REPORT FOR THE
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

CHOICE OF FORUM FOR JUDICIAL REVIEW OF AGENCY RULES

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This report was prepared for the consideration of the Administrative Conference of the United States. The opinions, views, and recommendations are those of the author and do not necessarily reflect the views of the Conference (including its Council, committees, or members), except where recommendations of the Conference are cited.

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I. Project Overview

ACUS adopted several recommendations in the 1970s through 1990s that identified principles to guide Congress in choosing the appropriate forum and venue for judicial review of agency rules.[1] Given continuing questions and subsequent developments, including the increasing prevalence of and debate over nationwide injunctions, ACUS decided to revisit the subject and, as appropriate, make recommendations to guide Congress in determining the appropriate forum and venue for judicial review of agency rules—with respect to both existing programs and programs established in the future.

Topics the project addresses include:

- Contexts in which agency rules should be subject to direct review by the courts of appeals rather than the district courts;
- Contexts in which Congress should consider limiting the venue for judicial review of rules beyond what the ordinary rules of venue would permit;
- Contexts in which the courts should consolidate multiple challenges to a single rule in a single case in a single court, and the processes for doing so; and
- Common ambiguities and other drafting problems in the statutes governing the choice of forum for judicial review of agency rules.

II. Introduction and Background

Ever since *Marbury v. Madison*, courts and Congress have struggled to identify the right forum to review federal agency action.[2] "The Administrative Conference of the United States has long had an interest in forum allocation in administrative cases."[3] The Administrative Procedure Act (APA)

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[1] Admin. Conf. of the U.S., Recommendation 75-3, *The Choice of Forum for Judicial Review of Administrative Action*, 40 Fed. Reg. 27,926 (July 2, 1975); *see also* Admin. Conf. of the U.S., 91-9, *Specialized Review of Administrative Action*, 56 Fed. Reg. 67,143 (Dec. 30, 1991); Admin. Conf. of the U.S., Recommendation 91-5, *Facilitating the Use of Rulemaking by the National Labor Relations Board*, 56 Fed. Reg. 33,851 (July 24, 1991); Admin. Conf. of the U.S., Recommendation 82-3, *Federal Venue Provisions Applicable to Suits Against the Government*, 47 Fed. Reg. 30,706 (July 15, 1982); Admin. Conf. of the U.S., Recommendation 80-5, *Eliminating or Simplifying the "Race to the Courthouse" in Appeals from Agency Action*, 45 Fed. Reg. 84,954 (Dec. 24, 1980); Admin. Conf. of the U.S., Recommendation 76-4, *Judicial Review Under the Clean Air Act and Federal Water Pollution Control Act*, 41 Fed. Reg. 56,767 (Dec. 30, 1976).

[2] 5 U.S. (1 Cranch) 137, 148 (1803).

[3] Admin. Conf. of the U.S., Recommendation 88-6, *Judicial Review of Preliminary Challenges to Agency Action*, 53 Fed Reg. 39,585; *see also* David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 57 (1975).

establishes a general presumption in favor of judicial review of federal agency actions, and establishes a default standard by which that review takes place.[4] The APA's default rules govern unless a more specific statute provides a different process, and one of the most inclusive such examples is the Hobbs Act, also known as the Administrative Orders Review Act, which specifies the nature and procedures for judicial review of a number of different designated agency actions.[5] In addition, there are many "[a]gency-specific statutes . . . govern judicial review of actions of particular agencies (often, of particular actions of particular agencies) and may provide specifically applicable rules that displace the general provisions of the APA."[6]

Although the APA contemplates judicial review, the APA does not specify *which* court has jurisdiction to hear that challenge. Unless Congress provides otherwise, challenges to final agency action, including rulemaking, begin in a federal district court under the default federal question jurisdiction statute.[7] The default rules of venue in cases brought against the United States apply, allowing a plaintiff a choice of venue that includes the district where the plaintiff resides.[8] If there are numerous overlapping challenges across federal districts, the Judicial Panel on Multidistrict Litigation (MDL Panel) has discretion to consolidate the cases in a single forum for pre-trial proceedings.[9] A district court's final judgment can be appealed as in any other case to a court of appeals,[10] with discretionary certiorari review by the Supreme Court thereafter.[11]

But Congress often provides for exceptions to the default rule of general federal question jurisdiction beginning in federal district court. Many statutes—referred to here as direct review

[4] Mead & Fromherz, *Choosing a Court to Review the Executive*, 67 ADMIN. L. REV. 1, 7 (2015).
[5] 28 U.S.C. §§ 2341-2351; Pub. L. No. 81–901, 64 Stat. 1129 (1950).
[6] Admin. Conf. of the U.S., Recommendation 2021-5, *Clarifying Statutory Access to Judicial Review of Agency Action*, 86 Fed. Reg. 53,262 (Sept. 27, 2021).
[7] 28 U.S.C. § 1331.
[8] 28 U.S.C. § 1391(e).
[9] 28 U.S.C. § 1407.
[10] 28 U.S.C. § 1291.
[11] 28 U.S.C. § 1254.

statutes—"specify[] the court in which to seek review," by indicating "the level of court in which to seek review and the geographical venue in which to seek review."[12] These direct review statutes may, for example, specify that challenges must be brought in a particular court, such as the D.C. Circuit.[13] Or, these direct review statutes may follow the model of the Hobbs Act, and provide that a party seeking review of a listed agency action must do so in a federal court of appeals, and then offer the challenger a choice of geographical venue between the circuit where the challenger resides or the D.C. Circuit.[14] If several petitions for review are filed challenging agency action, a statute (inspired by an ACUS recommendation[15]) provides that they will be consolidated in front of a circuit court chosen by random draw. When Congress provides that challenges over a particular type of agency action may be brought in a specific court, courts usually interpret those statutes to divest other courts of jurisdiction to review the same agency action.[16]

Litigation challenging agency policymaking—particularly rulemaking, which is the focus of this project—differs from other types of civil litigation in several key respects. First, the agency's decision is primarily reviewed on an administrative record developed before the agency, and rarely is any judicial factfinding needed, or even permitted.[17] Second, litigation can have wide-ranging implications for the laws and policies that govern the nation—implications that reverberate well beyond the parties to a particular case.

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[12] Jonathan R. Siegel, Sourcebook of Federal Judicial Review Statutes 51–58 (2021), available at https://www.acus.gov/sites/default/files/documents/ACUS-Sourcebook-of-Federal-Judicial-Review-Statutes.pdf
[13] 15 U.S.C. § 78o(j)(5); *see also* Siegel, *supra* note 12, at 52, 55.
[14] 28 U.S.C. § 2343.
[15] Admin. Conf. of the U.S., Recommendation 80-5, *Eliminating or Simplifying the "Race to the Courthouse" in Appeals from Agency Action*, 45 Fed. Reg. 84,954 (Dec. 24, 1980).
[16] *E.g.*, Axon Enter., Inc. v. Fed. Trade Comm'n, 598 U.S. 175, 185 (2023) ("A special statutory review scheme, this Court has recognized, may preclude district courts from exercising jurisdiction over challenges to federal agency action. . . . But Congress []may do so implicitly, by specifying a different method to resolve claims about agency action.").
[17] Siegel, *supra* note 12, at 52

Although Congress has been vesting review of some agency decisions directly in the court of appeals for over 100 years,[18] it has not settled on one particular model for doing so. As the hundreds of examples documented in ACUS's *Sourcebook of Federal Judicial Review Statutes*[19] demonstrate, Congress uses a variety of different linguistic and design choices in allocating jurisdiction to review agency decisions. This often leads to ambiguities in how to interpret and apply jurisdictional-channeling statutes to the particular challenges to agency action brought by litigants.

In Part III, this report discusses some of the most common ambiguities in direct review statutes and offers recommendations for reducing jurisdictional uncertainty going forward. In Part IV, this report considers vertical jurisdictional design choices: whether jurisdiction to review agency rulemaking should be vested directly in the court of appeals, left to the default route of initial district court review, or something else. Although this report suggests that initial district court review adds more value than prior commentary has suggested, it ultimately concludes that there is not sufficient basis to depart from ACUS's longstanding preference for direct circuit court review, at least in the context of challenges to agency rules.

In Part V, this report considers horizontal jurisdictional design choices, which could also be described as geographic venue choices. The question in this part is whether challenges to agency action should be vested in a particular court or allowed to be brought where the plaintiff chooses. It ultimately opts for neither, preferring instead the random lottery process currently used in the circuit court, and arguing that it should be extended to challenges brought in the district court as well.

III. Common Interpretative Difficulties

With hundreds of statutory provisions that determine which courts have jurisdiction to review agency decisions, thousands of cases brought each year challenging agency action, and

[18] Mead & Fromherz, *supra* note 4, at 12–13.
[19] Siegel, *supra* note 12.

innumerable executive-branch actions ripe for challenge, it is no surprise that courts must frequently interpret and apply statutory forum language. This section highlights several of the most common interpretive challenges that courts face.

A. Background Interpretative Principles

The Supreme Court has long recognized a "strong presumption that Congress intends judicial review of administrative action."[20] With decades of precedent articulating this presumption, the Court assumes that Congress is aware of it and "is presumed to legislate with it in mind."[21] In years past, the Court demanded "clear and convincing evidence" before interpreting a statute to preclude review altogether.[22] In recent years, however, the Court has suggested the presumption only applies if the "plain meaning" of the statute is ambiguous.[23] At least some justices have argued that this "presumption favors not merely judicial review 'at some point,' but *preenforcement* judicial review."[24] This project does not address whether or when judicial review should be available, nor ; it focuses instead on the appropriate forum for judicial review when Congress determines review should be available.

The availability of *some* judicial forum does not answer which forum that should be, and courts are sometimes called to interpret the scope of direct review statutory provisions that channel challenges to a particular court, often the court of appeals. In 1985, the Supreme Court interpreted a statute vesting review in the court of appeals broadly, reasoning that "[a]bsent a firm indication that Congress intended to locate initial APA review of agency action in the district courts, we will not

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[20] Bowen v. Mich. Acad. of Fam. Physicians, 476 U.S. 667, 670 (1986); *accord, e.g.*, Guerrero-Lasprilla v. Barr, 140 S. Ct. 1062, 1069 (2020); Stark v. Wickard, 321 U.S. 288, 309 (1944).
[21] Salinas v. U.S. R.R. Ret. Bd., 141 S. Ct. 691, 698 (2021). *But see* Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1327-29 (2014) (expressing skepticism that Congress drafts legislative language with this presumption in mind).
[22] Abbott Lab'ys v. Gardner, 387 U.S. 136, 141 (1967), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99, 105 (1977). The Court has also explained that it assumes that "Congress knows []that legal lapses and violations occur" and anticipated judicial review to be available to remedy such errors. Mach Mining, LLC v. EEOC, 575 U.S. 480, 489 (2015).
[23] Patel v. Garland, 596 U.S. 328, 347 (2022).
[24] Shalala v. Ill. Council on Long Term Care, Inc., 529 U.S. 1, 45 (2000) (Thomas, J., dissenting).

presume that Congress intended to depart from the sound policy of placing initial APA review in the courts of appeals."[25] Although the Court cautioned that "[w]hether initial subject-matter jurisdiction lies initially in the courts of appeals must of course be governed by the intent of Congress and not by any views [the Court] may have about sound policy," the Court emphasized that the administrative record rendered unnecessary the fact-finding function of the district court, and having review begin in the district court before appealed to the circuit court would lead to "duplicative" proceedings in both courts.[26] The Supreme Court cited this presumption as recently as 2018, emphasizing that it applies only if a direct review statute is ambiguous.[27] It is unclear what weight, if any, the presumption carries with it today.

For a time, the presumption led to mischief in the lower courts. The Third Circuit, for example, quickly "espoused a liberal construction of [its] jurisdiction over agency actions 'absent clear and convincing evidence of a contrary congressional intent.'"[28] Under this approach, courts of appeals had direct-review jurisdiction not only over the matters that Congress specified, but anything "'functionally similar' or 'tantamount to'" those matters identified by Congress.[29] The Second Circuit went even further, presuming that a statute providing simply for "judicial review," without mentioning any court, vested jurisdiction directly in the court of appeals.[30]

The recent trend among courts is to focus more on the text that Congress uses rather than inferences about congressional intent. As textualism becomes the dominant mode of statutory construction, we would expect a presumption in favor of direct review to become less important. And, indeed, during the most recent decade, courts invoke the presumption of direct review far less frequently, moving towards a neutral assessment of jurisdictional language without the

[25] Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 745 (1985).
[26] *Id.* at 744.
[27] Nat'l Ass'n of Mfrs. v. U.S. Dep't of Def., 583 U.S. 109, 131-32 (2018).
[28] Conoco, Inc. v. Skinner, 970 F.2d 1206, 1214 (3d Cir. 1992) (citation omitted).
[29] *Id.*; *see also* Cal. Energy Comm'n v. U.S. Dep't of Energy, 585 F.3d 1143 (9th Cir. 2009).
[30] Clark v. Commodity Futures Trading Comm'n, 170 F.3d 110, 111 (2d Cir. 1999).

presumption.[31] Nevertheless, the Supreme Court has not repudiated the presumption, which continues to be invoked.[32]

When a provision providing a specific jurisdiction exists, courts often must decide not only what claims may be brought using that method, but also whether that provision precludes other avenues for review.[33] In 1994, the Supreme Court in *Thunder Basin* articulated a set of factors to help courts determine "whether [a challenger's] claims are of the type Congress intended to be reviewed within" a specific review statute.[34] Specifically, a suit is less likely to be precluded when (1) "a finding of preclusion could foreclose all meaningful judicial review," (2) the "claims [are] considered 'wholly collateral' to a statute's review provisions," and (3) the arguments do not implicate "the agency's expertise."[35] Using these factors as a guide, courts determine whether it is ""fairly discernible" from the "text, structure, and purpose" of the direct review provision that the statute precludes other routes for judicial review.[36]

In recent years, the Supreme Court has seemed more skeptical of implied preclusion of district court review. For example, the Court has repeatedly allowed pre-enforcement challenges to an agency's structure to proceed outside of the framework of a specific statutory review provision.[37] In a recent concurring opinion, Justice Gorsuch criticized *Thunder Basin* and argued that litigants should be able to bring suit in federal district court under the general federal question jurisdiction statute unless a direct review statute *expressly* precludes that route.[38] Nevertheless, the ACUS

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[31] William Ortman, *Rulemaking's Missing Tier*, 68 ALA. L. REV. 225, 236 (2016) (discussing D.C. Circuit case law).
[32] *E.g.*, Nat'l Ass'n of Mfrs., 583 U.S. at 132; Am. Petroleum Inst. v. U.S. Dep't of Interior, No. 2:21-CV-02506, 2022 WL 16704444, at *4 (W.D. La. Oct. 5, 2022).
[33] *E.g.*, Axon Enter., Inc. v. Fed. Trade Comm'n, 598 U.S. 175, 185 (2023) ("A special statutory review scheme, this Court has recognized, may preclude district courts from exercising jurisdiction over challenges to federal agency action. . . . But Congress []may do so implicitly, by specifying a different method to resolve claims about agency action."); *compare id.* at 205 (Gorsuch, J., concurring) (criticizing *Thunder Basin* and arguing that residual district court jurisdiction exists unless Congress expressly displaces).
[34] Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 212–13 (1994).
[35] *Id.*
[36] Elgin v. U.S. Dep't of Treasury, 567 U.S. 1, 10 (2012).
[37] *Axon*, 598 U.S. at 186; Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 490 (2010).
[38] *Axon*, 598 U.S. at 205–11 (Gorsuch, J., concurring).

Sourcebook data suggests that only a fraction (about 10%)[39] of current direct review provisions contain language precluding other courts from conducting the same review. Perhaps this reflects Congress's assumption, based on the accumulated judicial precedent, that direct review statutes were exclusive without needing to say so expressly. Or perhaps this means that Congress in fact only intended a few statutes to be exclusive. Either way, moving away from implied preclusion of other review could have consequences for jurisdictional provisions throughout the *U.S. Code*.

Recommendation: In light of the modern trend towards textualism as the primary mode of statutory interpretation, Congress should draft forum statutes based on the assumption that they will be interpreted according to their plain language, and not with a presumption of direct circuit court review.

B. Supplemental Jurisdiction and "Inextricably Intertwined"

In light of "the expense, delay, and inconvenience of requiring [challengers] to sever inextricably related claims, resorting to two discrete appellate forums, in order to safeguard their rights," the Supreme Court has cautioned against interpreting agency review schemes in a way that requires claim-splitting: splitting a challenge to a single agency decision in two different lawsuits.[40] In addition to whatever jurisdiction Congress gives a court of appeals through the terms of a direct review statute, courts of appeals have identified several related bases for asserting exclusive jurisdiction over closely related agency actions: (1) All Writs Act jurisdiction,[41] (2) the APA's

[39] On ACUS's *Statutory Analysis Spreadsheet*, only approximately 72 statutes are marked as containing a provision excluding judicial review (column P) or an exclusive jurisdiction provision (column AB), out of 652 identified. Available at https://www.acus.gov/appendix/statutory-analysis-spreadsheet.
[40] Perry v. Merit Sys. Prot. Bd., 582 U.S. 420, 436 (2017).
[41] 28 U.S.C. § 1651(a).

command that interim agency actions are reviewable with the final action,[42] (3) supplemental jurisdiction,[43] and (4) power to review "inextricably intertwined" actions.

The All Writs Act gives courts of appeals the power of issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[44] The Act does not create or extend jurisdiction, but rather provides courts with express authority to issue relief related to a case otherwise within the court's jurisdiction.[45] Since *TRAC v. FEC*, the D.C. Circuit has repeatedly staked out power under the All Writs Act regarding "any suit seeking relief that might affect the Circuit Court's future jurisdiction" under a direct review statute. [46] Under this approach, a statute that provides for direct review of rules would also include claims of unreasonable delay in issuing rules,[47] or claims against an agency's withdrawal of a previously issued rule.[48] In contrast, however, the D.C. Circuit concluded that a statute vesting authority to review promulgation of a rule did not also provide jurisdiction to review an agency's denial of a petition for rulemaking.[49] Nor would such a statute allow the court of appeals to review action related to future agency rulemaking.[50] The law in other circuits is less developed, but largely follows the D.C. Circuit's lead.[51] If a court of appeals has authority under the All Writs Act, then that implies exclusion of district court authority.[52]

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[42] 5 U.S.C. § 704.
[43] *See* Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 45-51 (1995) (discussing pendent appellate jurisdiction generally). "Today, the terms 'ancillary,' 'pendent,' and 'supplemental' are all used, essentially interchangeably." 13 FED. PRAC. & PROC. JURIS. § 3523 (3d ed.).
[44] 28 U.S.C. § 1651(a).
[45] *E.g.*, Clinton v. Goldsmith, 526 U.S. 529, 535 (1999).
[46] Telecomms. Rsch. & Action Ctr. v. FCC, 750 F.2d 70, 75-76 (D.C. Cir. 1984).
[47] *Id.* at 76; *In re* Nat'l Nurses United, 47 F.4th 746, 752 (D.C. Cir. 2022); Idaho Conservation League v. Wheeler, 930 F.3d 494, 502 (D.C. Cir. 2019).
[48] Int'l Union, United Mine Workers of Am. v. U.S. Dep't of Labor, 358 F.3d 40, 43 (D.C. Cir. 2004).
[49] Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin., 489 F.3d 1279, 1288 (D.C. Cir. 2007) (Kavanaugh, J.)
[50] Am. Petroleum Inst. v. U.S. Env't Prot. Agency, 862 F.3d 50, 74 (D.C. Cir. 2017), decision modified on other grounds on reh'g, 883 F.3d 918 (D.C. Cir. 2018); *In re* Murray Energy Corp., 788 F.3d 330, 335 (D.C. Cir. 2015).
[51] *In re* La. Pub. Serv. Comm'n, 58 F.4th 191, 192 (5th Cir. 2023); Clark v. Busey, 959 F.2d 808, 811 (9th Cir. 1992).
[52] Telecomms. Rsch. & Action Ctr. v. FCC, 750 F.2d 70, 76 (D.C. Circuit 1984).

Second, the APA provides that "[a] preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action."[53] When a statute vests jurisdiction in a court of appeals to review an agency decision, it presumably includes all "preliminary, procedural, or intermediate" actions connected to final action.[54]

Supplemental jurisdiction is another route allowing a circuit court power beyond the particular terms of a direct review statute.[55] Supplemental jurisdiction permits appellate courts "to hear claims over which [they] otherwise lack jurisdiction that are 'closely related' to claims over which [they] have jurisdiction."[56] This doctrine does not apply unless there is a basis for the court's jurisdiction in the first place; otherwise, there is "nothing to which pendant jurisdiction may attach."[57] The D.C. Circuit has emphasized that this is a discretionary form of jurisdiction that "must be exercised sparingly and only when substantial considerations of fairness or efficiency demand it."[58]

Finally, courts interpret jurisdiction to review a specified agency action to encompass other matters that are "inextricably intertwined" with that action[59]—thereby precluding district court jurisdiction over those matters, too.[60] However, as noted above, the Supreme Court has indicated greater skepticism in recent years for implicit preclusion of district court jurisdiction, which means these older cases should be relied upon with caution.

C. "Order" includes Rules

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[53] 5 U.S.C. § 704.
[54] *Clark*, 959 F.2d at 811.
[55] *E.g.*, Consolo v. Fed. Mar. Comm'n, 383 U.S. 607, 613 (1966). The supplemental jurisdiction that federal courts of appeals exercise is not based on statute. *Pendent Appellate Jurisdiction*, 16 FED. PRAC. & PROC. JURIS. § 3937 (3d ed.). The principal supplemental jurisdiction statute, 28 U.S.C. § 1367, applies only to district courts. However, in other contexts, the Supreme Court has allowed supplemental jurisdiction without a statutory basis. *E.g.*, United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 (1966).
[56] Loan Syndications & Trading Ass'n v. SEC, 818 F.3d 716, 723 (D.C. Cir. 2016).
[57] *Id.*
[58] *Id.* at 724.
[59] Ctr. for Biological Diversity v. U.S. Env't Prot. Agency, 861 F.3d 174, 186 (D.C. Cir. 2017); D&G Holdings, L.L.C. v. Becerra, 22 F.4th 470, 477 n.7 (5th Cir. 2022).
[60] Mokdad v. Lynch, 804 F.3d 807, 812 (6th Cir. 2015).

A perpetual challenge for courts is determining whether statutory language that provides for review of "orders"[61] allows for review of rules. On the one hand, the APA defines "order" to explicitly exclude rulemaking.[62] Some statutes, such as the Administrative Orders Review Act as amended, explicitly authorize review of "rules, regulations, or final orders" in some circumstances and only "final orders" in others,[63] suggesting a distinction between the two. On the other hand, courts have struggled to identify a Congressional purpose in allowing direct review of orders but not rules when both types of agency action are typically reviewed on the basis of an administrative record compiled by the agency.[64]

For decades, courts have interpreted statutory provisions providing review of "orders" in a particular forum to include rulemaking.[65] Since at least the 1970s, the D.C. Circuit has generally interpreted "order" broadly to include "any agency action capable of review on the basis of the administrative record,"[66] even describing this as "a tenet of administrative practice and . . . hornbook administrative law."[67] In the D.C. Circuit's view, if "there is no need for judicial development of an evidentiary record, there is no gain from vesting jurisdiction in district courts," so it is "sensible" to route challenges to rules to the court of appeals.[68] But this interpretive presumption can be overcome. For example, when a statute provides for direct review of all "final orders" in one part,

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[61] *E.g.*, 28 U.S.C. § 2342 (providing for direct review of specific "final orders").
[62] 5 U.S.C. § 551(6); *see also* Watts v. SEC, 482 F.3d 501, 506 (D.C. Cir. 2007) (Kavanaugh, J.) (interpreting judicial review statute's use of "order" with reference to APA definition).
[63] *Compare* 28 U.S.C. § 2342(1), (2) (providing for direct review of specified "final orders") *with* 28 U.S.C. § 2342(3) (providing for direct review of specific "rules, regulations, or final orders").
[64] Inv. Co. Inst. v. Bd. of Governors of Fed. Rsrv. Sys., 551 F.2d 1270, 1277 (D.C. Cir. 1977).
[65] United States v. Storer Broad. Co., 351 U.S. 192, 196 (1956). But see United Gas Pipe Line Co. v. Fed. Power Comm'n, 181 F.2d 796, 799 (D.C. Cir. 1950); *Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals*, Note, 88 HARV. L. REV. 980, 989 (1975) ("The traditional view has been that when a statute provides for review of 'orders,' review of rules does not fall within that statute's grant of jurisdiction to the statutory forum.").
[66] *Inv. Co. Inst.*, 551 F.2d at 1278.
[67] N.Y. Republican State Comm. v. SEC, 799 F.3d 1126, 1131 (D.C. Cir. 2015); *see also, e.g.*, Am. Fed'n of Lab. & Cong. of Indus. Orgs. v. Nat'l Lab. Rels. Bd., 57 F.4th 1023, 1031 (D.C. Cir. 2023).
[68] *N.Y. Republican State Comm.*, 799 F.3d at 1131.

but only "rules" issued under specific statutory authority in another, the court of appeals lacked original jurisdiction over a rule issued under other statutory authority.[69]

Other circuits have largely followed the D.C. Circuit's lead in interpreting "order" in judicial review provisions, although sometimes reluctantly.[70] For example, in a 1984 decision, then-judge Breyer disagreed with the D.C. Circuit's approach when he rejected the argument that a Federal Communications Act's provision allowing for review of an "order" included challenges to a rule.[71] Ten years later, the First Circuit held the Administrative Orders Review Act's vesting of jurisdiction in courts of appeals to review "orders" from the Nuclear Regulatory Commission included challenges to regulations, expressing its view that the outcome was not the best reading of the statute but was required by a "substantial body of precedent."[72]

This confusion is the product of more than a century of legislating, across different eras, judicial review of agency decisions, against the backdrop of evolving interpretive rules.

Recommendation: When Congress intends to include rulemaking in the scope of a direct review provision, it should refer to rules explicitly, instead of relying on statutory language of "order."

D. Jurisdiction to Review Rules Issued Under Particular Statutory Authorization

Another common interpretive challenge is when there is a dispute between the parties as to whether the agency has performed an action that falls within the direct review statute, such as when

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[69] Am. Petroleum Inst. v. SEC, 714 F.3d 1329, 1334 (D.C. Cir. 2013).
[70] *E.g.,* Magassa v. Mayorkas, 52 F.4th 1156, 1169 (9th Cir. 2022) (Nelson, J., concurring) ("[T]he plain meaning of 'order,' [in 49 U.S.C. § 46110, providing for direct review of TSA and FAA orders] . . . does not include agency policies or procedures.") (criticizing Ninth Circuit for following D.C. Circuit's lead); *cf.* Rockford League of Women Voters v. U.S. Nuclear Regul. Comm'n, 679 F.2d 1218, 1221 (7th Cir. 1982) (writing that the D.C. Circuit's interpretation "does some violence to the language of 42 U.S.C. § 2239(b), but not so much, we think, as cannot be justified by the benefits to judicial economy from confining judicial review of NRC determinations to the courts of appeals").
[71] New England Tel. & Tel. Co. v. Pub. Utilities Comm'n of Me., 742 F.2d 1, 6 (1st Cir. 1984) (Breyer, J.) (rejecting argument that Federal Communications Act's provision allowing for review of "order" included challenge of rule); *see also* PBW Stock Exch., Inc. v. SEC, 485 F.2d 718, 733 (3d Cir. 1973) (rejecting argument that Section 25(a) of the Exchange Act, providing for challenge of agency "order," included challenge to regulation).
[72] Citizens Awareness Network, Inc. v. United States, 391 F.3d 338, 346 (1st Cir. 2004).

there is a dispute over the substantive statutory authority empowering the agency to take an action. Many review statutes are added by particular pieces of substantive legislation: the Dodd-Frank Act, for example, provided substantive authorization to agencies to act, and then provided for direct review of challenges to agency action taken pursuant to that authority.[73] As such, many statutes for direct review of agency actions apply only when the agency is implementing particular statutory directives.[74] But agency action will often arguably be justified by multiple directives, not all of which carry a direct review provision. And challengers commonly argue that an agency's action is not justified by any of the agency's substantive statutory authority. Once more, there is the potential for significant overlap between the merits and jurisdictional inquiries because both ask whether the agency's action is justified by a particular statute.

Prior to 2018, courts of appeals differed in whether the statutory authority identified by the agency controlled the jurisdictional test. The D.C. Circuit concluded "the statutory authority claimed by an agency will determine which courts have jurisdiction to review its actions."[75] In *Wellife Products v. Shalala*, the petitioner challenged a Food and Drug Administration (FDA) food-labeling rule, invoking a direct review provision that vested the court of appeals with jurisdiction to review agency action taken under specific provisions of the Food, Drug, and Cosmetics Act. However, the agency did not rely on any of the provisions that came with direct review. The D.C. Circuit noted that "[a]rguably, the FDA could have promulgated the regulation" under a statutory provision that would trigger direct review, but since the agency did not cite that statute, there was no jurisdiction.[76] Years

[73] *E.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 § 753 (2010).
[74] Am. Fed'n of Lab. & Cong. of Indus. Orgs. v. Nat'l Lab. Rels. Bd., 57 F.4th 1023, 1033–34 (D.C. Cir. 2023) ("We are somewhat puzzled by Congress's decision to provide for direct review in this court for unfair labor practice cases but not for representation matters, given that both types of cases are heard on agency records and would seem to benefit equally from quick resolution in our court.").
[75] Wellife Prod. v. Shalala, 52 F.3d 357, 359 (D.C. Cir. 1995).
[76] *Id.*

later, however, the D.C. Circuit found that an agency's mere citation to a statute that triggers direct review, without any suggestion that it even "colorably" justified the rule, was not enough.[77]

In a different statutory context, the Second Circuit reached the opposite view when the statutory authority under which the agency acted was undisputed. Challengers contested a Department of Energy decision to delay and withdraw a rule adopted at the very end of the prior presidential administration. Among other things, the challengers argued the agency's failure to implement the rule as adopted was inconsistent with the Energy Policy and Conservation Act. Actions taken under that Act would be reviewed directly in the court of appeals. Challengers pursued this argument simultaneously in both the district court and through a direct petition for review. The Second Circuit concluded that, "although [the agency] failed to cite to the [specific statute] as the basis for its rulemaking authority, we believe the power to do so derives, if at all, from Congress's general grant of authority" to the agency under that statute. As a result, the court of appeals had jurisdiction to review the agency's decision.[78]

In 2018, the Supreme Court rejected the argument that an agency's "passing invocation" of a statute "control[led] our interpretive inquiry" into the applicability of a direct review statute.[79] In adopting the challenged rule, the agency had cited several statutory sections, including one that triggered direct circuit court review. The Court had little difficulty concluding that the agency "did not promulgate or approve" the challenged rule under the relevant statute, noting that the statute did not purport to give the agency power to adopt the interpretation set forth in the regulation.[80] Although this decision does not foreclose looking to the agency's description of what it did to

[77] Loan Syndications & Trading Ass'n v. SEC, 818 F.3d 716, 723 (D.C. Cir. 2016).
[78] Nat. Res. Def. Council v. Abraham, 355 F.3d 179, 194 (2d Cir. 2004).
[79] Nat'l Ass'n of Mfrs. v. U.S. Dep't of Def., 583 U.S. 109, 124 n.8 (2018).
[80] *Id.*

determine which court should review the action, the Court's approach strongly suggests that courts should decide the agency's authority for themselves rather than defer to what the agency says.

When an agency decision implicates two different provisions, one of which channels jurisdiction and one of which does not, courts struggle to decide where the case should be brought. For example, consider a recent, divided Eleventh Circuit decision evaluating which had jurisdiction to review the Department of Justice's denial of a requested religious exemption from federal drug laws.[81] The court discussed whether the denial of the requested exemption was made pursuant to the Controlled Substances Act (CSA) (which provides for direct review in the court of appeals)[82] or the Religious Freedom Restoration Act (RFRA) (which could be brought in district court).[83] There were strong arguments for each: the agency was authorized to grant exemptions under the CSA, but the substantive analysis whether an exemption was justified hinged on the RFRA. The majority concluded that a decision issued under both statutory provisions triggered the CSA's exclusive jurisdictional statute, while the dissent argued that both the language of the agency's decision, and the substantive basis for it, was more fairly described as based on the RFRA.[84]

In a different context, the Second Circuit allowed a dual-statute challenge to proceed in the district court. The court acknowledged a plaintiff could not "evade [a statute's] claim-channeling and jurisdiction-stripping provisions" by framing its claims as arising under a statute without a channeling provision.[85] Nevertheless, because the "gravamen" of the claim at issue arose under a

[81] Soul Quest Church of Mother Earth, Inc. v. Att'y Gen., United States, 92 F.4th 953 (11th Cir. 2023)
[82] 21 U.S.C. § 877.
[83] *Soul Quest*, 92 F.4th at 964.
[84] *Id.*
[85] Avon Nursing & Rehab. v. Becerra, 995 F.3d 305, 313 (2d Cir. 2021). The complaint initially brought claims under both the Medicare and the Medicaid Acts. The district court dismissed both under the channeling provision of the Medicare Act. The Second Circuit did not discuss the dismissal under the Medicare Act but reversed only on the dismissal of the Medicaid Act.

non-channeling act—and that claim "arises independent" of the channeling statute—it could proceed in district court.[86]

There is a related disagreement surrounding the amount of deference to be given to other agency determinations that carry jurisdictional weight.[87] For example, implementing ACUS Recommendation 76-4,[88] the Clean Air Act provides that challenges to "nationally applicable" EPA decisions must be brought in the D.C. Circuit, while regional decisions may be brought in the "appropriate" circuit.[89] However, the Act further provides that the D.C. Circuit is the sole court to hear challenges to any "action [that] 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."[90]

Despite this clear statutory language, the Fifth Circuit held that courts could not only review the EPA's determination of nationwide scope or effect de novo, but could do so without any deference to the agency.[91] In fact, the Fifth Circuit went further and adopted a "default presumption that venue is proper in this circuit," rather than the D.C. Circuit.[92] The Fifth Circuit's approach was criticized as "quite wrong" by D.C. Circuit Judge Silberman, who argued that the EPA "is in a much better position than a regional circuit court to evaluate the nationwide impact of [its] action. Congress recognized that comparative advantage by delegating this unusual authority to an administrative agency."[93]

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[86] *Id.*
[87] Generally, courts "accord no deference to the executive branch in construing [the court's] jurisdiction." NetCoalition v. SEC, 715 F.3d 342, 348 (D.C. Cir. 2013).
[88] Admin. Conf. of the U.S., Recommendation 76-4, *Judicial Review Under the Clean Air Act and Federal Water Pollution Control Act*, 41 Fed. Reg. 56767, 56768 (1976); 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, 760 (2020).
[89] 42 U.S.C. § 7607(b)(1).
[90] *Id.*
[91] Texas v. U.S. Env't Prot. Agency, 829 F.3d 405, 421 (5th Cir. 2016).
[92] Calumet Shreveport Ref., L.L.C. v. U.S. Env't Prot. Agency, 86 F.4th 1121 (5th Cir. 2023).
[93] Nat'l Env't Dev. Assoc.'s Clean Air Project v. U.S. Env't Prot. Agency, 891 F.3d 1041, 1053 (D.C. Cir. 2018) (Silberman, J., concurring).

It is understandable that courts would be reluctant to allow either challengers or agencies to effectively pick the court that is allowed to review a decision through strategic invocation (or not) of specific statutory authorities that trigger one mode of review over another. At the same time, looking to the face of a complaint, or the face of agency action, to determine where challenges should lie adds a measure of certainty, while requiring courts to assess independently whether an agency action satisfies jurisdictional requirements adds uncertainty.

Recommendation: Congress should draft jurisdictional statutes to try to minimize the potential of either challengers or agencies from manipulating jurisdiction based on whether a particular section of law is cited or not.

E. Agency Action v. Inaction

Another common problem arises when courts have jurisdiction to review a regulation's "promulgation," but are faced with an agency that has refused to promulgate—or has delayed or withdrawn—a regulation.[94] Courts tend to interpret such provisions literally, and find that they only allow for review of the *adoption* of a rule, and not other things that an agency might do with regard to rules, such as withdrawing,[95] delaying, or refusing to engage in rulemaking.[96] However, courts will sometimes deem a lawsuit as functionally equivalent to an attack on an existing regulation, and consider it on direct review even if the challenge is framed as attacking some other agency action.[97] Even if lacking jurisdiction under actions other than promulgation under the terms of a direct review

[94] *E.g.*, Clean Water Act, 42 U.S.C. § 7607(b)(1).
[95] Int'l Union, United Mine Workers of Am. v. U.S. Dep't of Lab., 358 F.3d 40, 42 (D.C. Cir. 2004).
[96] Bethlehem Steel Corp. v. U.S. Env't Prot. Agency, 782 F.2d 645, 655 (7th Cir. 1986) (holding that the court of appeals lacks jurisdiction over denial of petition to require agency to issue new regulations to supersede previously adopted set); Nat. Res. Def. Council v. U.S. Env't Prot. Agency, 542 F.3d 1235, 1242 (9th Cir. 2008).
[97] Maier v. U.S. Env't Prot. Agency, 114 F.3d 1032, 1038 (10th Cir. 1997) (holding that court of appeals has jurisdiction under the Clean Water Act over the EPA's refusal to promulgate new regulation because it is "akin" to a challenge to prior regulation).

provision, courts will sometimes find authority under the All Writs Act to superintend what the agency does.[98]

F. Agency Rule Adoption v. Application

Courts have also struggled to determine which jurisdictional path is appropriate for a party who wishes to challenge a rule that is being applied to their particular situation. It is not uncommon for a direct review provision to channel challenges to an agency regulation to a court of appeals while leaving other challenges to the district court, or vice versa.

For example, a direct review statute provides that the FCC's orders, including its regulations, are subject to review exclusively in the court of appeals, which has "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" those regulations.[99] The United States has authority to bring forfeiture and civil penalty actions in federal district court against those who violate FCC regulations.[100] May a defendant in a forfeiture or penalty action challenge the validity (on constitutional grounds) of the FCC regulations that they are accused of violating?

The Sixth Circuit thought the answer clear: a person facing a forfeiture proceeding in district court may raise any available defenses, including the validity of the agency's regulations.[101] An Eighth Circuit panel initially agreed,[102] but on rehearing concluded that the jurisdictional bar forbade assertion of such defenses in district court.[103] The Ninth Circuit sided with the Eighth, emphasizing that "the Communications Act's jurisdictional limitations apply as much as to affirmative defenses as

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[98] *In re* Nat'l Nurses United, 47 F.4th 746, 752 (D.C. Cir. 2022); Idaho Conservation League v. Wheeler, 930 F.3d 494, 502 (D.C. Cir. 2019).
[99] 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a).
[100] 47 U.S.C. § 504(a).
[101] United States v. Any & All Radio Station Transmission Equip., 204 F.3d 658, 667 (6th Cir. 2000).
[102] United States v. Any & All Radio Station Transmission Equip., 169 F.3d 548, 552 (8th Cir. 1999).
[103] United States v. Any & All Radio Station Transmission Equip., 207 F.3d 458, 463 (8th Cir. 2000) ("A defensive attack on the FCC regulations is as much an evasion of the exclusive jurisdiction of the Court of Appeals as is a preemptive strike by seeking an injunction. Whichever way it is done, to ask the district court to decide whether the regulations are valid violates the statutory requirements."); United States v. Neset, 235 F.3d 415, 419 (8th Cir. 2000).

to offensive claims."[104] Under the latter two decisions, the party facing forfeiture may not raise its constitutional challenge to the FCC regulations, but instead must take some step to present its argument to the court of appeals, by, for example "applying for a license or a waiver or by petitioning the FCC to institute rulemaking procedures to amend the [challenged] regulations, and then, if administrative relief is denied, by seeking judicial review in the courts of appeals."[105]

The jurisdictional problem in these cases arose because Congress divided jurisdiction to apply the Act between the district court and the circuit court. Although the circuit court had broad exclusive jurisdiction over affirmative challenges to agency action, the district court had exclusive jurisdiction over forfeiture proceedings. This underscores a recurring problem highlighted in this part: ambiguity tends to appear with every jurisdictional division.

IV. Review Options: Structural

A. Direct Appellate Review versus Default District Court Review

Congress must often decide where and how challenges to agency rulemaking will be conducted. The principal choice facing Congress today is between the default procedure, where a challenge begins in federal district court, or a direct review provision that channels the challenge directly to a federal court of appeals.[106] Under the current framework, cases initially filed in the district court can be appealed following judgment to the appropriate regional circuit, while cases vested directly in the court of appeals bypass the initial district court decision. Under either system, the Supreme Court has discretionary certiorari jurisdiction following the court of appeals' decision. The common interpretative difficulties raised by direct review statutes are discussed above, and the related question of whether to vest review in a *particular* circuit is discussed below.

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[104] United States v. Dunifer, 219 F.3d 1004, 1007 (9th Cir. 2000).
[105] *Neset*, 235 F.3d at 420; *see also, e.g.*, Mary V. Harris Found. v. FCC, 776 F.3d 21, 24 (D.C. Cir. 2015); Garett R. Rose, *Who's Allowed to Kill the Radio Star? Forfeiture Jurisdiction Under the Communications Act*, 79 U. CHI. L. REV. 1553, 1571 (2012).
[106] The author of this report respectfully but strongly disagrees with Judge Newsome's assessment that these jurisdictional questions are "pretty boring." Soul Quest Church of Mother Earth, Inc. v. U.S. Att'y Gen., 92 F.4th 953, 972 (11th Cir. 2023).

1. Arguments in favor of direct circuit court review.

Both ACUS and the Supreme Court have endorsed direct circuit court review of agency decisions that are appropriately resolved on an administrative record, which includes challenges to most rulemaking. The Supreme Court praised the "sound policy of placing initial APA review in the courts of appeals."[107] In 1975, ACUS issued Recommendation 75-3, which favored direct review of "rules promulgated pursuant to the notice-and-comment procedures" whenever "(i) an initial district court decision respecting the validity of a rule will ordinarily be appealed or (ii) the public interest requires prompt, authoritative determination of the validity of the rule."[108] Professors Goodman and Currie offered an influential report in support of ACUS Recommendation 75-3.[109] They concluded that, "in general, notice-and-comment rulemaking should be reviewed in courts of appeals."[110]

a. Efficiency

The primary argument in favor of direct circuit review, when there will be no district-court factfinding, is that of efficiency. If a challenge is going to be appealed anyway, it will be less costly and quicker to allow it to proceed directly in the court of appeals. In the 1980s, the Supreme Court repeatedly endorsed the efficiency gains from skipping the district court.[111] Litigating at two levels is costly for litigants, whose lawyers will brief and potentially argue essentially the same issues more than once. And starting in the district court imposes a complex case on the already busy district judge, whose efforts on the case will be repeated by de novo review of the entire matter on appeal.

But "initial circuit court review is only a cost-saver when there is an appeal. If no appeal is had, district court review is a clear bargain compared to initial circuit court review. After all, initial

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[107] Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 745 (1985).
[108] Recommendation 75-3, *supra* note 1, at 27,927.
[109] Currie & Goodman, *supra* note 3, at 57.
[110] *Id.*
[111] *E.g.*, United States v. Fausto, 484 U.S. 439, 445 (1988) ("[B]eginning the judicial process at the district court level, with repetition of essentially the same review on appeal in the court of appeals, was wasteful and irrational."); Harrison v. PPG Indus., Inc., 446 U.S. 578, 593 (1980) ("The most obvious advantage of direct review by a court of appeals is the time saved compared to review by a district court, followed by a second review on appeal.").

circuit court review commits three judges' efforts to a challenge; district court review demands only a single judge's attention."[112]

Thus, the efficiency premise behind direct review assumes that an appeal is inevitable, or at least highly likely. As Currie and Goodman explain, "[o]nly a small fraction of the cases processed by most agencies wind up in court, and a high proportion of those that do could be expected to reach courts of appeals even if required to pass en route through district courts."[113] Whether this expectation is empirically correct is unknown.[114] Outside of the administrative review context, most lawsuits filed in federal court will be resolved—whether through settlement, trial, or pretrial judgment—at the district court without an appeal.[115] This substantially reduces the workload of appellate courts, who deal with only a fraction of the federal docket. Moreover, overinclusive direct

[112] Mead & Fromherz, *supra* note 4, at 36.
[113] Currie & Goodman, *supra* note 3, at 6.
[114] Federal agencies promulgate approximately 3,000-4,000 rules each year. Clyde Wayne Crews Jr., Biden's 2023 Federal Register Page Count Is The Second-Highest Ever, Forbes (Dec. 29, 2023), available at https://www.forbes.com/sites/waynecrews/2023/12/29/bidens-2023-federal-register-page-count-is-the-second-highest-ever/?sh=696a80ed1432. But the number of appellate decisions resolving challenges to agency rules (construed broadly) in a given year is perhaps a few dozen. *E.g.*, Window Covering Manufacturers Ass'n v. Consumer Prod. Safety Comm'n, 82 F.4th 1273 (D.C. Cir. 2023); Flight Training Int'l, Inc. v. Fed. Aviation Admin., 58 F.4th 234 (5th Cir. 2023); Am. Pub. Gas Ass'n v. U.S. Dep't of Energy, 72 F.4th 1324 (D.C. Cir. 2023); Chamber of Com. of U.S. v. SEC, 85 F.4th 760 (5th Cir. 2023); Am. Fed'n of Lab. & Cong. of Indus. Organizations v. Nat'l Lab. Rels. Bd., 57 F.4th 1023 (D.C. Cir. 2023); Mexican Gulf Fishing Co. v. U.S. Dep't of Com., 60 F.4th 956 (5th Cir. 2023); Am. Petroleum Inst. v. U.S. Dep't of Interior, 81 F.4th 1048 (10th Cir. 2023); Ctr. for Biological Diversity v. U.S. Env't Prot. Agency, 82 F.4th 959 (10th Cir. 2023); GPA Midstream Ass'n v. U.S. Dep't of Transportation, 67 F.4th 1188 (D.C. Cir. 2023); State v. Raimondo, 84 F.4th 102 (2d Cir. 2023); Midwest Ozone Grp. v. U.S. Env't Prot. Agency, 61 F.4th 187 (D.C. Cir. 2023); Heating, Air Conditioning & Refrigeration Distributors Int'l v. U.S. Env't Prot. Agency, 71 F.4th 59 (D.C. Cir. 2023); Bd. of Cnty. Commissioners of Weld Cnty., Colorado v. U.S. Env't Prot. Agency, 72 F.4th 284 (D.C. Cir. 2023); XO Energy MA, LP v. FERC, 77 F.4th 710 (D.C. Cir. 2023); Sanofi Aventis U.S. LLC v. United States Dep't of Health & Hum. Servs., 58 F.4th 696 (3d Cir. 2023); Mil.-Veterans Advoc. Inc. v. Sec'y of Veterans Affs., 63 F.4th 935 (Fed. Cir. 2023); Solar Energy Indus. Ass'n v. FERC, 80 F.4th 956 (9th Cir. 2023); Lotus Vaping Techs., LLC v. U.S. Food & Drug Admin., 73 F.4th 657 (9th Cir. 2023); Heal Utah v. U.S. Env't Prot. Agency, 77 F.4th 1275 (10th Cir. 2023); California v. U.S. Env't Prot. Agency, 72 F.4th 308 (D.C. Cir. 2023); Babaria v. Blinken, 87 F.4th 963, 976 (9th Cir. 2023); Ohio v. Becerra, 87 F.4th 759, 768 (6th Cir. 2023); VanDerStok v. Garland, 86 F.4th 179, 185 (5th Cir. 2023). The total number of challenges brought (including challenges in district court) is unknown.
[115] Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 J. EMPIRICAL LEGAL STUDIES 659, 659 (2004) (reporting that appeals are filed in 10 percent of filed cases). In 2022, the federal courts reported nearly 6.5 civil cases filed in federal district court for every appeal filed to the circuit courts. U.S. SUPREME COURT, 2022 YEAR-END REPORT ON THE FEDERAL JUDICIARY, available at https://www.supremecourt.gov/publicinfo/year-end/2022year-endreport.pdf.

review "might risk burdening the courts of appeals with a myriad of trivial cases that might better end in the district courts."[116]

The argument for efficiency, therefore, depends on being able to identify a class of cases destined for the court of appeals. Although empirical study is warranted before drawing firm conclusions, it seems reasonable to assume that challenges to politically or economically significant agency rules are likely to be appealed. If that empirical assumption holds, it would be more efficient to vest those challenges likely to be appealed—and only those challenges—directly in the court of appeals.

The efficiency gains from direct review come with some caveats. As discussed in more detail below, the efficiency argument downplays the potential benefits from having initial district court review. But even on efficiency's own terms, the argument assumes that jurisdictional choices are being made based on accurate assumptions about what categories of cases are destined for eventual appeal.

Moreover, jurisdictional ambiguity could erode efficiency gains, particularly if it is common.[117] As discussed in greater detail above, direct review statutes may have contested meanings, with latent ambiguities that can trip up courts and litigants. Any consideration of efficiency must bear in mind the added cost to both litigants and courts of jurisdictional fights. And a litigant who guesses wrong and chooses the wrong court might litigate the merits extensively before being told they must do it all over again. This is why some courts encourage litigants to file simultaneous petitions in both circuit and district court[118]—a procedure that falls far from the efficiency rationale justifying direct review statutes.

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[116] Currie & Goodman, *supra* note 3, at 54.
[117] Mead & Fromherz, *supra* note 4, at 23.
[118] Nat'l Auto. Dealers Ass'n v. FTC, 670 F.3d 268, 272 (D.C. Cir. 2012).

The cost of jurisdictional uncertainty can also often mean lost claims. This cost is vividly illustrated by a constitutional challenge to a new agency rule that was initially filed in district court.[119] Unfortunately for the challengers, there was a direct review provision that channeled challenges to agency "orders" to the court of appeals, and required that such challenges be brought within 60 days of the order.[120] The challengers argued that did not apply to them, because they were challenging an agency regulation, but circuit precedent had interpreted "order" to include rules.[121] Thus, the court of appeals concluded that the challenge had to be brought in the court of appeals within 60 days; because the challengers failed to do so, they could not assert their First Amendment challenge to the regulation in a pre-enforcement posture.[122]

b. Expedited, authoritative resolution

Perhaps even more important than cost savings is the savings of time that comes from direct review.[123] If we could determine that challenges to agency regulations are likely to be appealed even if initially brought in district court, vesting review directly in the court of appeals reduces the time to final, authoritative judgment by the amount of time that would have been spent in the district court.[124] If an agency rule is invalid, it is better to know swiftly than to allow it to unlawfully control agency action and distort citizens' behavior. This is particularly true if a rule impinges on constitutional rights, which courts typically deem as an irreparable injury.[125]

Agencies also benefit from quick, authoritative rulings on the validity of agency rules. Many statutes, including the Hobbs Act, require challenges to be brought within 60 days, reflecting a view

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[119] N.Y. Republican State Comm. v. SEC, 799 F.3d 1126, 1128 (D.C. Cir. 2015).
[120] *Id.* at 1130.
[121] *Id.* at 1132.
[122] *Id.* at 1135.
[123] Ortman, *supra* note 31, at 242 ("The costs of delay are potentially more serious.").
[124] *E.g.*, Nat. Res. Def. Council, Inc. v. U.S. Env't Prot. Agency, 673 F.2d 400, 405 n.15 (D.C. Cir. 1982) ("National uniformity, an important goal in dealing with broad regulations, is best served by initial review in a court of appeals.").
[125] *E.g.*, Beatrice Catherine Franklin, *Irreparability, I Presume? On Assuming Irreparable Harm for Constitutional Violations in Preliminary Injunctions*, 45 COLUM. HUM. RTS. L. REV. 623, 634 (2014).

that it is best if challenges to agency decisions are resolved quickly.[126] That goal of expedited resolution is also furthered by vesting review directly in the court most likely to have the final say.

There is a particular benefit to agencies in having the validity of their regulations resolved *authoritatively*, rather than just tentatively. If a district court strikes down a rule—or stays it preliminarily—that can cause significant disruption for an agency, even if the rule is ultimately upheld by higher courts. The uncertainty that lower court decisions can cast on the agency's policy can lead to significant confusion. Once more, bypassing the district court and providing that the challenge can proceed directly in the highest court with an appeal of right provides for a single, more authoritative resolution of the challenge.

The difference in time to final resolution between a petition for review and a case filed in district court will easily amount to years. First, challenges in district court routinely lack the 10, 30, or 60-day time limit that typically governs petitions for review,[127] so challenges can usually be brought up to six years after a rule was finalized.[128]

Moreover, cases that begin in the district court might make more than one trip to the court of appeals, as when the district court initially dismisses the challenge on standing grounds, only to be reversed. For example, a challenge to a 2015 regulation remains pending without an appellate court having weighed in on the merits. The challenge was filed shortly after the rule was finalized in district court, which dismissed the challenge for lack of standing in 2016.[129] The D.C. Circuit reversed in 2019, and remanded to the district court to assess the challenge on the merits.[130] In 2023,

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[126] *Timeliness of Petition or Application*, 16AA FED. PRAC. & PROC. JURIS. § 3961.3 (5th ed.); PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051, 2059 (2019) (Kavanaugh, J., concurring).
[127] Siegel, *supra* note 12, at 43.
[128] 28 U.S.C. § 2401(a).
[129] Save Jobs USA v. U.S. Dep't of Homeland Sec., 210 F. Supp. 3d 1 (D.D.C. 2016).
[130] Save Jobs USA v. U.S. Dep't of Homeland Sec., 942 F.3d 504, 508 (D.C. Cir. 2019).

the district court determined that the rule was valid.[131] The challengers have filed an appeal, which as of February 2024, remains pending in the D.C. Circuit.

Of course, even direct review does not necessarily mean the court of appeals will be the final word on the rule's validity. The potential for Supreme Court review remains present. If multiple challenges across multiple circuits are permitted, there is also the possibility of conflicting decisions on a rule's validity—with the attendant confusion and disruption such conflict brings. Consolidation or restricted venue choices may alleviate worries of conflicting rulings and are discussed in more detail below. Still, vesting review directly in the circuit court mitigates these concerns by reducing the number of courts that can weigh in.

2. Arguments in favor of district court review, followed by appellate review.

As discussed so far, efficiency and expedited resolution are common arguments for placing review directly in the circuit court. Embedded in that analysis is the idea that "the district court is unnecessary here because the functions it ordinarily performs in the judicial system are either performed by the administrative agency itself or are relatively unimportant."[132] This section highlights some of the features of initial district court review that might add value, in at least some cases. This does not necessarily mean that the costs (in time and resources) of two-tier review are justified by the benefits that district courts add to the process, but these benefits are more significant than proponents of direct review have previously acknowledged.

Before proceeding further, I reject any argument against district court review that depends on the premise that district judges are typically "inferior" in quality to circuit judges, and for that reason add little value when confronted with difficult cases such as reviewing agency rulemaking.[133] I

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[131] Save Jobs USA v. U.S. Dep't of Homeland Sec., 664 F. Supp. 3d 143 (D.D.C. 2023).
[132] Currie & Goodman, *supra* note 3, at 5.
[133] *Id.* at 12 (noting that circuit court "superiority" is based on "the supposed overall higher caliber of the appellate bench"); Ortman, *supra* note 31, at 276 ("The perception of district judge inferiority makes it worthwhile to consider a two-tier structure that maintains the initial jurisdiction of circuit courts.").

am aware of no evidence that would support this view,[134] and I find this argument unpersuasive and expressly do not rely on it here.[135]

a. Factual development.

The district court *is* indisputably superior to circuit courts in resolving factual disputes, but that comparative advantage is usually less important in reviewing agency rulemaking. The Federal Rules of Civil Procedure and other aspects of district court litigation provide for the methodological identification of key factual disputes, mechanisms for obtaining evidence, and ultimately to resolve those factual disputes.[136] Under the APA's deferential standard of review, the record on which an agency action is reviewed is the administrative record that existed before the agency, not a new record developed in the district court.[137] Further, federal courts do not generally review agency factual decisions de novo, but under a deferential posture where an agency's findings of facts are given significant weight.[138] Nevertheless, there are a few areas where courts are asked to consider facts and evidence beyond the administrative record.

Standing. Most commonly, challengers to agency rulemaking must establish their Article III standing, including that they are injured "in fact" by what the agency has done. Indeed, this is a threshold requirement for every party invoking the court's power, and can be raised sua sponte by the court even if the agency does not challenge standing. Standing must be established before the court can reach the merits.[139]

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[134] To the contrary, "[a]t least in the federal courts, nothing about the process by which judges are selected or the terms under which they serve suggests that judges on appellate courts are inherently more competent than trial judges at resolving legal issues." Chad M. Oldfather, *Universal De Novo Review*, 77 GEO. WASH. L. REV. 308, 330–31 (2009).
[135] Mead & Fromherz, *supra* note 4, at 42.
[136] *E.g.*, Harrison v. PPG Indus., Inc., 446 U.S. 578, 593 (1980) (noting that without a full administrative record, "the district court is the preferable forum, since the tools of discovery are there available to augment the record, whereas in a court of appeals a time-consuming remand to EPA might be required"); *cf.* Adam S. Zimmerman, *The Class Appeal*, 89 U. CHI. L. REV. 1419, 1466-70 (2022).
[137] Camp v. Pitts, 411 U.S. 138, 142 (1973). "[R]ulemaking as originally conceived did not produce the closed record presupposed by the traditional appellate review model," but agencies adapted. Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 998 (2011).
[138] 5 U.S.C. § 706(2).
[139] Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101 (1998).

In the half century since Currie and Goodman wrote, the standing requirements have become increasingly demanding, and those seeking to invoke the court's authority must demonstrate that they have been harmed in a cognizable way.[140] The evidence supporting a particular challenger's standing will often not be included in the administrative record, but must instead be submitted separately for the court's consideration. Thus, the D.C. Circuit has a local rule directing petitioners whose "standing is not apparent from the administrative record" to submit "evidence establishing the claim of standing" along with their opening brief.[141]

The burden of evidentiary proof applicable to standing questions fits uncomfortably in cases brought directly in the court of appeals. Before a district court can reach a decision on the merits in any case, it must satisfy itself that it has jurisdiction, including that the challenger has standing.[142] This imposes a burden of proof on the challenger to support standing "with the manner and degree of evidence required" at the particular stage of litigation.[143] Before entering judgment for a challenger on a paper record, therefore, the court must apply the summary judgment standard: find that there is no genuine dispute of material fact on standing. If there are conflicting affidavits or a need to make witness credibility determinations, then the court must have an evidentiary hearing and adjudicate the standing question.[144]

The courts of appeals, however, are ill-equipped to resolve such factual disputes.[145] In theory, a circuit court must determine that the petitioner has standing before it can resolve a petition for review on the merits. When confronted with a genuine factual dispute over standing, the court must resolve that dispute in some way.

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[140] *E.g.*, TransUnion LLC v. Ramirez, 594 U.S. 413, 423 (2021).
[141] D.C. CIRC. R. 28(a)(7).
[142] *E.g.*, United States v. Texas, 599 U.S. 670, 675 (2023).
[143] Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992).
[144] United States v. 1998 BMW "I" Convertible Vin No. WBABJ8324WEM 20855, 235 F.3d 397, 400 (8th Cir. 2000).
[145] *Cf.* Zimmerman, *supra* note 136, at 1469–70.

In practice, however, appellate courts make standing decisions based on a paper record, including whatever declarations a petitioner submits. In 2010, Professors Wildermuth and Davies considered at length the issue of standing in cases filed directly in the court of appeals.[146] The authors conducted an empirical study of nearly 100 published decisions of federal appellate courts confronted with a factual challenge to standing on a petition for direct review of an agency decision.[147] In over half of the cases studied, the parties had to create a new factual record on standing in the court of appeals. Yet most of the time the court decided the standing issue by crediting whatever evidence the petitioner submitted as a matter of law.[148] As Wildermuth and Davies put it: declarations submitted to the court of appeals "were subject to none of the protections that normally would help ensure accuracy. There was no discovery, no cross-examination, and, obviously, the affiants' credibility could not be fully weighed because they testified on paper, not before the court."[149] The trend identified by Professors Wildermuth and Davis appears to continue. In our research, we found a number of circuit court decisions resolving disputes over standing on petitions for review, but none believing the issue to require the factual development tools of a district court or special master.[150]

Incomplete Administrative Record. There is a presumption that the record supplied by the agency is complete, but the challenging party may overcome this presumption with clear evidence that the record fails to include documents or materials considered by the agency in reaching its decision.[151] Although relatively rare, courts sometimes permit discovery beyond the administrative record.[152]

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146 Amy J. Wildermuth & Lincoln L. Davies, *Standing, on Appeal*, 2010 U. ILL. L. REV. 957, 960 (2010).
147 *Id.* at 990–94.
148 *Id.* at 927; *see also, e.g.*, Katz v. Donna Karan Co., L.L.C., 872 F.3d 114, 121 (2d Cir. 2017).
149 Wildermuth & Davies, *supra* note 146, at 979.
150 *E.g.*, Am. Pub. Gas Ass'n v. U.S. Dep't of Energy, 72 F.4th 1324 (D.C. Cir. 2023).
151 Nat. Res. Def. Council, Inc. v. Train, 519 F.2d 287, 291 (D.C. Cir. 1975); Bar MK Ranches v. Yuetter, 994 F.2d 735, 739 (10th Cir. 1993).
152 U.S. Dep't of Com. v. New York, 139 S. Ct. 2551, 2574 (2019); Comm. of 100 on the Fed. City v. Foxx, 140 F. Supp. 3d 54, 59 (D.D.C. 2015) (describing the standard).

District courts are better suited to oversee additional discovery should it be needed; however, because there is no evidence that this arises frequently, in most cases the district court's record-generating abilities will go unused.

It is likely that district courts are more inclined to order extra-record discovery than the court of appeals. In fact, I found no example of a circuit court demanding discovery beyond the administrative record, which sometimes happens in district courts. Whether district courts are too eager to deploy discovery tools in agency review cases, or circuit courts are too reluctant, is perhaps a matter of perspective. To the extent that circuit courts are disallowing extra-record discovery where it is indicated simply because they lack a process for providing it, that would counsel in favor of a district court's role in reviewing agency decisions. To the extent that district courts are too quick to order extra-record discovery, that would further counsel against their involvement in APA cases. I am not aware of compelling evidence either way. In one high-profile example, a district court ordered depositions of agency officials in a challenge to an agency decision adding a citizenship question to the upcoming census. Ultimately, the Supreme Court concluded that the "District Court should not have ordered extra-record discovery when it did," but also that the extra-record discovery demonstrated that the agency rationale relied upon was improperly pretextual.[153] Ultimately, extra-record discovery is rare and is not a strong reason for looping district courts into the review process.

Constitutional challenges. Challengers sometimes include a constitutional argument against the validity of the agency action they are challenging. Many constitutional challenges can be resolved as a matter of law and/or on the evidence before the agency and would therefore not benefit from the district court's fact-finding capabilities. However, at least some constitutional challenges need not comply with the usual exhaustion rules, so there is a chance that the administrative record contains

[153] U.S. Dep't of Com. v. New York, 139 S. Ct. 2551, 2574 (2019).

none of the evidence relevant to the constitutional question.[154] And some constitutional challenges may raise factual issues that require resolution.[155] The Supreme Court has described fact-finding in district courts as essential to providing "meaningful" judicial review for some constitutional claims.[156] Nevertheless, it is not clear that, at this point, there are many challenges to agency rules that raise a colorable constitutional challenge requiring fact treatment by a district court.

Equitable Discretion. Challenges to agency rules often seek a temporary stay/preliminary injunction, with the ultimate relief being vacatur of the rule. Both forms of relief call for the exercise of equitable judgment, which nominally includes an evaluation of particular facts.

For preliminary relief, the APA contemplates a stay of agency action,[157] which is assessed under the traditional factors that govern preliminary injunctive relief,[158] including not only likelihood of success on the merits but also irreparable harm, balance of the equities, and where the public interest lies.[159] These latter factors often depend on the exercise of judgment based on specific facts about the world, as exemplified by appellate courts reviewing factual findings for clear error[160] and the overall exercise of judgment for abuse of discretion.[161]

Similarly, for final relief, a court finding an agency rule to be unlawful must choose between vacatur, or remand without vacatur, based on, among other things, the potential disruption that would result from vacatur.[162] Here, too, an appellate court reviewing a district court's choice of relief does so only from a deferential abuse of discretion posture.[163]

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[154] Carr v. Saul, 593 U.S. 83, 93 (2021).
[155] *See, e.g.*, McCullen v. Coakley, 573 U.S. 464, 493 (2014).
[156] McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 483–84, 496-97 (1991); Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43 (1993).
[157] 5 U.S.C. § 705.
[158] Nken v. Holder, 556 U.S. 418, 426 (2009).
[159] Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).
[160] *E.g.*, Lindell v. United States, 82 F.4th 614, 618 (8th Cir. 2023).
[161] *E.g.*, John Doe Co. v. Consumer Fin. Prot. Bureau, 849 F.3d 1129, 1134 (D.C. Cir. 2017).
[162] Allina Health Servs. v. Sebelius, 746 F.3d 1102, 1110 (D.C. Cir. 2014).
[163] *E.g.*, Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, 985 F.3d 1032, 1051 (D.C. Cir. 2021).

Admittedly, this concern of preserving the fact-finding necessary to the exercise of discretion is likely more theoretical than real. Although nominally applying a deferential standard of review to lower courts' equitable findings, appellate court decisions often read as if they are assessing the equities de novo. Appellate courts, including the Supreme Court, regularly bring to bear their own equitable discretion without concern that they are unable to make such judgments without fact-finding.[164]

Resolving Factual Disputes when Needed. The inability of a circuit court to resolve factual disputes, if they arise, is a serious challenge to vesting jurisdiction directly in that court. The circuit court facing a genuine factual dispute has two principal options available to it: (1) ignore it (or decide that the factual dispute does not matter to the outcome), or (2) refer the factual dispute to a district court(?) better equipped to resolve the issue. The latter process is clumsy at best and threatens to significantly delay the final resolution of a case, while driving up costs for both litigants and the court.

The Hobbs Act contemplates the possibility of a factual dispute being channeled to the court of appeals, so it allows the circuit court to transfer a case with "a genuine issue of material fact" to the district court "for a hearing and determination as if the proceedings were originally initiated in the district court."[165] Although this mechanism appears only to apply to proceedings under the Hobbs Act,[166] the Ninth Circuit (at the Department of Justice's urging) has held it is available for petitions for review under other jurisdictional provisions as well.[167] But having a circuit court transfer a petition to a district court after the circuit court has conducted some preliminary

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[164] *E.g.*, Trump v. Int'l Refugee Assistance Project, 582 U.S. 571, 579 (2017).
[165] 28 U.S.C. § 2347(b)(3).
[166] 28 U.S.C. § 2341 (definition section limiting scope of chapter); *cf.* Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 488 n.10 (1999) (noting, skeptically, the Department of Justice's concession that the provision applied to an immigration case outside the purview of the Hobbs Act).
[167] *See Reno*, 525 U.S. at 496, nn.2–3 (Ginsburg, J., concurring); Gallo-Alvarez v. Ashcroft, 266 F.3d 1123, 1129 (9th Cir. 2001).

review would add a step, moving away from the efficiency rationale justifying direct review. I am aware of only a single instance where a circuit court actually transferred a case otherwise within the circuit court's jurisdiction to a district court for factual development.[168]

Federal Rule of Appellate Procedure 48 allows the court of appeals to "appoint a special master to hold hearings, if necessary, and to recommend factual findings and disposition in matters ancillary to proceedings in the court."[169] Circuit court appointment of a special master in direct review proceedings does not appear to be common. Westlaw reports only two appellate decisions appointing a special master in agency petition cases, both in the context of enforcement proceedings on a petition filed by the agency rather than a challenger.[170] Indeed, the rule's text leaves some doubt whether a master is appropriate for factual findings that are essential, rather than "ancillary," to the petition for review.[171]

It is also well-accepted that a court can remand a matter to a federal agency for further fact-finding if the reviewing court finds the administrative record inadequate in some way,[172] although it is doubtful that anything short of de novo review by a federal court, including of factual findings, would be satisfactory when faced with a constitutional question.[173]

The upshot is that a statute or rule could provide circuit courts with these or other mechanisms to resolve factual disputes when needed. But these processes are awkward and inconsistent with the usual role of federal appellate courts. If factual disputes are commonplace, the

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[168] *Gallo-Alvarez*, 266 F.3d at 1129 (transferring petition to review order of deportation for factual development).
[169] FED. R. APP. P. 48(a).
[170] Reich v. Sea Sprite Boat Co., 50 F.3d 413, 413 (7th Cir. 1995); Nat'l Lab. Rels. Bd. v. Grapetree Shores, Inc., 813 F. App'x 835 (3d Cir. 2020).
[171] Rafaelano v. Wilson, 471 F.3d 1091, 1099 (9th Cir. 2006) (Rawlinson, J., dissenting).
[172] *E.g.*, F.C.C. v. ITT World Commc'ns, Inc., 466 U.S. 463, 469 (1984).
[173] Stern v. Marshall, 564 U.S. 462, 492 (2011); Crowell v. Benson, 285 U.S. 22, 46 (1932); Martin H. Redish & William D. Gohl, *The Wandering Doctrine of Constitutional Fact*, 59 ARIZ. L. REV. 289, 300 (2017); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 986 (1988); *cf.* Axon Enter., Inc. v. Fed. Trade Comm'n, 598 U.S. 175, 198 (2023) (Thomas, J., concurring).

efficiency advantage of proceeding directly in the court of appeals evaporates.[174] Nevertheless, there is little evidence that, at least right now, courts commonly need to engage in factual development or resolve factual disputes in challenges to agency rules.

b. Narrowing and Clarifying the Issues

Even if a case will eventually make it to a court of appeals, and even if there are no factual issues that require district court resolution, initial district court review likely adds value by sifting through the material and issuing an opinion—one statistically likely to be affirmed[175]—which helps clarify the issues on appeal. Having a round of litigation and the benefit of a neutral decision, lawyers in the circuit court can refine and narrow the arguments on appeal in a way that likely leads to better decision-making.[176]

In a 2016 article, Professor Ortman invoked the epistemic value of diversity by arguing that judicial review should include one more judge's perspective.[177] Under this view, "[i]ncreasing the number of judges that hear rulemaking cases could reduce errors," and it increases the chance of including an additional perspective, otherwise missing among the three judges picked at the appellate court.[178] More judges improves the judiciary's final decision.[179]

Advocates for direct circuit review largely discount the value that district courts provide. For example, Currie and Goodman posit that, for challenges that end up on appeal, "a district court opinion defining and focusing the issues . . . is superfluous because opinions by the administrative

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[174] Harrison v. PPG Indus., Inc., 446 U.S. 578, 593–94 (1980) ("It may be seriously questioned whether the overall time lost by court of appeals remands to EPA [Environmental Protection Agency] of those cases in which the records are inadequate would exceed the time saved by forgoing in every case initial review in a district court.").
[175] *Just the Facts: U.S. Courts of Appeals,* ADMIN. OFF. OF THE U.S. COURTS (Dec. 20, 2016), https://www.uscourts.gov/news/2016/12/20/just-facts-us-courts-appeals ("Fewer than 9 percent of total appeals resulted in reversals of lower court decisions in 2015.").
[176] Ortman, *supra* note 31, at 247–48.
[177] *Id.* at 251–53.
[178] *Id.* at 257–58.
[179] *Id.* at 257–58.

law judge or by the agency itself will already have served that purpose."[180] This might be true in some adjudications of individual claims, but it is less persuasive in the context of challenges to agency regulations.[181] Agency rules may generate lengthy administrative records, and agency explanations for their rule can span hundreds of pages.[182]

Moreover, the key issues in a challenge to agency rulemaking are not necessarily the same as the question before the agency: a litigant challenging an agency rule may raise a procedural objection to how the agency acted, or a constitutional challenge to the agency's structure beyond the scope of the agency's decision-making authority. Further, judicial review typically involves application of deferential standards of review, which often include difficult questions about the level and type of deference that is required. The agency's decision usually will address none of these issues, but a district court decision will.

c. Additional Benefits of Two-Tier Review

Litigation involving agency rules can often have significant consequences for the executive branch's policy goals, and the state of the country we live in.[183] Direct review by a single court omits the two tiers of review—district court followed by an appeal of right to the circuit court—that virtually every other federal lawsuit is entitled to.[184] Thus, some of the most significant (in terms of widespread impact) federal lawsuits are given less process than cases with no impact beyond the immediate litigants.

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[180] Currie & Goodman, *supra* note 3, at 5–6 (footnotes omitted; emphasis added).
[181] Ortman, *supra* note 31, at 240 ("The rulemaking process, however, yields no legal opinions.").
[182] *E.g.*, Promoting and Protecting the Open Internet, 30-7 FCC Rcd. Supp. 5601, 2015 FCC LEXIS 1008 (March 12, 2015); Dist. Hosp. Partners, L.P. v. Sebelius, 973 F. Supp. 2d 1, 7 (D.D.C. 2014) (noting annual Medicare Inpatient Prospective Payment System rules are hundreds of pages), *aff'd in part, rev'd in part,remanded sub nom. by* Dist. Hosp. Partners, L.P. v. Burwell, 786 F.3d 46 (D.C. Cir. 2015).
[183] *E.g.*, Frank B. Cross, *Pragmatic Pathologies of Judicial Review of Administrative Rulemaking*, 78 N.C. L. REV. 1013, 1069 (2000).
[184] Ortman, *supra* note 31, at 227.

In his 2016 article, Professor Ortman outlines this position. Comparing the practice of federal litigation outside of administrative law, Ortman argues that it is "more likely that we have too few judicial tiers in rulemaking cases than that we have too many elsewhere. The implication is that our courts are probably getting too many rulemaking cases wrong."[185] He criticizes direct appellate review's "one-tier structure that likely produces needless error and may even exacerbate judicial politicization."[186]

Ortman points to benefits from two tiers of review beyond simply enhancing the ultimate decision of the court of appeals in a particular matter. First, having multiple courts weigh in increases the prospect of published disagreement, which, Ortman argues, "would provide valuable signals to outsiders."[187] This is particularly beneficial when a circuit court reverses a district court decision, as the district court decision may provide an analysis that the agency (or Congress) ultimately wishes to adopt.[188] Additionally, the mere existence of a disagreement suggests that this is an issue that is worthy of closer attention. To be sure, there are reasons to doubt that this signaling plays an important role in review of agency decisions. A divided circuit court opinion, or dissents from denial of rehearing en banc, likely provide more visible signals than a district court opinion that is reversed. We have become so accustomed to attributing significance to the judicial hierarchy that circuit court decisions reversing a district court are viewed not as a mere difference of opinion but as an authoritative determination that the district court was wrong in some objective sense.

There is also the potential benefit of percolation, which suggests that the judiciary's final resolution of a legal issue will be enhanced when that issue is litigated more times before it reaches the court with the final say.[189] Percolation is vividly demonstrated by the widespread view that the

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[185] *Id.* at 259.
[186] *Id.* at 268.
[187] *Id.* at 259.
[188] *Id.*
[189] *Id.* at 248.

Supreme Court benefits from allowing issues to develop in the lower courts, including ripening into splits before it weighs in.[190] In a narrow view of percolation, already contemplated above, the reviewing court benefits from having a lower court opinion to examine, and the advocates fine-tune their arguments on appeal to enhance the quality of their product.[191] But in a broader version, it is not simply having *one* lower court decision but *several*, each resolving the issue in different ways before the appellate court weighs in. The appellate court thus has the advantage of a wider range of perspectives, arguments, and fact-patterns on which to assess the legal issue. Whether this happens frequently in the context of agency rule review—and whether circuit courts genuinely consider the decisions of the district courts before it—are both empirical questions.[192]

B. Other alternatives

So far, the choice has been presented as a binary: single-judge district court review followed by an appeal of right to a three-judge circuit court versus direct review in a three-judge court of appeals. However, there are other possibilities to consider. This section briefly mentions selected other possible structures, along with some of the flaws these alternative structures present.

1. Single-judge/single-tier review

[190] *E.g.*, United States v. Texas, 599 U.S. 670, 702 (2023) (Gorsuch, J., concurring) (noting that an issue is likely to reach the Court eventually but until it does "we would greatly benefit from the considered views of our lower court colleagues"). The concept of percolation is in arguable tension with the Court's aggressive use of vacatur when litigation becomes moot before the Court has an opportunity to weigh in. *E.g.,* Chapman v. Doe by Rothert, 143 S. Ct. 857, 858 (2023) (Jackson, J., dissenting). The Court's choice to step in to erase lower court precedent before it is confronted with a live case or controversy presenting the issues discussed in that lower court decision suggests the Court perceives more harm than good in the existence of judicial decisions that are not its own. *Id.* (criticizing "contemporary practice" of mootness vacatur on several grounds, including that "our common-law system assumes that judicial decisions are valuable and should not be cast aside lightly, especially because judicial precedents are not merely the property of private litigants, but also belong to the public and legal community as a whole").

[191] Ortman, *supra* note 31, at 248.

[192] Scholars have argued that direct review provisions make it difficult to achieve systemic or class-wide relief, as those types of claims are better brought in district court. David Ames et al., *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV. 1, 25 (2020); Adam S. Zimmerman, *The Class Appeal*, 89 U. CHI. L. REV. 1419, 1436 (2022). Whether this is considered a feature or a bug of direct review provisions might depend on one's perspective. In any event, this argument holds greatest weight when considering judicial review of agency adjudications; challenges to agency rules can lead to widespread relief (vacatur of a rule) and resolution of major policy questions (by determining whether the agency policy, as set forth in the rule, is valid).

First, it is conceivable to provide for single-tier review in a court other than a three-judge court of appeals panel. For example, one might vest review in a single-judge district court but eliminate the appeal of right. Justice Rehnquist once argued for the elimination of an appeal of right in civil cases across the board.[193] An advocate of this position could point out that we are already willing to settle for a single-tier of review with the current direct review model, and this structure simply changes which court engages in this review. Further, because the APA's deferential review model assumes that agency decisions are presumptively correct,[194] reducing the need to give litigants access to more than a single judge.[195] From an efficiency perspective, taking the time of a single judge is a clear winner even over direct circuit review.[196] And although appeal of right remains available to most other litigants following final judgment as a theoretical matter, empirically, most civil cases are resolved exclusively by a district judge without further appeal.

The major drawbacks to a single-tier/single-judge review scheme include (1) the view (that I do not share[197]) that it would be unseemly to permit a single judge to dictate final resolution of a case without any opportunity to appeal even glaring errors,[198] and (2) the view that if multiple challenges can be brought against the same rule, and are not consolidated for decision, then there is a heightened risk of inconsistent rulings that cannot be ironed out through the normal appellate process.[199]

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[193] Linda Greenhouse, *Rehnquist Asks Limit to Automatic Appeals*, N.Y. TIMES (Sept. 16, 1984).
[194] Even as courts have moved away from deference to agency interpretations of the law, the APA still commands a generous arbitrary and capricious standard for the substance of agency decisions.
[195] *E.g.*, Denberg v. U.S. R.R. Ret. Bd., 696 F.2d 1193, 1196 (7th Cir. 1983) ("[T]o allow someone seeking judicial review of administrative action to get that review in the district court with a right of appeal to the court of appeals is to give him two judicial reviews of administrative action. That is too much . . . .").
[196] Currie & Goodman, *supra* note 3, at 9.
[197] Mead & Fromherz, *supra* note 4, at 23–24.
[198] *Id.* ("[I]t would be unseemly and demeaning for a single district judge to set aside the decisions of an expert administrative agency . . . ."); Currie & Goodman, *supra* note 3, at 13–14 ("[I]t is fair to say that judicial review by a federal court of more than one judge has come to be looked upon as a matter of basic right in all cases, civil and criminal, administrative and nonadministrative.").
[199] Currie & Goodman, *supra* note 3, at 15.

The problem of a single-tier/single-judge review scheme is thought to be particularly problematic from the perspective of an agency. If a single judge has the authority to vacate an agency's regulation (with only certiorari jurisdiction as a check), that allows a single individual to overturn the product of what was likely a lengthy deliberative process involving numerous subject matter experts and politically responsive leaders. For this reason, Judge Friendly suggested allowing only single-judge review for challenges to agency actions, but with an appeal of right available to the agency.[200] However, creating favored classes of litigants creates its own problems of seemliness, as the modern trend has been away from allowing particular litigants access to appeal rights that are denied to others. Ultimately, the case has not been made for vesting review in just a single judge without any right of appeal.

2. Two-tier review with Supreme Court as the second tier

The single-tier review proposals discussed so far contemplate discretionary Supreme Court review on certiorari jurisdiction, but it is also possible to contemplate appeal of right to the Supreme Court.[201] For example, the three-judge district court, followed by an appeal of right to the Supreme Court, was a common model used a century ago in important cases.[202] One can imagine several variations on this same theme, such as review by a single district judge with appeal of right to the Supreme Court, or direct circuit court review with appeal of right to the Supreme Court.

The primary drawback to this model is that no one seems to like it: not the Supreme Court, not other judges, not litigants, and not Congress.[203] For example, Judge Smith of the Ninth Circuit

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[200] HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 176 (1973). The district court would have the authority to certify difficult questions or questions that otherwise warrant additional review to the circuit court, through a process akin to the permissive interlocutory appeal of 28 U.S.C. § 1292(b). *Id.*

[201] *See* Alan Morrison, *It's Time to Enact a 3-Judge Court Law for National Injunctions*, BLOOMBERG LAW (Feb. 6, 2023), https://news.bloomberglaw.com/us-law-week/its-time-to-enact-a-3-judge-court-law-for-national-injunctions.

[202] Pub. L. No. 63–32, 38 Stat. 208, 219–20 (1913) (Interstate Commerce Commission); *see generally* Michael E. Solimine, *Congress, Ex Parte Young, and the Fate of the Three-Judge District Court*, 70 U. PITT. L. REV. 101 (2008).

[203] 17A FED. PRAC. & PROC. JURIS. § 4234 (3d ed.) ("Fortunately in 1976 Congress heeded the pleas from the Court, the Judicial Conference of the United States, and others, and virtually abolished the use of three-judge courts."); *see also, e.g.*,

argues against adopting this today, pointing out the flaws when it was used in the past: "(1) the significant burden this system placed on the federal judiciary, and (2) the impediment this system would create against the percolation of federal law."[204] Although the Supreme Court's current caseload is less now than it was in decades past, there are sound workload worries that justify allowing any additional appeals of right to the Court. For this reason, some fifty years ago Congress phased out almost all circumstances where a party had an appeal of right to the Supreme Court, and only very rarely enacts a statute with such a provision.[205]

3. Other Two-Tier Models

Scholars have proposed other ideas for a two-tier review structure primarily focused on appellate courts. In the 1970s and 1980s, there was considerable debate over the wisdom of a super circuit National Court of Appeal—proposed variously by the Commission on Revision of the Federal Court Appellate System (Hruska Commission), the Federal Judicial Center Report of the Study Group on the Caseload of the Supreme Court (Freund Commission), and others—that would resolve circuit splits and other cases referred to it by the Supreme Court or by circuit courts.[206] Some of the proposals contemplated that this new court would be ideally placed to review significant agency decisions with nationwide scope, either directly in the first instance, or as a second-tier of review following an initial stop in the circuit courts.[207]

H.R. Rep. No. 105-478, 25 (1998) (quoting from Department of Justice opposition to a proposal to create a new three-judge process because it would be "cumbersome, confusing, and inefficient, which in all likelihood will result in fewer judges–not more–having the opportunity to rule").

[204] Milan D. Smith, Jr., *Only Where Justified: Toward Limits and Explanatory Requirements for Nationwide Injunctions*, 95 NOTRE DAME L. REV. 2013, 2035 (2020)

[205] *Id.*

[206] COMM'N ON REVISION OF THE FED. CT. APP. SYS., REPORT OF RECOMMENDATIONS 5-10 (1975), available at https://www.ojp.gov/pdffiles1/Digitization/25944NCJRS.pdf; *see also* PAUL A. FREUND ET AL., FED. JUD. CTR., CASE LOAD OF THE SUPREME COURT 18, 27 (1972), available at https://www.law.berkeley.edu/wp-content/uploads/2019/03/Freund-Report-FJC-Report-of-the-Study-Group-on-the-Caseload-of-the-Supreme-Court-1972.pdf.

[207] Currie and Goodman, *supra* note 3, at 86–88.

The most significant challenge to entrusting a National Court of Appeals to serve as the second tier of review is that it doesn't exist. The proposal was quite controversial in its time, and subject to strong disagreement from both scholars and judges. Congress never adopted it, and the proposal largely fell out of favor. Congress ultimately authorized additional circuit judgeships, reducing the workload crisis that triggered calls for institutional reform,[208] and the Supreme Court significantly *reduced* the number of cases it accepted on certiorari, undermining the justification that the new court would help alleviate an overburdened Supreme Court.[209] With today's workload patterns, one might question the utility of an added layer of review between circuit courts and the Supreme Court, especially as many challenges to agency regulations end up being taken by the Supreme Court.

Yet some still consider the idea of a court other than the Supreme Court being able to review circuit court decisions to be an attractive possibility. An appeal of right in rulemaking cases to an en banc court is a possibility,[210] although it would be a tremendous burden on judges' workload and would face stiff opposition from the many judges who loathe en banc review.[211]

Professor Ortman proposes a creative process of inter-circuit peer review: "After a circuit court decides a rulemaking case, the losing party could have an appeal of right to a different circuit."[212] If the circuits disagree, there is an automatic circuit split ripe for the Supreme Court to review. If the circuits agree, however, that sends a strong signal that the decision is correct.[213] This approach has almost all of the downsides of the current two-tier system of district court review

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[208] *See Chronological History of Authorized Judgeships – Courts of Appeals*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/authorized-judgeships/chronological-history-authorized-judgeships-courts-appeals (last visited Mar. 6, 2024).
[209] Chief Justice John Roberts, Remarks at the Federal Judicial Center National Symposium for U.S. Court of Appeals Judges (Oct. 21, 2002), available at https://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_10-21-02.
[210] *Cf.* 52 U.S.C. § 30110 (vesting exclusive jurisdiction to construe act's constitutionality in D.C. Circuit en banc court).
[211] Ortman, *supra* note 31, at 270 (calculating that providing mandatory en banc of rulemaking cases in the D.C. Circuit would roughly double its workload); *cf.* Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. REV. 1373, 1384 (2021).
[212] Ortman, *supra* note 31, at 276–77.
[213] *Id.* at 276–80.

followed by a circuit appeal, including duplication and added costs, except that those costs are even greater because it taxes the time of six judges instead of four. Moreover, vesting initial review in a district court allows for fact-finding when needed, but that feature is missing from this model.

4. Transfer Model

A final possibility would be a transfer model: cases would be filed in a district court, which would be required to transfer the matter immediately to a circuit court upon deciding that certain criteria are met. This model draws on two existing processes. First, the procedure is akin to the process for establishing a three-judge district court in certain election law cases.[214] A request for a three-judge panel is presented to a single judge, who reviews it to decide if the request falls within the purview of the statute and is not "wholly insubstantial."[215] Second, on the other end of the discretion spectrum, district courts can certify, for interlocutory review to the circuit court, orders raising difficult legal issues. The circuit court then decides whether to accept the appeal.[216]

The transfer model could use either of these standards, or a new one better suited to agency rulemaking review. One possibility could be that if a litigant raises a (1) substantial challenge to (2) a rule that has gone through notice-and-comment rulemaking, and (3) has a nationwide impact, the district court would immediately transfer the case to the circuit court. The district court could not enjoin or invalidate an agency's rule itself, but the circuit court could.

Under this transfer model, if the district court's review happened quickly, and made only the limited review of determining whether the case warrants transfer, there could be substantial efficiency and timeliness gains over a full two-tier review. Further, having the district court as a screener of cases and issues and identifying those that merit more expedited resolution would aid the

[214] 28 U.S.C. § 2284.
[215] Shapiro v. McManus, 577 U.S. 39, 44 (2015).
[216] 28 U.S.C. § 1292(b).

circuit court's resolution of the case. Finally, having the district court already involved in the case makes it easier to rely upon it should there arise need for further fact development.

There are several potential downsides to this approach. Most significantly, the criteria for transfer would have to be specified in a way that avoids the ambiguity that plagues direct review statutes. One could imagine providing for transfer only under a more limited set of cases (i.e., if the challenge raises "significant unresolved issues," seeks "nationwide injunctive relief," or challenges a "significant" agency regulation), but these open the door to greater interpretative difficulties and would require more litigation at the pre-transfer stage, undermining the goals of efficiency and speed. But specificity creates a problem of its own: if the criteria restrict judicial discretion, then there is little need to have a court undertake a screening process.

The bottom line is that, from the perspective of primary vertical jurisdictional allocation options, the two top contenders are the direct circuit review model, and the default federal litigation model of district court followed by appeal of right to the circuit court. Alternatives to these two review models have more drawbacks than upsides, at least as the federal courts are currently structured.

Recommendation: Congress should provide that all challenges to agency rules that are the product of notice-and-comment rulemaking,[217] or formal rulemaking,[218] must be brought directly in the circuit court.

This report recommends that ACUS adhere to Recommendation 75-3's general view that challenges to agency rulemaking be placed directly in the court of appeals.[219] To be sure, there are reasons to think that a layover in district court adds value, and those benefits of district court involvement are more significant than prior scholarship and recommendations have

[217] 5 U.S.C. § 553.
[218] 5 U.S.C. § 553(c).
[219] Siegel, *supra* note 12, at 54.

acknowledged.[220] Whatever the arguments that a routine agency adjudications or other agency action should commonly be placed directly in the circuit court,[221] challenges to agency rulemaking are among the class of cases where the need for quick, definitive resolution is highest. It is likely that the benefits of direct circuit review for challenges to agency rulemaking outweigh the marginal benefits of initial district court review.

Because the current approach of vesting jurisdiction in the court of appeals only on an ad hoc basis can lead to jurisdictional uncertainty and inconsistency between statutory programs, Congress should consider adopting a statute vesting *all* challenges that are the product of notice-and-comment rulemaking or formal rulemaking. There are other forms of rules, including those that need not go through notice-and-comment process,[222] but having notice-and-comment rulemaking be the jurisdictional trigger for direct review ensures a measure of formality and the creation of an extensive record, and provides an incentive to agencies to engage in notice-and-comment rulemaking if they want to obtain swift resolution of any challenges. Moreover, vesting challenges to rules that are the product of notice-and-comment rulemaking reduces jurisdictional ambiguity by creating a relatively objective trigger that would justify direct circuit review.

This would be a slight departure from ACUS Recommendation 75-3 which called for circuit courts to be the default rule for challenges to notice-and-comment rulemaking but contemplated that some agency rule challenges would be too unimportant to warrant direct circuit review. These unimportant rule challenges have yet to be identified, and one might question whether *any* attempt to disrupt a rule adopted after notice-and-comment rulemaking is truly unimportant. Moreover, even if categories of unimportant challenges exist and could be identified, the added cost of jurisdictional

[220] *See also* Mead & Fromherz, *supra* note 4.
[221] *Id.*
[222] 5 U.S.C. § 553(d).

uncertainty in drawing those lines would likely swamp the efficiency gains that most strongly favor direct circuit court review.

V. Venue Choices

In addition to which level(s) of court should be involved in reviewing agency rulemaking, Congress must decide which venue(s) are best for that review to take place.

In general, federal civil venue rules are written with a somewhat permissive scope, allowing a plaintiff suing a corporation to pick any federal district court where a substantial part of the events giving rise to the lawsuit arose *or* any district with personal jurisdiction over the defendant.[223] Lawsuits against the federal government typically have even *more* venue choices, allowing the plaintiff the additional option of bringing suit in the district where the plaintiff resides.[224] This "offers a broad choice of venue for suits against federal officers, employees, and agencies."[225] Statutes providing for direct circuit court review often maintain plaintiff-focused venue, allowing challengers to file a petition for review in the regional circuit in which they reside or in the D.C. Circuit,[226] although some require that any petition be brought only in a designated court, usually the D.C. Circuit.[227]

This part first considers arguments for and against restricting venue to a particular court designated by Congress. The next part discusses possibilities for restricting venue beyond what the

[223] 28 U.S.C. §§ 1391(b), (c). In one extreme example, the patent venue statute had been interpreted to allow a plaintiff choice of any federal district court, led to extreme forum-shopping. J. Jonas Anderson, *Court Capture*, 59 B.C. L. REV. 1543, 1588 (2018) (describing patent venue rules and the concentration of patent cases in the Eastern District of Texas). The Supreme Court rejected that expansive interpretation of the venue rules in *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 581 U.S. 258, 263 (2017).
[224] 28 U.S.C. § 1391(e).
[225] *Particular Classes of Parties—United States*, 14D FED. PRAC. & PROC. JURIS. § 3814 (4th ed.).
[226] 28 U.S.C. § 2343.
[227] Siegel, *supra* note 19, at 54–55; *see also* S.1265 (Stop Judge Shopping Act) (granting "original and exclusive jurisdiction to the U.S. District Court for the District of Columbia over any civil action for declaratory or injunctive relief against the enforcement of a federal law if the relief extends beyond the parties involved.").

current rules allow, without requiring all cases be brought in a pre-designated court. Finally, this part considers methods of consolidating multiple challenges in a single court.

A. Restricted Venue

1. Arguments in favor of a designated court

At one end of the spectrum, Congress could designate one particular court as the appropriate venue for challenges.[228] For example, Congress has vested exclusive venue in the D.C. Circuit or the Federal Circuit over several types of agency rulemaking. There are several arguments in favor of vesting jurisdiction to challenge agency rulemaking in only one specific court.

a. Expertise

First, the judges of that court can gain expertise in reviewing agency rules.[229] Through repetition, the judges of the court gain experience with the regulatory regime and come into future cases with at least some familiarity with the basic concepts, jargon, and review structure that applies.[230] This expertise is most beneficial when reviewing particularly complicated regulatory programs, or that require extensive specialized knowledge.[231] This familiarity leads both to a gain in efficiency (by limiting the number of judges who have to undertake the burden of learning about the program) and decision-making quality. As now-Chief Justice Roberts once wrote, even when challenges to agency action can be filed elsewhere, "lawyers frequently prefer to litigate in the D.C. Circuit because there is a far more extensive body of administrative law developed there than in other circuits."[232]

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[228] These provisions are arguably better described as jurisdictional rather than venue, *cf. Lion Oil Co. v. U.S. Env't Prot. Agency*, 792 F.3d 978, 982 n.1 (8th Cir. 2015), but the difference between the two is not material for purposes of this report, which uses "venue" as a way of distinguishing from the structural jurisdictional choices discussed in the previous section. *See also* Siegel, *supra* note 12, at 54 (using "geographical venue").
[229] Susan Low Bloch & Ruth Bader Ginsburg, *Celebrating the 200th Anniversary of the Federal Courts of District of Columbia*, 90 GEO. L.J. 549, 575 (2002).
[230] Currie & Goodman, *supra* note 3, at 67-69.
[231] Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 330 (1991).
[232] John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 389 (2006).

b. Uniformity

Second, the related goals of uniformity and predictability are furthered if all cases challenging a category of agency action go to a particular court.[233] Both challengers and agencies alike can consider the composition of the court and the nuances of the relevant circuit's law. And by providing for just one court to review what the agency does, there is no risk of a circuit split, "promoting a uniform national body of law."[234]

c. End forum-shopping

One of the most compelling reasons in favor of a designated court is to eliminate forum-shopping.[235] As then-Judge Costa noted, forum-shopping in challenges to agency policymaking "poses serious problems for the courts."[236] With forum-shopping, a litigant picks a particular court (and, in extreme examples when there is only a single judge assigned to a forum, a particular judge[237]) thought to be disproportionately favorable to their cause. This allows for the law to be decided not by the average member of the federal judiciary but by someone peculiarly hostile to what the executive branch has done.[238] The law that agencies produce "is thus driven to the lowest, most critical common denominator," as agencies anticipate that their "rule must not only pass muster with a majority of the circuits or even with ninety percent of the circuits—a rule acceptable to eleven of the twelve circuits could easily be struck down by the twelfth, strategically chosen as the forum by a

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[233] Ryan Kirk, *A National Court for National Relief: Centralizing Requests for Nationwide Injunctions in the D.C. Circuit*, 88 TENN. L. REV. 515, 559 (2021).
[234] Bruff, *supra* note 231, at 331.
[235] JOANNA R. LAMPE, CONG. RSCH. SERV., LSB10856, WHERE A SUIT CAN PROCEED: COURT SELECTION AND FORUM SHOPPING 4–5 (2022), available at https://crsreports.congress.gov/product/pdf/LSB/LSB10856. To be sure, not everyone agrees that forum-shopping is a problem. *Compare, e.g.*, Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1530 (1995), *and* Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267 (1996), *with* Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting A Venue*, 78 NEB. L. REV. 79, 80 (1999). However, for purposes of this report I assume that "a system that limits opportunities to forum shop is generally preferable to a system that promotes such opportunities." Mead & Fromherz, *supra* note 4, at 51.
[236] Gregg Costa, *An Old Solution to the Nationwide Injunction Problem*, HARV. L. REV.: BLOG (Jan. 15, 2018), https://harvardlawreview.org/blog/2018/01/an-old-solution-to-the-nationwide-injunction-problem/.
[237] *Id.*
[238] *Id.*

regulated entity."[239] The problem of forum-shopping becomes even worse with the asymmetry of judicial review.[240] As Professor Bray put it, forum-shopping allows litigants to "[s]hop 'til the [regulation] drops." If the government wins ten cases but the eleventh vacates a rule, that one loss controls.[241]

Although expecting an agency rule to face a challenge in *every* circuit may be more hypothetical than real, agencies do often face repetitive challenges in different circuits. For example, six circuits have turned away challenges to the FDA's recent regulation of flavored e-cigarettes, while a single outlier circuit concluded that the regulation was arbitrary and capricious.[242]

Moreover, forum-shopping causes the public to view litigation as just a game, and judges as ideological partisans:[243] "[T]he federal judiciary's reputation as impartial and nonpartisan suffers

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[239] Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1251 (1999).
[240] Labrador v. Poe by & through Poe, 144 S. Ct. 921, 927 (2024) (Gorsuch, J., concurring) ("Just do a little forum shopping for a willing judge and, at the outset of the case, you can win a decree barring the enforcement of a duly enacted law against anyone."); U.S. Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring) ("And the stakes are asymmetric. If a single successful challenge is enough to stay the challenged rule across the country, the government's hope of implementing any new policy could face the long odds of a straight sweep, parlaying a 94-to-0 win in the district courts into a 12-to-0 victory in the courts of appeal. A single loss and the policy goes on ice . . . What in this gamesmanship and chaos can we be proud of?").
[241] Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 460 (2017); *see also, e.g.*, *Developments in the Law: District Court Reform: Nationwide Injunctions*, 137 HARV. L. REV. 1701, 1710 (2024); Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095, 2143 (2017) ("Currently individuals who seek to launch broadsides against executive agendas they disagree with can initiate litigation in jurisdictions more amenable to nationwide injunctions to achieve programmatic relief on the cheap."); Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615, 656 (2017) ("By obtaining a favorable ruling from a single trial court judge--sometimes effectively handpicked through careful choice of venue--a litigant may have a statute or regulation definitively construed or even invalidated throughout the entire nation.").
[242] *Compare* Magellan Tech., Inc. v. FDA, 70 F.4th 622 (2d Cir. 2023), *and* Liquid Labs LLC v. FDA, 52 F.4th 533 (3d Cir. 2022), *and* Avail Vapor, LLC v. FDA, 55 F.4th 409 (4th Cir. 2022), *and* Gripum, LLC v. FDA, 47 F.4th 553 (7th Cir. 2022), *and* Lotus Vaping Techs., LLC v. U.S. Food & Drug Admin., 73 F.4th 657, 661 (9th Cir. 2023), *and* Prohibition Juice Co. v. FDA, 45 F.4th 8 (D.C. Cir. 2022), *with* R.J. Reynolds Vapor Co. v. Food & Drug Admin., 65 F.4th 182, 192 (5th Cir. 2023).
[243] *E.g.*, Ezra Ishmael Young, *The Chancellors Are Alright: Nationwide Injunctions and an Abstention Doctrine to Salve What Ails Us*, 69 CLEVLAND ST. L. REV. 859, 885 (2021) (noting "clear evidence" that some nationwide injunctions were forum- and judge-shopped, which "undermine the legitimacy of judicial proceedings and threaten public confidence in the courts"); Miles v. Illinois Cent. R. Co., 315 U.S. 698, 706 (1942) (Jackson, J. concurring) ("The judiciary has never a favored this sort of shopping for a forum. It has sought to protect its own good name as well as to protect defendants by injunctions against the practice of seeking out soft spots in the judicial system in which to bring particular kinds of litigation.").

when the public watches judges in the 'red state' of Texas halt Obama's policies, and judges in the 'blue state' of Hawaii enjoin Trump's."[244]

Designating a single venue for challenges to agency rules reduces these concerns by eliminating the choice. However, to be effective, the exclusive venue provision must take care to prevent litigants from crafting their challenges to fit within/fall outside of the exclusive venue provision. For example, under the current system of some agency challenges allocated to circuit courts and others to district courts, a litigant may attempt to recast their challenge to end up in their preferred forum.[245] And, although usually thought of from the perspective of a plaintiff, the current scheme also permits the *agency* some leeway in choosing a forum by modifying the type of decision-making process it will undertake or the authorities that it invokes to support its rule. In an extreme example, the Clean Air Act allows the agency to effectively choose its forum by designating (or not) rules as having a nationwide impact.[246]

2. Arguments against a designated court

Notwithstanding the apparent benefits from vesting jurisdiction in a particular court, there are potential drawbacks. Indeed, today it is the exception rather than the rule for Congress to provide only a specific court with jurisdiction to review agency action.

a. Critiques of specialty courts

One of the most significant objections to vesting jurisdiction in a particular court is that it tends to turn the court into a specialty court, and most commentary is sharply critical of specialized administrative courts.[247] There are several reasons why. First, scholars have argued that specialist

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[244] Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1104 (2018); *see also* Costa, *supra* note 236 ("Most troubling, the forum shopping this remedy incentivizes on issues of substantial public importance feeds the growing perception that the courts are politicized.").
[245] Mead & Fromherz, *supra* note 4, at 52.
[246] 42 U.S.C. § 7607(b).
[247] RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 148 (1985); FRIENDLY, *supra* note 200, at 188; Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111 (1990); Currie & Goodman, *supra* note 3.

courts tend to be more prone to capture and ideologically driven decision-making.[248] The appointment process will be most closely watched by the groups most directly affected (which very well may be the agencies themselves).[249] In the context of reviewing agency rules, this can also mean more politicization in the nomination process,[250] which some have argued has already happened with the D.C. Circuit.[251] Further, the people likely to be nominated for a position on a specialty court will likely come with extensive experience—and pre-formed views—on how things should be done.[252] Judge Posner, for example, argued that there is a tendency of specialist judges to view every decision they face through the lens of the major ideological divide of the field, as opposed to simply trying to apply the law to the particular facts on which they are confronted.[253]

In contrast, scholars argue that generalist judges, by virtue of their exposure to wider range of matters, are more likely to remain well-balanced and better able to deal with broader changes in law and developments in society.[254] As Judge Leventhal wrote, "lifetime assignment to a specialized court poses the danger of judges walled in with narrow focus, and walled out from developments elsewhere in the society and law."[255] Or as Judge Ginsburg and FTC Commissioner Wright wrote, in the context of considering specialized antitrust courts, "exposure to other areas of the law may give the generalist insights unavailable to a specialist but nonetheless helpful in penetrating an argument or seeing an issue in a broader context, perhaps one that implicates limitations upon government

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[248] Anderson, *supra* note 223, at 1572; Paul R. Gugliuzza, *Rethinking Federal Circuit Jurisdiction*, 100 GEO. L.J. 1437, 1449 (2012). Commentators frequently cite the brief life of the Commerce Court as an example of failed judicial specialization, as the court was frequently reversed by the Supreme Court and is widely believed to have been captured by the railroad industry. *E.g.*, POSNER, *supra* note 247, at 154 n.38.
[249] *E.g.,* Henry J. Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634, 639 (1974); POSNER, *supra* note 247, at 154.
[250] Szymon S. Barnas, *Can and Should Universal Injunctions Be Saved?*, 72 VAND. L. REV. 1675, 1710 (2019).
[251] Mank & Solimine, *State Standing and National Injunctions*, 94 NOTRE DAME L. REV. 1955, 1979 (2019).
[252] *E.g.,* Friendly, *supra* note 249, at 639.
[253] *Id.*; POSNER, *supra* note 247, at 152; Cass R. Sunstein, *Participation, Public Law, and Venue Reform*, 49 U. CHI. L. REV. 976, 998 (1982).
[254] POSNER, *supra* note 247, at 156.
[255] Harold Leventhal, *Book Review,* 75 COLUM. L. REV. 1009, 1016 (1975).

institutions."[256] Judge Wood echoed all of these considerations and added a benefit from accountability:

> Generalist judges cannot become technocrats; they cannot hide behind specialized vocabulary and 'insider' concerns. The need to explain even the most complex area to the generalist judge (and often to a jury as well) forces the bar to demystify legal doctrine and to make the law comprehensible.[257]

Today, administrative cases are overrepresented in the D.C. Circuit, but there are plenty of other types of cases that the D.C. Circuit hears,[258] which might prevent it from revealing many of the flaws attributed to specialty courts.[259] Others might argue that the D.C. Circuit law tends to favor the government,[260] even under its current jurisdictional portfolio. Either way, there is a significant risk of the D.C. Circuit becoming less generalist should it become the exclusive venue for additional challenges to agency rules, which would very likely mean an increase in the percentage of its workload devoted to agency review.

b. Ossification of law

The flipside of predictability and uniformity is ossification: that law will get stuck in the past and not be allowed to grow. Were agency decisions to be reviewed only in a single circuit, there is no opportunity for circuit splits to develop. Either this reduces the chances of Supreme Court review,

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[256] Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Courts: Specialists Versus Generalists*, 36 FORDHAM INT'L L.J. 788, 804 (2013).
[257] Diane P. Wood, *Generalist Judges in A Specialized World*, 50 SMU L. REV. 1755, 1767 (1997).
[258] *E.g.*, John M. Golden, *The Federal Circuit and the D.C. Circuit: Comparative Trials of Two Semi-Specialized Courts*, 78 GEO. WASH. L. REV. 553 (2010).
[259] *Cf.* Gugliuzza, *supra* note 248, at 1467 (arguing that the Federal Circuit's range of cases is not sufficiently diverse to have a "generalizing" effect).
[260] *E.g.*, Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 278 (2014) (explaining D.C. Circuit's role in enshrining and expanding *Chevron* deference); Jonathan H. Adler, *Super Deference and Heightened Scrutiny*, 74 FLA. L. REV. 267, 275 (2022) ("Particularly in the U.S. Court of Appeals for the D.C. Circuit, judges are loathe to second-guess the scientific assumptions, judgments, and conclusions of regulatory agencies."); Amanda Leiter, *Substance or Illusion? The Dangers of Imposing A Standing Threshold*, 97 GEO. L.J. 391, 404 (2009) (criticizing D. C. Circuit's precedents on standing as uniquely stingy).

or the Supreme Court will be tasked with choosing which decisions to review without the benefit of other courts weighing in to point out counterarguments or competing perspectives.[261]

There are two main responses to the concern that the law will stagnate. The first is to suggest that it might be overstated. True, circuit splits may not arise, but as the experience of the Federal Circuit suggests, the Supreme Court is perfectly capable of intervening to correct errors that it perceives even without competing circuit opinions.[262] Second, even if there is some cost to decreasing the number of courts charged with wrestling with some legal issues, whatever downsides there are might well be worth the benefit of having uniformity and predictability in the law, with these virtues having a premium in the context of agency review.

c. Access to justice/litigant costs

Another potential downside of providing for venue in only one designated court is that it might increase the cost for the challenger. The usual rules of venue appreciate that distance from the courthouse increases travel costs for litigants and their attorneys. Seizing on this concern, one author argues that the same considerations apply with full force to challenges to agency rules, contending that "litigation in the D.C. Circuit may be challenging for plaintiffs and attorneys located far away," and that burden will fall hardest on challengers who lack financial resources.[263] Another version of this argument suggests that "adjudication in Washington is undesirable because it works against local control of and citizen participation in governmental affairs."[264]

While access to justice is an important consideration when designing venue rules generally, there is no reason to think that this is a major concern in the context of challenges to agency rules. Non-frivolous pro se litigation against agency rulemaking is vanishingly rare, and with the factual

[261] James R. Maxeiner, *Legal Indeterminacy Made in America: U.S. Legal Methods and the Rule of Law*, 41 VAL. U. L. REV. 517, 550 (2006).
[262] Timothy B. Dyk, *Thoughts on the Relationship between the Supreme Court and the Federal Circuit*, 16 CHI.-KENT J. INTELL. PROP. 67 (2016).
[263] Kate Huddleston, *Nationwide Injunctions: Venue Considerations*, Forum, 127 YALE L.J. 242, 250 (2017).
[264] Sunstein, *supra* note 253, at 995.

record established before the agency, there is typically no need for the named litigant to ever appear in court.[265] Moreover, challenges to rules are typically brought by well-resourced litigants—states, industry, or public interest law firms—for which distance is not a significant barrier. As Cass Sunstein wrote: "Lawsuits are not town meetings; citizen participation is all but irrelevant."[266]

Citing attorney licensure requirements, one commentator further argues that forcing a party to litigate in a distant forum may deprive them of their lawyer of choice.[267] This concern also seems negligible. For starters, although many federal district courts have stringent admission requirements, the District Court for D.C. and federal appellate courts are much more welcoming; and any choice to restrict venue to one of those courts would not pose a meaningful barrier to litigation through one's attorney of choice. But, moreover, given the nuances and complexity of administrative law practice, I suspect that nearly all attorneys tapped to challenge an agency rule will already be experienced administrative law litigators who are likely to be admitted in the courts that are designated to hear such cases.

The argument about plaintiff convenience loses further traction when challenging an agency regulation—especially when the challenge seeks broad relief such as vacatur—as there are many other interests besides the named plaintiff at stake.

On the flip side of any venue conversation is the burden on the government.[268] Just like with the challenger, this does not seem to be a very important factor in the context of challenges to agency regulations. The Department of Justice has United States Attorney's Offices across the country, and even though challenges to agency rules will likely be handled by attorneys from Washington, D.C., these attorneys can travel for whatever oral argument might be held without

[265] As noted above, even factual disputes over standing are regularly resolved on papers rather than live testimony.
[266] Sunstein, *supra* note 253, at 995.
[267] Huddleston, *supra* note 263.
[268] Sunstein, *supra* note 253, at 992 ("[R]epresentatives of the United States Government—primarily Justice Department attorneys—will be required to traverse the country to defend lawsuits.").

imposing a significant burden on the public fisc. In sum, the cost factor neither compels nor precludes restricting venue to a particular court.

B. Temporary Judicial Assignments

Rather than designate an existing court, like the D.C. Circuit, as the exclusive venue for challenging rules, Congress could create a new court with rotating membership. One author, inspired by the FISA Court, proposed a court consisting of "twelve borrowed district court judges—one from each geographic circuit—that would be appointed by the Chief Justice of the Supreme Court to serve two-year terms."[269] By limiting membership to a two-year term, this court would avoid many of the problems that otherwise are thought to plague specialty courts.

Judge Costa proposed a statute requiring certain challenges to agency action to "be randomly assigned to one of the regional circuits for selection of the three-judge panel."[270] This proposal also eliminates forum-shopping, and if the circuit chief judge assigns judges fairly, should create a balanced tribunal to review the agency's decision. This does mean that the judges reviewing the agency's rule are unlikely to have special sophistication or experience with administrative law, although whether this is a beneficial feature or a bug is perhaps in the eye of the beholder. Moreover, the process for identifying the circuit and selecting the judges may prove too cumbersome for cases with extremely urgent time demands.

Another iteration of Judge Costa's plan would be to randomly assign cases to a circuit that would resolve the case using its standard three-judge panel practice, instead of calling for a special procedure for identifying the three judges who would serve.[271]

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[269] Barnas, *supra* note 250, at 1708 (discussing proposal in context of dealing with nationwide injunctions).
[270] Costa, *supra* note 236; *see also* Thomas O. McGarity, *Multi-Party Forum Shopping for Appellate Review of Administrative Action*, 129 U. PA. L. REV. 302, 372 (1980).
[271] Ronald M. Levin, *Vacatur, Nationwide Injunctions, and the Evolving APA*, 98 NOTRE DAME L. REV. 1997, 2030 (2023).

Still another proposal would apply the logic of random selection to district courts, requiring that challengers file within a set number of days after the agency rule, "and then assigning the case—by random lottery—to any one of the federal district courts."[272] Presumably, the case would then be assigned randomly to one of the judges of that district, with appeal of right available to the appropriate regional circuit. It is unclear under this proposal whether each district would be weighted the same or the lottery would consider the number of judges in a district; to get a truly random sample, one could have a lottery of every active federal district judge in the country. This could mean that challenges to agency rules are consolidated in an inconvenient forum before a judge with neither interest nor experience in administrative law.

C. Calls for District Court Venue Reform

Other venue proposals would modify district court venue to ensure that cases are assigned randomly across a larger geographic scope.[273] Although the federal venue statute no longer vests venue in a particular division of a federal district court,[274] many districts are subdivided into small divisions with a limited number of judges—or perhaps even a single judge—assigned.[275] By choosing to bring a case in a division with a single judge, a litigant can effectively "pick" the judge that will resolve their case. As the Chief Justice acknowledged in a different context, this creates a "concern that case assignment procedures allowing the party filing a case to select a division of a district court might, in effect, enable the plaintiff to select a particular judge to hear a case."[276]

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[272] Adam White, *Congress Should Fix the Nationwide Injunction Problem with a Lottery*, YALE J. ON REGUL.: NOTICE & COMMENT BLOG (Feb. 11, 2020), https://www.yalejreg.com/nc/congress-should-fix-the-nationwide-injunction-problem-with-a-lottery/.
[273] *E.g.*, Fair Courts Act, H.R. 3652, 118th Cong. (2023).
[274] *Divisional Venue*, 14D FED. PRAC. & PROC. JURIS. § 3809 (4th ed.).
[275] *E.g.*, Alex Botoman, *Divisional Judge-Shopping*, 49 COLUM. HUM. RTS. L. REV. 297, 300 (2018).
[276] U.S. SUPREME COURT, 2021 YEAR-END REPORT ON THE FEDERAL JUDICIARY, available at https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf.

Judge-shopping in challenges to agency action has now been well documented,[277] and it has not been denied or disputed.[278] If the current practice of open judge-shopping is tolerated, then it will likely become more and more common, and the existing ethical norm against it will be further eroded.[279] This report therefore recommends that efforts should be made to eliminate—or at the very least reduce—the opportunities for any class of litigants to engage in judge-shopping.

In mid-March 2024, the Judicial Conference of the United States adopted a policy that lawsuits seeking injunctive relief against state or federal actions be assigned through a district-wide random selection process.[280] There have been several other proposals that would eliminate the ability of a litigant to choose a specific judge. Some of these would call for random assignment on a district-wide basis.[281] In August 2023, the American Bar Association adopted a resolution "urg[ing] federal courts to eliminate case assignment mechanisms that predictably assign cases to a single United States District Judge without random assignment when such cases seek to enjoin or mandate the enforcement of a state or federal law or regulation."[282] Instead, "in such situations," cases should be assigned randomly "on a district-wide basis rather than a division-wide basis."[283] The ABA Report noted that,

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[277] *E.g.*, Letter from Amanda Shanor, Assistant Professor, Wharton Sch. of U. Pa., & The Brennan Ctr. for Just., to Hon. Thomas Byron III, Secretary, Comm. on Rules of Prac. & Proc., Admin. Off. of the U.S. Courts (Sept. 1, 2023), available at https://www.uscourts.gov/sites/default/files/23-cv-u_suggestion_from_prof._amanda_shanor_and_the_brennan_center_for_justice_-_civil_case_assignments_1.pdf; Mot. for Leave to File Amicus Curiae Br. and Br. of Stephen I. Vladeck as Amicus Curiae in Supp. of Applicants, United States v. Texas, 143 S. Ct. 51 (2022) (No. 22A17), available at https://www.supremecourt.gov/DocketPDF/22/22-58/230032/20220713161446965_22A17%20tsac%20Stephen%20I.%20Vladeck.pdf.

[278] Josh Blackman, *Forum Shopping is Rational*, REASON: THE VOLOKH CONSPIRACY (Mar. 5, 2020, 6:59 PM), https://reason.com/volokh/2020/03/05/forum-shopping-in-rational/; Resp. in Opp'n to Mot. to Transfer Venue, Texas v. United States, (S.D. Tex. 2023) (No. 6:23-cv-00007), ECF No. 34.

[279] *E.g.*, Joseph W. Mead, *Ending Judge-Shopping in Cases Challenging Federal Law*, YALE J. REGUL.: NOTICE & COMMENT BLOG (Mar. 18, 2024), https://www.yalejreg.com/nc/ending-judge-shopping-in-cases-challenging-federal-law-by-joseph-mead/.

[280] U.S. Courts, Conference Acts to Promote Random Case Assignment (Mar. 12, 2024), https://www.uscourts.gov/news/2024/03/12/conference-acts-promote-random-case-assignment.

[281] *E.g.*, Levin, *supra* note 271, at 2034.

[282] Am. Bar Ass'n, House of Delegates Res. 521 (Aug. 8, 2023), available at https://www.americanbar.org/content/dam/aba/directories/policy/annual-2023/521-annual-2023.pdf.

[283] *Id.*

> [T]he perception that a party can choose a preferred judge is problematic whether the practice is used to advance a conservative ideology or a liberal one. . . . The organization of the courts and case-assignment should be fair, and should be seen as fair by all, and should not be used as a vehicle for advancing any kind of political agenda.[284]

The U.S. Department of Justice has also weighed in, asking the Federal Rules Advisory Committee to amend the federal rules to prevent the "potential for and perception of judge-shopping, which can undermine confidence in the judiciary."[285]

One challenge to implementing this proposal is how to deal with district case assignment practices that allow for more subtle deviations from a purely random assignment with equal weighting across a district. For example, senior judges may be allocated fewer cases than active, or can opt out of certain categories of cases. Other districts may decline to assign as many new cases to judges who are dealing with particularly challenging dockets, like a multidistrict litigation (MDL) panel. The goal of encouraging random assignment across the district would not necessarily need to displace these existing practices.

Another approach would be to allow division-shopping but place a limit on the likelihood of drawing any particular judge. Professors Anderson and Gugliuzza suggest Congress enact legislation providing that "'no judge in a district court having more than one judge shall have greater than a 50 percent probability of being assigned a given case."[286] A recent bill introduced in Congress uses a 25 percent threshold.[287]

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[284] *Id.* at 2. Professor Shanor and the Brennan Center recently proposed an amendment to the Federal Rules to provide that, where "a plaintiff seeks injunctive or declaratory relief that may extend beyond the district in which the case is filed, districts shall use a random or blind assignment procedure to assign the case among the judges in that district." *Supra* note 277.

[285] *Letter from Principal Deputy Assistant Attorney General Brian Boynton* (Dec. 21, 2023), available at https://www.uscourts.gov/sites/default/files/23-cv-dd_suggestion_from_doj_-_civil_case_assignments_0.pdf.

[286] J. Jonas Anderson & Paul R. Gugliuzza, *Federal Judge Seeks Patent Cases*, 71 DUKE L.J. 419, 478 (2021).

[287] Fair Courts Act, H.R. 3652, 118th Cong. (2023).

Surprisingly, there has been substantive pushback against these proposals.[288] Professor Blackman argues that judge-shopping is just as acceptable as forum-shopping, contending that "[f]orum shopping is not new. Judge shopping is not new," and it is entirely rational—indeed obligatory—for competent attorneys.[289] Thus, in Professor Blackman's view, not only *did* states pick specific judges in bringing challenges to nationwide policies, but they were right to do so.

This is an extreme outlier position, as the vast majority of scholarly commentary—both generally and in the context of agency review—is sharply critical of judge-shopping, across the political spectrum.[290] Even as forum-shopping may sometimes be tolerated as a necessary evil justified by the benefits of allowing litigants more convenient access to the courts, that indulgence "does not exist with respect to judge-shopping."[291] Courts regularly punish attorneys for judge-shopping, describing it as unethical and abusive.[292]

Whether it is rational or ethical for an individual litigant to engage in judge-shopping, courts have long opted rules allocating caseloads in a way that minimize the opportunity for litigants to

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[288] *E.g.*, Nate Raymond, *Conservative US judges criticize new rule curbing 'judge shopping',* Reuters (Mar. 13, 2024), https://www.reuters.com/legal/government/conservative-us-judges-criticize-new-rule-curbing-judge-shopping-2024-03-13/.

[289] Blackman, *supra* note 278; *see also* Josh Blackman, *Department of Justice v. Texas Judges*, REASON: THE VOLOKH CONSPIRACY (Mar. 4, 2023, 12:25 AM), https://reason.com/volokh/2023/03/04/department-of-justice-v-texas-judges/.

[290] *E.g.*, Katherine A. Macfarlane, *The Danger of Nonrandom Case Assignment: How the Southern District of New York's "Related Cases" Rule Shaped Stop-and-Frisk Rulings*, 19 MICH. J. RACE & L. 199, 227 (2014) ("[T]he suggestion that a case has been steered to a particular judge's docket for reasons having nothing to do with efficiency or practicality undermines confidence in the judiciary's procedures, which must be neutral at every stage, even at assignment."); Theresa Rusnak, *Related Case Rules and Judge-Shopping: A Resolvable Problem?*, 28 GEO. J. LEGAL ETHICS 913 (2015) ("The practice of judge-shopping threatens to erode the objectivity of the United States judicial system. . . . all forms of judge-shopping are universally condemned."); Levin, *supra* note 271, at 2033 ("It is difficult to conceive of any public policy that could justify allowing such stark judge shopping.").

[291] Norwood, *supra* note 235, at 268.

[292] *E.g.*, Hernandez v. City of El Monte, 138 F.3d 393, 399 (9th Cir. 1998) (holding that the district court had inherent authority to dismiss case based on judge-shopping, noting that "[j]udge-shopping clearly constitutes 'conduct which abuses the judicial process'"); Welk v. GMAC Mortg., LLC, 720 F.3d 736, 738 (8th Cir. 2013) (affirming sanctions against attorney who judge-shopped); Standing Comm. on Discipline of U.S. Dist. Ct. for Cent. Dist. of Cal. v. Yagman, 55 F.3d 1430, 1443 (9th Cir. 1995) ("Judge-shopping doubtless disrupts the proper functioning of the judicial system and may be disciplined."); Cruz v. Abbate, 812 F.2d 571, 574 (9th Cir. 1987) ("The suggestion that the case assignment process is being manipulated for motives other than the efficient administration of justice casts a very long shadow."); Vaqueria Tres Monjitas, Inc. v. Rivera Cubano, 230 F.R.D. 278, 280 (D.P.R. 2005) ("[A]ny active litigating attorney would know that judge-shopping is not acceptable and thus sanctionable.").

choose their judge, including widespread random assignment and limited opportunities for a litigant to force disqualification.[293]

The case for eliminating judge-shopping is particularly strong in the context of challenging agency rules. As noted above in the discussion of forum-shopping, the asymmetrical stakes and nationwide impact of the court's review counsels against allowing litigants to pick their forum. And the increased public attention to judge-shopping poses a serious threat to public confidence in the judiciary.[294] Meanwhile, there is no serious countervailing convenience interest in agency rule challenges that would justify allowing a litigant to choose a courthouse closer to their home.

Although random case assignment at the district level would address these concerns, there are other options as well. For example, Congress could re-enact *statutory* divisional venue rules, requiring the plaintiff to show that they have satisfied venue rules, not only at the district level but at the divisional level as well.[295] This would be unsatisfactory because it would still allow a litigant to know the judge they would get before even filing. Moreover, division-shopping would likely continue, as it usually is not hard to find a plaintiff who satisfies divisional venue and add them to the suit in order to pick the judge the other parties want.

A more modest possibility would be to amend the venue statute to require that states sue only in the district and division encompassing their state capital. Although section 1391(c)(2) provides that plaintiff "entit[ies]" will be deemed to reside "only in the judicial district in which it maintains its principal place of business," courts have rejected the argument that this limits states to

[293] *E.g.*, *In re* Mann, 229 F.3d 657, 658 (7th Cir. 2000) ("'Judge shopping' is not a practice that should be encouraged.").
[294] Comm. on Rules of Prac. & Proc., *Draft Minutes of the Civil Rules Advisory Committee Meeting on October 17, 2023*, Agenda Book 354 (Jan. 4, 2024), available at https://www.uscourts.gov/sites/default/files/2024-01_agenda_book_for _standing _committee_meeting_final_0.pdf ("We cannot be blind to the perception that litigants—from both ends of the political spectrum—may attempt to exploit judicial assignment arrangements to obtain favorable results on cases of high national importance.").
[295] LAMPE, *supra* note 235.

their capital.[296] States may feel singled out by this proposal, but because the best-documented examples of judge-shopping include states leaving their capital, it is a modest place to start.[297]

Recommendation: Congress should require that, where a district court has jurisdiction and venue over a civil lawsuit that calls into question the validity of an agency rule, the case must be assigned on a random basis to a judge drawn from the entire pool of active judges in that district. This reduces the ability of litigants to judge-shop by filing in a particular division.

D. Consolidation

Another question is what to do when multiple challenges are filed against a single rule. At the circuit level, the lottery system provides for consolidation of petitions for review in a single circuit, to be chosen randomly among those where petitions had been filed.[298] This was a clear improvement over the "first-filed" rule, which led to some extreme and bizarre races to the courthouse.[299]

For cases in district courts, cases filed within a district may be consolidated by operation of local rule or practice, but there is no automatic process for consolidating challenges across districts. Courts have the discretion to transfer cases in the interests of justice,[300] and the MDL panel also has authority to consolidate cases for pretrial proceedings in a particular forum.[301] Unlike the lottery system, the MDL panel's process is discretionary at the district court—both whether it is triggered, and which court will end up with the cases. And, significantly, district court consolidation is not for ultimate resolution but for pretrial proceedings only, which are relatively unimportant in challenges to agency rules.

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[296] California v. Azar, 911 F.3d 558, 570 (9th Cir. 2018).
[297] Josh Blackman, *Forum Shopping in California*, REASON: THE VOLOKH CONSPIRACY (Feb. 5, 2023, 8:44 PM), https://reason.com/volokh/2023/02/05/forum-shopping-in-california/.
[298] 28 U.S.C. § 2112(a)(3).
[299] Recommendation 80-5, *supra* note 1.
[300] 28 U.S.C. § 1404(a).
[301] 28 U.S.C. § 1407.

The benefits to consolidation include efficiency, as a rule's validity will be litigated once, not repeatedly. It enhances certainty, avoiding the prospect of inconsistent rulings, which are particularly problematic for agencies who face vacatur of a rule if they lose just once, even if they prevail in every other litigation. It also helps to mitigate against forum-shopping, as the rule's validity will be determined in a district not necessarily chosen by the challenger.

There are downsides to consolidation as well. Most significantly, it prevents the development of circuit splits, and prevents hearing additional judicial perspectives about a rule's validity. Nevertheless, in the context of reviewing agency rules, the benefits of efficiency, certainty, and reduction of forum-shopping justify reducing the number of courts with a chance to weigh in.

On the whole, when considering challenges to agency rulemaking, the benefits of consolidation outweigh the costs, as reflected in Congress's longstanding choice to consolidate many petitions for review. This process should be extended to challenges to agency rulemaking filed in district courts, where perhaps dozens of cases might proceed simultaneously to a single rule. The benefits of consolidation are at least as powerful in district court as circuit court.

The current dichotomy between circuit and district court consolidation was vividly demonstrated by challenges to the revised Waters of the United States rule, adopted by the EPA and the Army Corps of Engineers. Litigants challenging the new definition brought numerous lawsuits in district courts and filed several petitions for review in circuit courts.[302] Some litigants, recognizing the jurisdictional ambiguity, sued in both district and circuit court.[303] The petitions for review were randomly consolidated before the Sixth Circuit, which issued a divided panel decision preliminarily staying the new definition.[304] In contrast, the MDL panel declined to consolidate the district court

[302] Nat'l Ass'n of Mfrs. v. U.S. Dep't of Def., 583 U.S. 109 (2018).
[303] *Id.* at 114.
[304] *In re* U.S. Dep't of Def., 817 F.3d 261 (6th Cir. 2016).

litigation.[305] Thus, all circuit court challenges would be decided by the Sixth Circuit (no matter where they were filed), but challenges filed in district court could ultimately work their way up to any number of other circuits. Ultimately, the Supreme Court decided that these challenges belonged in district court.[306] Five years later, and with multiple agency revisions intervening in the meantime, the Supreme Court weighed in directly on the underlying statutory question.[307]

Consolidating cases in a single, randomly selected district court may come with some logistical challenges. One challenge is that challenges to agency action brought in district court can often be brought years after a rulemaking, while petitions for review in circuit court typically must be brought in a matter of weeks, which makes consolidation of the latter easier. Another downside of this approach is that many federal district courts disfavor practice by attorneys not located within their state, and through aggressive restrictions on the right of practice, coupled with mandatory local counsel requirements, make it difficult for outsiders to appear.[308] Department of Justice attorneys are exempt from admission requirements,[309] and a similar exemption from local admissions requirements could be provided for cases consolidated through this practice.

Recommendation: The consolidation lottery procedure of Section 2112 should be extended to apply to challenges to rules filed in federal district courts. Further, attorneys should be deemed eligible to appear in the consolidated case if they are admitted to practice in any federal court.

VI. Recommendations

[305] *In re* Clean Water Rule, 140 F. Supp. 3d 1340, 1341 (J.P.M.L. 2015).
[306] *Nat'l Ass'n of Mfrs.*, 583 U.S. at 132.
[307] Sackett v. U.S. Env't Prot. Agency, 598 U.S. 651, 668 (2023).
[308] Gabriel J. Chin, *Toward National Criminal Bar Admission in U.S. District Courts*, 89 FORDHAM L. REV. 1111, 1112 (2021); Chad G. Marzen, *An Analysis of United States Federal District Court Admission Requirements*, 42 VT. L. REV. 663, 666 (2018).
[309] 28 U.S.C. § 517.

A. In light of the modern trend towards textualism as the primary mode of statutory interpretation, Congress should draft forum statutes based on the assumption that they will be interpreted according to their plain language, and not with a presumption of direct circuit court review.

B. When Congress intends to include rulemaking in the scope of a direct review provision, it should refer to rules explicitly, instead of relying on statutory language of "order."

C. Congress should draft jurisdictional statutes to try to minimize the potential of either challengers or agencies from manipulating jurisdiction based on whether a particular section of law is cited or not.

D. Congress should provide that all challenges to agency rules that are the product of notice-and-comment rulemaking, or formal rulemaking, must be brought directly in the circuit court.

E. Congress should require that, where a district court has jurisdiction and venue over a civil lawsuit that calls into question the validity of an agency rule, the case must be assigned on a random basis to a judge drawn from the entire pool of active judges in that district. This reduces the ability of litigants to judge-shop by filing in a particular division.

F. The consolidation lottery procedure of Section 2112 should be extended to apply to challenges to rules filed in federal district courts. Further, attorneys should be deemed eligible to appear in the consolidated case if they are admitted to practice in any federal court.