AN OVERLOOKED FOOTNOTE IN *TRUMP V. CASA* ENSURES THAT THE DEBATE OVER UNIVERSAL INJUNCTIONS ISN'T OVER

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INTRODUCTION

Several months ago, I wrote in Law360 that, given the tenor of the questioning in *Trump v. CASA*—the birthright citizenship case—I did not expect the court to address the issue of universal injunctions.[1] That prediction plainly turned out to be wrong. But I was not wrong that Republican and Democratic administrations alike would continue to be troubled by the forum shopping that has given individual district court judges authority to issue rulings of nationwide impact. And I continue to believe, as I said then, that a simple legislative reform could mitigate that concern. For nearly forty years, when several parties appeal the same federal administrative agency decision to different circuit courts of appeal, the Multi-District Panel randomly assigns venue to a single circuit court. Expanding the Multi-District Panel's authority to do random selection in district as well as circuit court cases brought under the Administrative Procedure Act ("APA")[2] would greatly reduce forum-shopping. A single footnote in *Trump v. CASA* underscores the continued importance of that suggested reform.

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1. Harvey Reiter, *Address Nationwide Injunction Issues with Random Venues*, LAW360 (June 3, 2025), https://perma.cc/MW4Y-V2RZ.

2. As explained later in this Article, several statutes call for petitions for review of the decisions of certain administrative agencies to go directly to the circuit courts of appeal. *See, e.g.*, Federal Power Act, 16 U.S.C. § 825l(b); Securities Exchange Act of 1934, 15 U.S.C. § 78y(a)(1). If multiple parties seek review of the same agency ruling in different courts of appeal within a ten-day window, the Multi-District Panel randomly selects the venue. 28 U.S.C. § 2112(a). But the same statute giving the Panel this authority expressly denies it when multiple appeals of administrative agency cases are filed in different federal district courts. 28 U.S.C. § 2112(d). That is significant because most APA cases begin in the district courts, not the courts of appeal. *See* Multidistrict Litigation Act of 1968, Pub. L. No. 90-296, 82 Stat. 109 (codified at 28 U.S.C. § 1407).

"Nothing we say today resolves the distinct question whether the Administrative Procedure Act authorizes federal courts to vacate federal agency action."[3] That was the largely overlooked, but immensely significant footnote in Justice Barrett's opinion in *Trump v. CASA*—an opinion that itself announced the qualified conclusion that "'universal injunctions' . . . *likely* exceed the equitable authority that Congress has granted to federal courts" under the Judiciary Act of 1789.[4]

This Article examines the significance of the footnote—a footnote suggesting that the federal courts' jurisdiction in cases arising under the APA is likely broader than the equitable authority they possess under the Judiciary Act, as construed in *Trump v. CASA*. This Article's focus on a singular footnote is not intended to understate the power of the Court's central holding. That ruling—granting a partial stay[5] of the universal injunction ordered by a lower court to halt implementation of President Trump's executive order purporting to end birthright citizenship—was itself only nominally preliminary (hence Justice Barrett's qualification that universal injunctions "likely" exceed the authority given federal courts). To be sure, the circuit courts have cautioned that stays and preliminary injunctions are not rulings on the merits.[6] The Supreme Court, however, has made quite clear that *its* rulings in what has been called its "shadow docket"[7] put a decidedly heavy thumb on the scales. "Although our interim orders are not conclusive as to the merits," the Court recently advised, that such orders "inform how a court should exercise its equitable discretion in like cases."[8]

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3. Trump v. CASA, Inc., 606 U.S. 831, 847 n.10 (2025).

4. *Id*. at 837 (emphasis added).

5. The stay was partial in the sense that the preliminary injunction was still to remain in effect as to the named plaintiffs, including a number of state governments. *Trump v. CASA*, 606 U.S. at 861–62.

6. *See, e.g.*, Cook Cnty. v. Wolf, 962 F.3d 208, 234 (7th Cir. 2020) ("There would be no point in the merits stage if an issuance of a stay must be understood as a *sub silentio* disposition of the underlying dispute."); CASA de Maryland, Inc. v. Trump, 971 F.3d 220, 282 (King, J., dissenting) (4th Cir.) (same), *vacated on grant of rehearing en banc*, 981 F.3d 311 (4th Cir. 2020). *See also* ACA Connects v. Bonta, 24 F.4th 1233, 1249 (9th Cir. 2022) (Wallace, J., concurring) ("[A] disposition of a preliminary injunction appeal is not an adjudication on the merits and . . . the parties should not 'read too much into' such holdings.") (internal citation omitted); Ctr. for Biological Diversity v. Salazar, 706 F.3d 1085, 1090 (9th Cir. 2013) ("We have repeatedly emphasized the preliminary nature of preliminary injunction appeals.").

7. The "shadow docket"—a term first coined a decade ago by University of Chicago law professor Willaim Baude—refers to the use of emergency orders and summary decisions by the Supreme Court of the United States without oral argument. Nina Totenberg, *The Supreme Court and 'The Shadow Docket'*, NPR (May 22, 2023), https://perma.cc/J4KT-XEHR. *See, e.g.*, Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting); *see also* Louisiana v. Am. Rivers, 596 U.S __ (2022) (Kagan, J., dissenting) (criticizing the use of the shadow docket to establish precedent).

8. Trump v. Boyle, No. 25A11, slip op. at 1 (U.S. July 23, 2025) (order granting stay of district court injunction that had ordered the President to return Consumer Product Safety Commission Commissioner Boyle to her position). The Court's unsigned order in that case cited the Court's earlier ruling in Trump v. Wilcox, 605 U.S. __ (2025), another "interim" ruling in which the Court stated its "judgment that the Government faces greater risk of harm from an order allowing a removed officer to continue exercising the executive power than a wrongfully removed officer faces from being unable to perform her statutory duty." *Boyle*, slip. op. at 1. While beyond the scope of this Article, it strikes this author as dubious that a single member of a multimember agency—especially a minority member, like the numerous Democratic commissioners of several agencies whom President Trump has fired to date—has *any* executive power, much less enough executive power, to somehow harm the government irreparably (a putative prerequisite for emergency relief).

It is also worth noting the jarring juxtaposition between Justice Barrett's majority opinion in *Trump v. CASA* and her questions at oral argument in *United States v. Texas*, 599 U.S. 670 (2023), which involved a challenge by Texas and Louisiana to DHS guidelines prioritizing immigration enforcement to focus on removal of terrorists and dangerous criminals, a little more than two years earlier. On the one hand, Barrett's opinion fixes the scope of the federal courts' remedial powers to those extant

Justices Gorsuch and Kavanaugh have gone a step further, rebuking judges who they said had flouted the Court's interim directives, even though "not necessarily 'conclusive as to the merits.'"[9]

I. REMEDIAL AUTHORITY OF THE FEDERAL COURTS UNDER THE ADMINISTRATIVE PROCEDURE ACT

The Court's opinion in *Trump v. CASA* involved lawsuits challenging the constitutionality of President Trump's executive order claiming to end birthright citizenship. It did not, however, decide any constitutional issue, turning instead on the Court's interpretation of the remedial authority given federal courts by statute. Since the lawsuits were challenges to the actions of the President,[10] and since the President is not an "agency" within the meaning of the APA,[11] the Judiciary Act of 1789, not the APA, governed the scope of the federal courts' remedial powers. But with the exception of purely ministerial acts by agencies to carry out executive orders,[12] most executive orders are implemented by federal agencies whose actions are then presumptively subject to review under the APA.[13]

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at a single point in time—1789, the year the Judiciary Act became law. *CASA*, 606 U.S. at 841. In stark contrast, during the oral argument in *United States v. Texas*, Justice Barrett—accepting the Government's claim that "that [vacatur] was not contemplated at the time of the APA's enactment" in 1946—asked the following question: "Why can't remedial authority evolve over time? . . . Remedial authority is a flexible concept, and so maybe the courts of appeals have expanded that concept. Why would that be impermissible?" Ronald M. Levin, *Vacatur, Nationwide Injunctions, and the Evolving APA*, 98 NOTRE DAME L. REV. 1997, 2014 (2023) (quoting Transcript of Oral Argument at 49–50, United States v. Texas, 599 U.S. 670 (2023) (No. 22-58)). Apart from this seeming contradiction, Harvard professor Jack Goldsmith offers a separate quarrel with Justice Barrett's opinion in *CASA*: Justice Barrett's opinion, he notes in an article in the Harvard Law Review, rests on the erroneous assumption that section 11 of the Judiciary Act of 1789 "endowed federal courts with jurisdiction over '*all* suits . . . in equity,'" and "thus [equitable remedies] 'must have a founding era antecedent.'" Jack Goldsmith, *Interim Orders, the Presidency, and Judicial Supremacy*, 139 HARV. L. REV. 86, 114–115 (2025) (emphasis added). But, as Goldsmith then notes, the birthright citizenship case is "based on federal question jurisdiction and suits against the United States," neither of which became the basis for federal jurisdiction until 1875, "*not* 1789." *Id.* at 115–116 (emphasis added).

9. Nat'l Insts. of Health v. Am. Pub. Health Ass'n, 145 S. Ct. 2658, 2663–4 (2025) (Gorsuch & Kavanaugh, JJ., concurring in part and dissenting in part). The joint statement by Justices Gorsuch and Kavanaugh prompted an apology from long time district court judge William Young, who said he had never before been accused of defying a Supreme Court order, but who explained that he "simply did not understand that orders on the emergency docket were precedent." Jan Wolfe & Nate Raymond, *Judges Vexed by Supreme Court 'Shadow Docket' Rulings in Trump Cases*, REUTERS (Sept. 10, 2025), https://perma.cc/5BK6-RA9E.

10. *CASA*, 606 U.S. at 831.

11. Franklin v. Massachusetts, 505 U.S. 788, 800–801 (1992).

12. *See, e.g.*, Orr v. Trump, 778 F. Supp. 3d 394, 420 (D. Mass. 2025). When an agency exercises judgment or discretion, it is still subject to APA oversight, otherwise it "would allow the President and agencies to simply reframe agency action as orders or directives originating from the President to avoid APA review." AIDS Vaccine Advoc. Coal. v. U.S. Dep't of State, 766 F. Supp. 3d 74, 83 (D.D.C.), *enforced*, 768 F. Supp. 3d 1 (D.D.C. 2025) (finding likelihood of success on merits of APA claim challenging agency implementation of Foreign Aid EO).

13. State v. Su, 121 F.4th 1, 15 (9th Cir. 2024); New York v. Trump, 133 F.4th 51, 70–71 n.17 (1st Cir. 2025); Chamber of Com. of U.S. v. Reich, 74 F.3d 1322, 1326–27 (D.C. Cir. 1996). *See also* Stephen M. Johnson, *Deregulation: Too Big for One Branch, But Maybe Not for Two*, 53 SETON HALL L. REV. 839, 853 n.64 (2023). This point may even turn out to be relevant with respect to birthright citizenship. While the President's Executive Order purported to end birthright citizenship (Exec. Order No. 14,160, 90 Fed. Reg 8449 (Jan. 29, 2025)), it appears that a number of agencies will be involved in attempts to implement it, should currently effective injunctions be lifted. Devan Cole, John Fritze & Priscilla Alvarez, *New Documents Show How Passport and Social Security Rules Would Change to Enforce Trump's Birthright Citizenship Order*, CNN (July 28, 2025),

The distinction between executive order and the actions of administrative agencies is relevant to the issue of universal judicial remedies because the APA grants federal courts two additional remedial powers akin to, but distinct from, preliminary injunctive relief under the Judiciary Act: the power to stay and the power to set aside agency action. In both cases, as several of the Justices have noted, relief, almost by definition, is *not* confined solely to the plaintiffs bringing the challenge.

A. Stays of Agency Action Under Section 705

First, section 705 of the APA permits courts to "postpone", i.e., stay "the effective date of an agency action . . . pending conclusion of the review proceedings."[14] While the standards for stays under APA section 705 are the same as those governing requests for preliminary injunctions, i.e., likelihood of success on the merits, irreparable harm, balancing of interests and the public interest,[15] the relief provided by a preliminary injunction after *Trump v. CASA* is potentially different. To be sure, a preliminary injunction under the Judiciary Act and a stay under the APA are similar.[16] "Both," the Supreme Court observed in *Nken v. Holder*, "can have the practical effect of preventing some action before the legality of that action has been conclusively determined."[17] But a preliminary injunction is directed against a particular party (as relevant here, a government agency) and, under *Trump v. CASA*, provides direct[18] relief only to the complainants. By contrast, a stay, while a "kind of an injunction,"[19] "operates upon the judicial proceeding itself[,] . . . either by halting or postponing some portion of the proceeding, or by temporarily divesting an order of enforceability."[20]

Justice Kavanaugh's concurring opinion in *Trump v. CASA* makes essentially the same observation, noting that "in cases under the Administrative Procedure Act, plaintiffs may ask a court to preliminarily 'set aside' a new agency rule."[21] His meaning is plain enough,

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https://perma.cc/3GR2-6MG5 (discussing documents that even U.S. citizens may be required to provide "to verify their own immigration status to obtain a passport or Social Security number for their children").

14. 5 U.S.C. § 705 (authorizing federal courts to "issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings").

15. Nken v. Holder, 556 U.S. 418, 434 (2009). *See also* Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958) (denying stay and preliminary injunction as failing to meet the four standards without distinguishing between stays and injunctions); D.C. v. U.S. Dep't of Agric., 444 F. Supp. 3d 1, 15 (D.C. Dist. Ct. 2020) ("The factors governing issuance of a preliminary injunction also govern issuance of a § 705 stay" (citing Texas v. EPA, 829 F.3d 405, 424, 435 (5th Cir. 2016); Humane Soc'y of United States v. Gutierrez, 558 F.3d 896, 896 (9th Cir. 2009); Cuomo v. U.S. Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985))).

16. In addition to stays, or postponements of the effective date of agency action, APA section 705 also implicitly authorizes injunctive relief, giving a reviewing court the option to "preserve status or rights" instead of postponing implementation of the agency's orders or regulations. 5 U.S.C. § 705. Preservation of "status or rights" could be read to limit relief to the parties seeking judicial review. *See id.*

17. Nken, 556 U.S. at 428.

18. As the Court noted in *CASA*, even though preliminary injunctions provide direct relief only to the parties to the case, such injunctions may indirectly and "incidentally" benefit non-parties. 606 U.S. 831, 851 (2025).

19. Nken, 556 U.S. at 441–42 (Alito, J., dissenting).

20. *Id.* at 428–29.

21. *CASA*, 606 U.S. at 869 (Kavanaugh, J., concurring).

even if his reference to "set aside," which appears in section 706, not section 705,[22] is imprecise. "In my view," he adds, "there often (perhaps not always, but often) should be a nationally uniform answer on whether a ***major*** new federal statute, rule, or executive order can be enforced throughout the United States during the several-year interim period until its legality is finally decided on the merits."[23] A stay, which temporarily maintains the *status quo ante*, means that the challenged rule or regulation will not be in effect, essentially making its import nationwide and not simply applicable to those parties who have sought the stay. Over the decades, many agency rules and regulations have been stayed pending appeal.[24]

B. Vacatur of Agency Actions Under Section 706

Second, a reviewing court has express authority under the APA to "set aside" final agency action that it finds arbitrary and capricious or otherwise not in accordance with law.[25] "On its face," observes Washington University law professor Richard Levin, "the phrase 'shall . . . set aside" in § 706 seems to mean that a court not only may, but must, "set aside" a rule that it considers unlawful."[26] "Thus," he added, "the normal remedy in this situation is for the court to order that the rule be vacated and remanded to the agency for further consideration. The rule has to be either remanded or not remanded; *it cannot be remanded only with respect to an individual plaintiff*."[27]

Justice Kavanaugh's concurrence in *Corner Post v. Federal Reserve System* is to similar effect:

> When a federal court sets aside an agency action, the federal court vacates that order—in much the same way that an appellate court vacates the judgment of a trial court. … Over the decades, this Court has affirmed countless decisions that vacated agency actions, including agency rules. … Those decisions vacated the challenged agency rules rather than merely providing injunctive relief that enjoined enforcement of the rules against the specific plaintiffs.[28]

To be sure, several scholars have maintained that the "set aside" language in the APA should be read more narrowly, as in putting to the side rather than to nullify.[29] And at least a few of the Supreme Court justices (Alito, Gorsuch and Barrett) have voiced their support

22. *Id.* Justice Kavanaugh's interpretation of "set aside" is discussed *infra* Section I.B.
23. *CASA*, 606 U.S. at 872 (Kavanaugh, J., concurring).
24. *See, e.g.*, Texas Top Cop Shop, Inc. v. Garland, 758 F. Supp. 3d 607, 619 (E.D. Tex. 2024*);* Wages And White Lion Invs., L.L.C. v. FDA, 16 F.4th 1130, 1135–36 (5th Cir. 2021); D.C. v. U.S. Dep't of Agric., 444 F. Supp. 3d 1, 46, 48 (D.C. Dist. Ct. 2020) (noting that "federal courts have issued hundreds of injunctions reaching beyond the parties in the lawsuit"); Texas v. EPA, 829 F.3d 405, 411 (5th Cir. 2016); *In re* GTE Serv. Corp., 762 F.2d 1024, 1026 (D.C. Cir. 1985).
25. 5 U.S.C. § 706.
26. Levin, *supra* note 8, at 2005.
27. *Id.* (emphasis added).
28. Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys., 603 U.S. 799, 830–831 (2024) (Kavanaugh, J., concurring).
29. Levin*, supra* note 8, at 2011 (discussing theory advanced by Professors John Hamilton and Samuel Bray).

for that view.[30] But Justices Roberts, Kavanaugh and Jackson—all of whom once sat on the D.C. Circuit bench (a group Justice Kagan jokingly referred to as the "DC Cartel")—"have exhibited strong hostility to that interpretation."[31] Indeed, if this view of "set aside" were adopted, it would invalidate the circuit courts' "ordinary APA remedy" of vacatur of unlawful or arbitrary and capricious agency action.[32]

As the foregoing discussion suggests, it is at the very least arguable, if not mostly settled that the APA gives federal courts power both to grant preliminary stays of agency orders and regulations and to vacate them in rulings on the merits—both with universal effect. *Trump v. Casa*'s footnote thus assures that the objections of those troubled by the power this vests with a single judge to issue orders with nationwide application will not have disappeared with the Supreme Court's decision in that case.

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30. *See* United States v. Texas, 599 U.S. 670, 695–704 (2023) (Gorsuch, J., concurring) (questioning whether "set aside" under APA gives courts power to vacate arbitrary or unlawful agency action).

31. Professor Levin recounts in his 2023 article the hostile reaction then Solicitor General Elizabeth Prologar encountered when arguing that federal courts lack the authority to vacate final agency action under the APA:

> At argument, Solicitor General Elizabeth Prelogar (SG) took the position that a judicial decree under the APA may not vacate or enjoin an agency rule on a universal basis; normally, she suggested it should only provide relief for the benefit of the prevailing challenger.11 Chief Justice Roberts responded with considerable consternation, as did other members of the Court who, like the Chief Justice, had previously served as judges on the D.C. Circuit. "[Y]our position on vacatur," Chief Justice Roberts said,
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> > sounded to me to be fairly radical and inconsistent with, for example, you know, with those of us who were on the D.C. Circuit, you know, five times before breakfast, that's what you do in an APA case. And all of a sudden you're telling us that, no, you can't vacate it, you do something different. Are you overturning that whole established practice under the APA?
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> When the SG confirmed that she thought that "the lower courts, including the D.C. Circuit, have . . . been getting this one wrong," Roberts replied with a "[w]ow." The SG went on to assert that the lower courts had not been paying attention to the text, context, and history of the APA. Justice Kavanaugh, another D.C. Circuit veteran, met her assertion directly. He noted that he had served on that court with very eminent judges who paid a lot of attention to those factors.16 He added that the SG's claim was "a pretty radical rewrite, as the Chief Justice says, of what's been standard administrative law practice." Justice Jackson joined in their criticism.
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> In the wake of these unsympathetic, if not hostile, reactions from what Justice Kagan jokingly called the "D.C. Circuit cartel," it seemed clear that the Court was not likely to accept the SG's view in this case.

Levin, *supra* note 8, at 1999–2000 (internal citations omitted).

32. Ins. Mktg. Coal. Ltd. v. FCC, 127 F.4th 303, 317 (11th Cir. 2025). *See also* Long Island Power Auth. v FERC, 27 F.4th 705,717 (2nd Cir. 2022) (noting that "'vacatur is the normal remedy' under the APA"); Am. Great Lakes Ports Ass'n v. Schultz, 962 F. 3d 510, 519 (D.C. Cir. 2020) (same); Advocs. for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin., 429 F.3d 1136, 1151 (D.C. Cir. 2005) (explaining that vacatur is "normally required"); SE Alaska Conservation Council et al. v. U.S. Army Corp. of Eng'rs, 486 F. 3d 638, 654-55 (9th Cir. 2007) (referring to vacatur as the "normal remedy for an unlawful agency action").

II. THE REAL—AND BIPARTISAN—CONCERN ABOUT UNIVERSAL INJUNCTIONS IS ABOUT FORUM-SHOPPING

In the years leading up to *Trump v. Casa*, judges, legal commentators and representatives of the Biden and Trump Administrations have expressed misgivings about the power of single federal district court judges to grant nationwide injunctions that bring administrative agency actions to a halt. But their objection—at least in the APA context—is not really to the notion that so much power should be vested in a single decisionmaker. After all, as the "DC cartel" observed—drawing from their own prior experiences as circuit court judges— single panels of only three appellate judges can, and do, overturn nationwide agency regulations issued by major agencies like the FTC, FCC, NLRB, Surface Transportation Board, OSHA and others using the APA's authorization to "set aside" unlawful agency actions.[33] Rather the concern about district court-issued nationwide injunctions seems to be twofold. Multiple district courts might reach conflicting decisions.[34] And, probably more importantly, with over seven hundred district court judges to choose from (some being the only judge in a federal district or one of its divisions),[35] plaintiffs can often select the decisionmakers they believe most likely to rule in their favor.

The latter was the sentiment voiced by Justice Kagan during May 2025 oral arguments in *Trump v. Casa*. "In the first Trump administration, it was all done in San Francisco, and then in the next administration, it was all done in Texas, and there is a big problem that is created by that mechanism."[36] Statistics suggest that from the challengers' perspective this has been a highly successful strategy.[37]

The broader underlying problems of conflicting court rulings and forum-shopping will not disappear—there are scores of legal challenges to the actions of the Trump Administration that are already in the courts and many of them involved requests for nationwide injunctive relief for violations of the APA.[38] But the problems these requests pose are also not beyond the ability of Congress to address. It has addressed the issue before.

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33. Levin, *supra* note 8, at 1999–2000.

34. See, e.g., Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. Rev. 1065, 1106 (2018). A third objection voiced by opponents of the nationwide injunction is that it prevents the issue presented from "percolating" through various courts, thereby better fleshing the issue out for likely subsequent review by the Supreme Court. *See* Charlton C. Copeland, *Seeing Beyond Courts: The Political Context of the Nationwide Injunction*, 91 Univ. Colo. L. Rev. 789, 808 (2020). But this concern doesn't logically apply to review of administrative agency decisions. Why would it be important for an issue presented in a single administrative order to percolate among multiple district courts, when other administrative agency decisions that go directly to the circuit courts (and get consolidated) don't need to "percolate"?

35. *See, e.g.*, Letter from the Brennan Ctr. for Just. of New York Univ. Sch. of L. to H. Thomas Byron III, Sec'y, Comm. on Rules of Prac. & Proc., Admin. Off. of the U.S. Cts. (Sept. 23, 2023), https://perma.cc/N9GX-7EQN.

36. Transcript of Oral Argument at 147, Trump v. Casa, Inc., 606 U.S. 831 (No. 24A884).

37. Justice Kagan's observation was spot on. As recounted in a 2024 Harvard Law Review report there were 64 injunctions during the first Trump Administration, 59, or 92% of them granted by judges appointed by Democratic Presidents. *District Court Reform: Nationwide Injunctions*, 137 HARV. L. REV. 1701, 1705 (2024). During the Biden Administration there were 14 injunctions, all of them ordered by Republican-appointed judges. *Id.*

38. *See, e.g.*, Sri Medicherla, *Repealing Without Procedure*, The REGUL. REV. (May 15, 2025), https://perma.cc/4YMH-6FRB (discussing likely APA challenges to agency repeal of regulations without notice and comment); Harvey L. Reiter, *Ending EPA's "Endangerment" Finding*, THE REGUL. REV. (Apr. 16, 2025), https://perma.cc/D33J-ANCL (same); Harvey L. Reiter, *Could*

A. The Multi-District Panel Has Long Been Used to Reduce Forum-Shopping

One need look no farther than the history of the current treatment of appeals of administrative agency decisions that, by statute, go straight to the various circuit courts of appeal. Congress first addressed the issue of forum-shopping among the circuit courts decades ago, when it enacted 28 U.S.C. § 2112(a), more commonly known as Multi-Circuit Petition Statute.

That 1958 law was intended to consolidate venue for multiple petitions for review of the same agency decision in a single circuit court—the first circuit court in which a petition for review had been filed. But, despite its good intentions, the law soon engendered races to be the first to file. The races themselves became a precision science:

> On the afternoon of December 14, 1978, Stephen L. Grossman, an FERC Administrative Law judge, stood poised, stopwatch in hand, waiting for an employee of the Commission to insert a document into a time-stamp machine located in the Commission's Office of Public Information. Nearby, a lawyer for a natural-gas producer also stood poised, one hand raised skyward. Watching the lawyer intently was another lawyer employed by his firm, positioned, arm likewise raised, in the office doorway; two other employees of the same firm completed a human chain to a colleague standing at a public telephone on the second floor of the same building.[39]

That is how Nicholas Fels opened his 1980 law review article describing a hearing ordered by the Fifth Circuit to ascertain which of dueling petitions for review of a FERC order—one filed in the D.C. Circuit and the other filed in the Fifth Circuit—came first. His article, another law review article[40] and a report from the Administrative Conference of the United States (ACUS)[41]—all published that same year—had a common message. It was time to reform the "race to the courthouse" spectacle that had been fostered by the 1958 statute.

"Courts," recalled George Washington University law professor Jonathan Siegel, "were required to conduct rather absurd investigations into which of multiple petitions for

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the Major Questions Doctrine Limit Reciprocal Tariffs?, The REGUL. REV. (Apr. 30, 2025), https://perma.cc/KRE2-BYCX (discussing lawsuit challenging agency implementation of Trump executive order on tariffs as violation of APA"s "major questions doctrine"; Bonnie Eslinger, *Judge Orders Reinstatement Of Many Fired Federal Workers*, Law360 (Mar. 13, 2025), https://www.law360.com/articles/2310225?scroll=1&related=1 (discussing judge's ruling that unexplained firing of probationary workers was arbitrary and capricious under the APA).

39. Nicholas Fels, *Beyond the Stopwatch: Determining Appellate Venue on Review of FERC Orders*, 1 Energy L. J. 35 (1980).

40. Thomas O. McGarity, *Multi-Party Forum Shopping for Appellate Review of Administrative Action*, 129 U. Pa. L. Rev. 302, 325 (1980).

41. Jonathan R. Siegel, Admin. Conf. OF THE U.S., Sourcebook of Federal Judicial Review Statutes 42–43 (2021) https://www.acus.gov/sites/default/files/documents/revised-sourcebook-combined-copy-to-circ-may282021.pdf (crediting a 1980 ACUS report with the idea of amending 28 U.S.C. § 2112(a) to adopt the random selection process).

review had been filed first [like the hearing Mr. Fels described in his article], and the priority given to the first-filed petition favored wealthier parties, who could, for example, afford to pay agents to wait in an agency's file room and in a courthouse to detect the exact moment an order was issued and to file a petition for review immediately thereafter."[42]

The common solution suggested by the two authors and by ACUS was for the courts to adopt a random selection process. It took a while, but in 1988 Congress amended U.S.C. § 2112(a). Under the modified statute, when petitions for review of the same agency action are both served on the agency and filed in multiple circuits within 10 days of the agency's decision, the matter goes to the Judicial Panel on Multidistrict Litigation (JPML), which then conducts a lottery to determine venue and all related cases get transferred to the circuit court selected in the lottery.[43] Parties still have the right to seek transfer to "any" other circuit court on grounds that transfer would serve "the convenience of the parties in the interest of justice."[44] But even in those limited circumstances where transfer occurs, the case will still be heard by a single court.

This system of consolidation and random selection both addresses the concern that different circuit courts might issue conflicting opinions and mitigates the problem of forum shopping. To be sure, losing parties still file their petitions for review in the circuit courts they perceive as most favorable to them. But major rulemaking proceedings typically involve multiple issues, so even largely prevailing parties will often find *some* issue to appeal.[45] And these parties will seek review in the circuit courts *they* perceive to be most favorable.

Thus, random selection in major agency cases has become commonplace.[46] But while it works quite well where the statutes contemplate direct review of agency action in the circuit courts, the "vast majority" of challenges to administrative agency actions must first be raised in the federal district courts.[47] It would not be complicated to utilize the random selection process in the district court context.

Since 1968 the Judicial Panel on Multidistrict Litigation—the same panel that handles random selection of circuit courts—has had authority to transfer civil cases involving "common questions of fact" to a single district court judge or a panel of district court judges

42. *Id*.
43. U.S.C. § 2112(a)(1)–(3).
44. U.S.C. § 2112(a)(5).
45. One self-described management attorney explained the issue this way: "Many union lawyers on the losing side of Board decisions- even if unsuccessful on only a minor issue- therefore 'race to the courthouse' to file petitions for review in the District of Columbia, frequently on the very day the Board decision is released." Harry L. Browne, *A Management View of NLRA Reform*, 12 Gonzaga L. Rev. 32, 67 (1976). While his characterization was plainly not neutral, he wasn't wrong.
46. Two recent examples are the Multi-Circuit Panel's random selection, respectively, of the Sixth and Fourth Circuit courts of appeal to hear challenges to (1) the FCC's restoration of the "net neutrality rule," *In re* MCP No. 185, No. 24-7000, 2024 WL 3650468, at *3 (6th Cir. Aug. 1, 2024), and (2) the FERC's Order No. 1920 governing long-term regional transmission planning, *In re* MCP 190, Nos. 24-1650, (J.P.M.L. Aug. 8, 2024) (ordering consolidation of cases 24-1748, 24-1751, 24-1756 and 24-1650).
47. Joseph Mead, *Choosing the Court to Review Agency Rulemaking*, The REGUL. REV. (Nov. 11, 2024), https://perma.cc/4YMH-6FRB. *See also*, ADMIN. CONF. OF THE U.S. *Administrative Conference Recommendation 2024-1, Choice of Forum for Judicial Review of Agency Rules*, https://www.acus.gov/sites/default/files/documents/Choice-of-Forum-Adopted-Recommendation-2024.06.13_0.pdf (recommending "direct review of agency rules by a court of appeals" rather than beginning in the district courts).

for pretrial proceedings.[48] It has exercised this authority thousands of times.[49] One of the key purposes of the transfer and consolidation is to avoid inconsistent discovery rulings.[50]

Consolidation of civil cases brought in multiple district courts for *pretrial* purposes, however, would serve no practical purpose in the APA context. "[W]hen a party seeks review of agency action under the APA," the D.C. Circuit noted in its 2001 decision in *American Bioscience, Inc. v. Thompson,* the district judge "sits as an appellate tribunal" and "[t]he 'entire case' on review is a question of law."[51] It is this very attribute of APA cases brought in federal district court, however, that makes the random venue selection process contemplated under § 2112(a) so appealing (no pun intended).

As in both the multidistrict pretrial process and the random selection process in circuit court APA cases, deploying a random selection process to establish venue in federal district court APA cases would avoid conflicting court decisions on the same questions of law. And, by creating uncertainty among litigants about a case's ultimate venue, forum shopping would be less prevalent.

B. Statutory Obstacles to Reform

But none of this can happen under existing law. Subsection (d) of section 2112 itself expressly states that its provisions "are not applicable to proceedings… to review or enforce those orders of administrative agencies, boards, commissions, or officers which are by law reviewable or enforceable by the district courts."

Nor is there the same time constraint to bring APA cases in the district courts as apply to petitions for review that, by law, go straight to the circuit courts of appeal. Challenges in the latter category must be brought typically within 30 or sixty days of the agency's final action.[52] By contrast the six-year catch-all federal statute of limitations applies to APA cases filed in the federal district courts. And the Supreme Court's June, 2024 decision in *Corner Post* further complicates that fact by holding that the six year time limit does not begin to accrue for an individual litigant until that litigant has actually been harmed by the agency's regulations, even ones that may be decades old.[53] As Justice Kagan noted in her dissent in

48. 82 Stat. 109–110 (1968).
49. Overview of Panel, U.S JUD. PANEL ON MULTIDISTRICT LITIG., https://perma.cc/GB8S-79FJ.
50. *Id.*
51. Am. Bioscience, Inc. v. Thompson, 269 F.3d 1077, 1083 (D.C. Cir. 2001). There are limited circumstances in which a district court will allow discovery in an APA case, such as when there is a question whether the agency has provided the full record on which its decision is based. *See, e.g.,* Bar MK Ranches v. Yuetter, 994 F.2d 735, 739 (10th Cir. 1993) ("An agency may not unilaterally determine what constitutes the Administrative Record"). But "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.'" Camp v. Pitts, 411 U.S. 138, 142 (1973).
52. Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys., 603 U.S. 799, 812 (2024) (noting that the Hobbs Act, which applies to many federal agencies, requires petitions for review to be filed in the applicable circuit court of appeals within 60 days of "a final order.") The Federal Power and Natural Gas Acts impose the same deadline. *See* 16 U.S.C. § 825l; 15 U.S.C. § 717r(b).
53. *Corner Post,* 603 U.S. at 812.

that case, "[t]he majority's ruling makes legal challenges to decades-old agency decisions fair game." Under it, she adds:

> *Any* established government regulation about *any* issue—say, workplace safety, toxic waste, or consumer protection—can now be attacked by *any* new regulated entity within six years of the entity's formation. A brand-new entity could pop up and challenge a regulation that is *decades* old; perhaps even one that is as old as the APA itself.[54]

III. Conclusion

I'm accordingly suggesting a two-fold statutory solution. First, the time limit to seek review of final agency decisions should be uniform and should follow the Hobbs Act standard of 60 days following issuance of final agency action. There is no logical reason that Congress's catch-all six-year statute of limitations should apply to an APA case that originates in the federal district court, while parties challenging nearly all other APA cases in the circuit courts of appeal must file within 60 days. APA cases are not like ordinary civil litigation in which an individual plaintiff may not discover a potential cause of action until years after the fact. The errors, if any, in an agency decision are laid bare in the decision itself. More importantly, that reform would enhance stability in the law.

Second, Congress should amend section 2112 by expanding the roll of the MDL Panel to encompass random assignments of APA complaints that challenge the same final agency action in multiple federal district courts. In such cases, as it does now in circuit court cases, it would randomly select the venue for a case from among the district courts in which claims were made within the 10-day window following issuance of the final agency action. Then, as it already does in multidistrict pretrial consolidations, it could select a panel of district court judges from the same circuit in which the case was filed to preside over the matter as an appellate tribunal.

The reforms outlined above are relatively straightforward. At least as important, they are politically and philosophically neutral. Legislators of both major political parties know that political majorities change. Knowing this, there's at least a chance that they may see the advantages of expanding the successful section 2112 model as a means to reduce forum shopping.

54. *Id*. at 862 (Jackson, J., dissenting).