

Where a Suit Can Proceed: Court Selection and Forum Shopping

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The past several years have seen court cases challenging high-profile government actions including [environmental regulations](#), [immigration policies](#), [election administration](#), [economic measures](#), and [government responses](#) to the [COVID-19 pandemic](#). Plaintiffs in cases such as these often have some flexibility in selecting the court where their suits will proceed. They sometimes choose where to file suit based on their perception of how particular legal rules in a jurisdiction might apply or how likely the judges or juries in a given court are to rule favorably on their claims—a practice known as “[forum shopping](#).” In some cases, they may even try to bring their cases before a specific judge—a [type of forum shopping](#) sometimes called “[judge shopping](#).” While certain long-standing legal doctrines limit forum shopping, some commentators and legislators have raised [concerns about forum shopping](#), particularly in suits challenging government action. They argue that [recent legal developments](#), such as the increased prominence of [nationwide injunctions](#), may exacerbate those concerns.

This Legal Sidebar provides an overview of court selection and forum shopping, with an emphasis on court selection in federal court litigation. The Sidebar first outlines the legal authorities that determine where a case can proceed. It then discusses how litigants may choose among available courts seeking a litigation advantage. The Sidebar discusses the debate around forum shopping and judge shopping, then closes with analysis of key proposed legal reforms.

Legal Doctrine on Jurisdiction and Venue

Two key legal factors determine where a lawsuit can proceed: *jurisdiction* and *venue*. Litigants and courts consider jurisdiction and venue when deciding whether a case should proceed in federal or state court and which specific court within either system should hear the matter. Jurisdiction and venue rules serve multiple purposes, and in some circumstances, either by design or in effect, they limit opportunities for forum shopping. Often, however, the law allows for multiple possible options.

[Jurisdiction](#) refers to the power of a court to rule on a matter. In order to hear a case, a court must have both [personal jurisdiction](#)—meaning the court can exercise authority over the litigants—and [subject matter jurisdiction](#)—meaning it can rule on the legal issues presented. Parties can [waive personal jurisdiction](#) and consent to litigate in a court that could not otherwise exercise authority over them. By

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contrast, subject matter jurisdiction is [mandatory](#), so a court lacking subject matter jurisdiction cannot hear a case even if the parties consent.

[Venue](#) refers to the court where it is proper for a case to proceed. Venue will often lie in a court near where one or more [parties are located](#) or where the events giving rise to litigation occurred. Like personal jurisdiction, venue is [subject to waiver](#), meaning that parties can consent to litigate in a court where venue would not otherwise be proper.

The Constitution grants federal courts [limited subject matter jurisdiction](#). Federal courts can generally hear cases only if authorized to do so by the Constitution and a federal statute. Many suits challenging government actions fall within the constitutional and statutory grants of jurisdiction, which, among other things, allow federal courts to hear cases “[arising under](#)” the Constitution or federal laws or treaties and cases to which the [United States is a party](#). States, on the other hand, operate courts of [general jurisdiction](#), which are not bound by federal constitutional limits on subject matter jurisdiction. As part of their general jurisdiction, state courts have [concurrent jurisdiction](#) to hear most cases that could proceed in federal court.

Congress may enact legislation to direct certain types of cases to [state](#) or [federal court](#), subject to [some constitutional limits](#). Congress can also channel cases within the federal judiciary to particular federal courts. By default, [venue for federal court litigation](#) often lies in the trial-level district court in “a judicial district in which any defendant resides” or where “a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated.” However, judicial [review of certain agency actions](#) begins in the federal appeals courts. In some cases, federal statutes require that cases on a particular subject proceed in a particular court. For instance, a provision of the [Clean Air Act](#) requires that challenges to certain administrative actions under the Act proceed in the D.C. Circuit. Congress can also alter procedures for appellate review. For instance, most district court decisions are subject to [appellate review](#) by the U.S. Court of Appeals for the circuit in which the district court is located, but Congress has provided for [direct appeal to the Supreme Court](#) in limited categories of cases.

Like the federal government, each state has its own system of courts with its own rules governing jurisdiction and venue. State judicial systems may [vary significantly](#), but each state has at least one court of general jurisdiction. While Congress has significant power to structure the federal courts and set procedural rules for federal litigation, it has limited authority to regulate state courts.

Court Selection, Forum Shopping, and Judge Shopping

When filing a civil suit, the [plaintiff selects the court](#) where the suit will initially proceed. Plaintiffs challenging government action may have more choice in where to file suit than an individual plaintiff suing an individual defendant does, because many challenges to government action are subject to concurrent state and federal jurisdiction, and laws and government policies often affect people in multiple geographic locations. The plaintiff’s choice of court may not be the final word on the matter. As discussed below, a defendant who objects to the plaintiff’s choice of forum may sometimes be able to move a case to a different court, and courts sometimes dismiss or transfer cases on their own initiative.

Often, a plaintiff challenging government action will have the option to file in either state or federal court. One exception to this is when a resident of a state challenges a law or policy of her home state on state law grounds, for instance, by arguing that a state statute violates the state constitution. Such a case generally does not fall within the federal courts’ subject matter jurisdiction and would need to proceed in state court, if at all. By contrast, [suits against the federal government](#) generally fall within the federal courts’ jurisdiction, as do suits against either the federal government or a state government involving claims [arising under the federal Constitution or federal law](#).

In addition to selecting between federal and state court, plaintiffs may also be able to select between various courts within the federal or state judicial system. Federal laws and regulations often apply to people in many areas of the country, sometimes nationwide, while state laws and regulations often apply statewide. Entities such as nonprofit organizations with members in many geographic locations may be able to establish jurisdiction and proper venue in [any judicial district](#) where one or more members affected by a challenged action reside. Individuals, for-profit corporations, or state governments challenging federal action may also be affected by government action in multiple geographic locations and may thus be able to challenge the government action in any of several courts.

[Plaintiffs](#) sometimes [select](#) between state and federal court based on how they believe each court is likely to rule on their claims. Within each system, litigants may also seek out the specific court they believe is most likely to rule favorably. In particular, the federal judicial system allows for some variation in how courts apply the law. While all federal courts generally apply the same body of federal law, they may [differ in how they interpret those laws](#) (which some view as a benefit of the federal system, allowing for [full exploration of legal issues](#)). The Supreme Court sometimes [steps in to resolve divergences](#) between the courts of appeals known as “circuit splits,” but it does not always do so. A plaintiff may thus consider existing precedents and elect to sue in a court that has interpreted the applicable law in a way that is more likely to benefit her or avoid a court that she knows has interpreted the law unfavorably. Plaintiffs may also select a forum based on how they believe different courts are likely to resolve novel legal questions, sometimes basing the decision on a perceived partisan lean of the courts or judges. Traditionally, federal courts have been idealized as independent, [non-partisan entities](#) that should apply the law in a politically neutral manner. However, some litigants and other court watchers perceive [differences among courts](#) and contend that certain courts may be more or less likely to accept particular arguments, especially in novel or politically charged cases.

In some federal cases, plaintiffs may attempt to select not only the court in which their claims proceed but also the specific judge who will hear the case. So-called judge shopping may take [several forms](#), but one method that has gained particular attention in recent years involves strategic filing in courts with few available judges. Generally in the federal system, a new case is randomly assigned to a judge within the appropriate district (or a three-judge panel of the appropriate appellate court). However, a number of federal district courts are subdivided into [geographic divisions](#), and some divisions have only one or two active judges, so a plaintiff who sues in those divisions has a [high likelihood](#) of being able to proceed before her judge of choice. In recent years, some observers have [expressed concerns](#) that litigants challenging government actions were filing suit in those divisions in an attempt to [judge shop](#).

Outside the context of litigation against the government, federal court forum shopping and judge shopping are [common](#) in [patent cases](#), notwithstanding a 2017 [Supreme Court decision](#) that imposed some limits on the practice by narrowly construing the applicable venue statute with respect to place of incorporation and business. Forum shopping may also occur in [state courts](#), with litigants seeking to file in the state with the most favorable laws or to proceed before a [specific court](#) within a state that they believe may rule more favorably.

Traditionally, the plaintiff is the “[master of the forum](#)” and may sue in the court of her choice so long as jurisdiction exists and the venue is appropriate. However, defendants and courts may sometimes override the plaintiff’s choice of forum. For instance, if a plaintiff files in state court a case that could have been filed in federal court, the defendant can [remove the case from state court to federal court](#). The federal government often removes state court litigation challenging federal laws or regulations. If a defendant demonstrates that the plaintiff’s chosen venue is improper or that the court lacks personal or subject matter jurisdiction, the court must [dismiss the case or transfer it](#) to another court where jurisdiction and venue are proper. Likewise, if a federal court determines that it lacks subject matter jurisdiction at any time during litigation, it must [dismiss](#) or [transfer the case](#) even if the parties do not seek dismissal. If multiple plaintiffs file related suits in several different courts, the parties may litigate over whether cases

challenging the same law or policy should be consolidated in [multidistrict proceedings](#) and, if so, which court should hear the consolidated cases.

Debate Around Forum Shopping

Forum shopping is [not a new practice](#)—parties have long sought possible advantages during litigation, including seeking to obtain a [favorable decisionmaker](#) to the extent possible. (An analogous practice is [jury selection](#), in which litigants routinely seek the most favorable possible panel.) The phrase *forum shopping* may carry a negative connotation. However, some commentators [defend forum shopping](#) or downplay some concerns around it, noting that it may be [difficult to draw the line](#) between [generally accepted litigation strategy](#) and practices warranting concern.

A recent focus for concerns about forum shopping is the growing prevalence of, and public attention to, [emergency litigation](#) and [nationwide injunctions](#) against government action. A nationwide injunction is a court order that prevents the government from implementing a challenged law, regulation, or other policy against all persons and entities whether or not such persons or entities are parties participating in the litigation. (If the injunction is against the federal government, it may—but need not—[apply nationwide](#). Injunctions against state governments fully barring enforcement of state laws or policies generally do not apply nationwide but are similar from a legal standpoint.) While nationwide injunctions have existed for decades, many commentators argue that in recent years courts have become [more willing](#) to issue [far-reaching injunctive relief](#). An increase in nationwide injunctions [raises the stakes](#) in forum selection. If a court blocks a policy with respect to the plaintiff only, the government may still be able to [implement the policy](#) with respect to most people. On the other hand, if a court blocks a law or policy in its entirety, the government must litigate the case, often on an emergency basis, [before it can effectively pursue its policy goals](#).

Nationwide injunctions and forum shopping have also featured in recent public discussion of perceived [politicization of the federal courts](#). Concerns about politicization relate to forum shopping because some observers note that [many recent cases](#) challenging high-profile Democratic policies proceeded before judges appointed by Republican presidents and vice versa. Some of those cases were filed in districts or divisions that offered plaintiffs a high chance of assignment to preferred judges. The perception that parties can pick a certain court or judge and thereby secure a more favorable case outcome may increase the perception of politicization of the judiciary. This notion [undermines](#) the portrayal of judges as independent, nonpartisan actors who apply the law neutrally.

Considerations for Congress

Commentators and legislators have advanced a number of proposals that would seek to address perceived issues related to forum shopping and judge shopping. Because Congress generally has [broad constitutional authority](#) to regulate proceedings in the lower federal courts but limited power to regulate state judicial proceedings, this section focuses on proposed reforms to the federal courts.

Some recent proposals would specifically target judge shopping in divisions with few active judges. One option would be to eliminate divisional case assignments so that cases would be [randomly assigned](#) within each judicial district. That change could limit divisional judge shopping but would also increase practical burdens on litigants or judges in geographically large districts, either requiring judges to travel throughout the district or requiring litigants to travel for trial. Another option would be to [cap the probability](#) that plaintiffs filing in a certain division are assigned to any particular judge, for example at one in two or one in three. This change could be accomplished by restructuring divisions to eliminate those with one or two active judges or by assigning some cases to judges in other divisions within a district. The courts or Congress could also [tighten venue restrictions](#) by requiring each case “to be

connected to not just the district in which it is filed, but to the *division* in which it is filed, if the district is divided into divisions.”

Some proposals would change the venue rules for certain cases. One proposal would require all [suits seeking nationwide injunctions](#) to be brought in a particular forum, such as the District of Columbia federal courts. Proposals may also target narrower classes of cases. For instance, some recent proposals have concerned forum selection in [bankruptcy](#), [antitrust](#), [immigration](#), and [patent cases](#). Another proposal would have [moved environmental litigation](#) related to a specific [natural gas pipeline](#) from the Fourth Circuit to the D.C. Circuit. As an alternative to *requiring* certain cases to proceed in a specific venue, Congress could retain current venue rules but allow government defendants to transfer some cases. That would provide flexibility for the government to consent to the plaintiff’s preferred venue or proceed in a different court.

Congress might also consider reforms that would not directly regulate jurisdiction or venue but might mitigate concerns around forum shopping in challenges to generally applicable government action. For instance, [limiting](#) or [banning](#) nationwide [injunctions](#), sending nationwide injunction cases to a [three-judge district court](#), or providing for [direct Supreme Court review](#) in such cases might limit litigants’ incentive and ability to forum shop in district court.

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