. Because other circuits would have fewer cases in which venue was proper due to characteristics of the defendants, the importance of the D.C. Circuit's ideological and jurisprudential leanings vis-à-vis that of other circuits would increase.

The confluence of the unavailability of nationwide injunctions and the current venue regime is most concerning, though, for access to justice for less sophisticated and less well-resourced litigants. For actions by the federal government, such as the promulgation of agency rules, litigation in the D.C. Circuit may be challenging for plaintiffs and attorneys located far away—as the Congress that passed the Mandamus and Venue Act understood. Moreover, a plaintiff's attorney must have the credentials to access a particular jurisdiction or ties to attorneys with such credentials. This requirement may be difficult to meet, particularly in actions that involve a time-pressure dimension, since attorneys are typically barred in one or a limited number of states. For under-resourced or *pro se* litigants, accessing the forum with the favorable ruling may be quite difficult. Finding an affordable lawyer able to litigate in a jurisdiction far from one's home state may be challenging, particularly on short notice. Logistical and financial hurdles to such filing may be greater. Consequently, where a federal action affects those of different class backgrounds, those who do not have access to resources may end up litigating in a less favorable jurisdiction. Litigation far from the plaintiff's home district also disproportionately prevents plaintiffs who lack financial resources from attending court if they wish, exacerbating disparities in the functional openness of the proceedings to litigants based on wealth.[34]

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32. To the extent that the party of the appointing president functions as a proxy for ideology, the D.C. Circuit currently has seven active judges appointed by Democratic presidents and four by Republicans. *See Judges*, U.S. COURT OF APPEALS, D.C. CIR., http://www.cadc.uscourts.gov/internet/home.nsf/Content/Judges [http://perma.cc/7U8Q-SVYD]. Six of the court's senior judges were appointed by Republicans, while one was appointed by a Democrat. *Id.*

33. Al Kamen, *U.S. Court's Liberal Era Ending*, WASH. POST (Jan. 27, 1985), http://www.washingtonpost.com/archive/politics/1985/01/27/us-courts-liberal-era-ending/9ebd2abe-edcc-481e-ab07-ef78d56319af/?utm_term=.685d4c6ef1b8 [http://perma.cc/3R6F-L9X7].

34. *See* Sunstein, *supra* note 18, at 984. *Cf.* Judith Resnik, *The Contingency of Openness in Courts: Changing the Experiences and Logics of the Public's Role in Court-Based ADR*, 15 NEV. L. J. 1631,

Such an outcome is obviously troubling in its potential to reify inequities in the legal system.[35] Indeed, it was one of the major concerns animating the venue reforms underlying § 1391(e).[36] The *National Mining* court's observation that only those individuals "with astute enough lawyers" would be able to make it to a forum in which venue is proper for all plaintiffs echoes this concern with disparate access based on litigant (or attorney) sophistication. Both the justification for venue provisions and the D.C. Circuit's consideration of the interrelationship of venue and nationwide injunctive relief evince this concern with equalizing litigant access—to the courts and to prior judgments—irrespective of resources.

It is true that the federal court system contemplates differing outcomes for similarly-situated individual litigants in that different circuits may reach different conclusions, and the system not only tolerates but builds in some disuniformity.[37] But in private litigation, that disuniformity is less likely to be the result of similar lawsuits stemming from the same action: plaintiffs have fewer choices of forums in which to file, and nonmutual offensive issue preclusion exists. Where the defendant is a federal actor, though, that broader range of forum choice and the absence of nonmutual offensive issue preclusion increases the odds of differing outcomes for similarly situated individual litigants alleging harm from the *same* purportedly wrongful act. And as described above, that difference may be due not to the happenstance of the action but to the plaintiff's sophistication in litigation. Moreover, such actions disproportionately implicate Washington, D.C.—unlike private-law cases.

A worst-case scenario might see the D.C. Circuit turn into the litigation equivalent of Logan Airport during the first week after the January 2017 travel ban executive order: overcrowded, with differential access based upon resources. In that week, before the district court in Washington issued a nationwide temporary restraining order barring implementation of President Trump's first travel ban,[38] only a district court in Massachusetts had clearly barred federal officials from detaining and physically removing travelers, and the scope of

1637-42 (2015) (describing historical conceptions of the function of open courts, including empowerment of individual claimants, and persistent debates regarding disparities in access based on economic resources).

35. AM. BAR ASS'N, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS, MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY (1994) (finding that forty-seven percent of low-income households had at least one legal need in the year preceding the survey); *see generally* BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA (Samuel Estreicher & Joy Radice eds., 2016).

36. *See supra* text accompanying notes 10-14.

37. *See, e.g.*, Berger, *supra* note 2, at 20.

38. Washington v. Trump, No. 2:17-cv-00141-JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017).

that order beyond the district was unclear.[39] Logan Airport, as the only international airport in the country at which travelers could feel relatively comfortable that they would not be detained, consequently became clogged with travelers, and individuals with the ability to pay for a last-minute flight change scrambled to obtain one of the few available tickets to Logan in order to reach the favorable jurisdiction.[40]

A similar, though less dramatic, set of circumstances risks playing out in the litigation context where nationwide injunctive relief is unavailable, forcing plaintiffs to face a crowded docket in the D.C. Circuit and differential access to the Circuit based upon litigant resources. Such an outcome would be in tension with § 1391(e)'s goal of expansive venue, which enables litigants to sue federal actors outside of the District of Columbia. This worst-case scenario may not happen, since it is contingent on the federal courts in the District of Columbia ruling in favor of the plaintiffs in the first instance. But the possibility of such a scenario, and the dependence on the composition of the D.C. Circuit as to whether and in what circumstances it comes to pass, is troubling.

CONCLUSION

Debates over the scope of injunctive relief need to take into consideration the venue statutes and the structural incentives they create for litigants. Because of venue rules, the absence of formal nationwide injunctions would not preclude the functional equivalent of forum shopping in lawsuits over particular federal governmental actions, at least for those with the resources and sophisticated legal representation to reach forums with favorable judgments and venue based on defendants' characteristics. Where nationwide injunctive relief is not available but there is a precedential ruling in a circuit containing at least one district in which venue is proper under § 1391(e)(1)(A) or (B), plaintiffs

39. Tootkaboni v. Trump, No. 1:17-cv-10154, 2017 WL 386550 (D. Mass. Jan. 29, 2017); Matt Zapotosky & Lori Aratani, *Travelers Previously Blocked by Trump's Immigration Ban Are Arriving in the U.S. Through Boston*, WASH. POST (Feb. 3, 2017), http://www.washingtonpost.com/news/post-nation/wp/2017/02/03/travelers-previously-blocked-by-trumps-immigration-ban-are-arriving-in-the-u-s-through-boston [http://perma.cc/PQ2K-69L8] (explaining that Lufthansa, for example, had posted on its website that travelers otherwise purportedly barred would be able to enter the country via flights to Boston).

40. *See, e.g.*, Zapotosky & Aratani, *supra* note 39; Steve Vladeck, *Lufthansa To Abide By Anti-Ban Court Order—Travelers Targeted by Trump Can Now Fly (to Boston)*, JUST SEC. (Feb. 2, 2017, 9:27 PM), http://www.justsecurity.org/37210/lufthansa-abide-anti-ban-court-order-travelers-targeted-trump-fly-to-boston [http://perma.cc/CS7S-HVJ5]. This account stems in part from observations by the Author during involvement in efforts to aid individual travelers stranded abroad or in transit following the issuance of the first travel ban on January 27, 2017.

will likely seek to litigate in that circuit if possible. As a result, without nationwide injunctive relief, the problem of forum shopping would shift from a categorical to a case-by-case basis—with corresponding inequities arising for differently resourced litigants. Such a system would place pressure on caseload and ideological valence of the D.C. Circuit in particular, since the decisions of that court would be more consequential given the frequent availability of venue in suits against federal actors sitting in the District of Columbia.

Current academic and popular discussions of the normative desirability of nationwide injunctive relief center on the cases brought in a single district with a ruling resulting in nationwide effect. But the conversation suffers from not taking into account the ways in which changes to the system in terms of courts' available output—the scope of injunctive relief—affect litigants' input—the forums in which they choose to file suit. The Congress that passed the Mandamus and Venue Act in 1962 viewed accessibility of the forum to plaintiffs and decreased litigation in the D.C. Circuit as particularly important features of the venue system's structural design.[41] Cabining of nationwide injunctions against federal actors implicates both of those considerations. A full evaluation of the merits of nationwide injunctions—and any ensuing legal reforms—must take into account the relationship between the available scope of injunctive relief and the choice architecture that § 1391 creates for litigants. Without concomitant consideration of the access to justice and institutional design concerns underlying § 1391(e), the conversation is incomplete.

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41. *See supra* notes 13-17 and accompanying text.