CALLING THE SHOTS: MULTISTATE CHALLENGES TO FEDERAL VACCINE MANDATES

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INTRODUCTION

Multistate litigation brought by state attorneys general (“AGs”) frustrated the Biden administration’s efforts to combat the COVID-19 pandemic by vaccinating workers. Nationwide injunctions played an important role in halting the implementation of vaccine mandates in multistate actions. State challenges to vaccine mandates are consistent with AG lawsuit trends against recent presidential administrations. These challenges also reveal new emerging patterns that shed light on the future of multistate litigation and nationwide injunctions. State vaccine mandate lawsuits have continued to raise criticisms of nationwide injunctions and, at the same time, provide insights on pathways forward for reform.

I. AG ACTIVISM AND NATIONWIDE INJUNCTIONS

AGs have become increasingly active in suing the federal government in multistate coalitions during recent presidential administrations. These state coalitions are highly partisan with Republican AGs suing the federal government when there is a Democratic president in office and Democratic AGs suing when there is a Republican president. Concurrent with the

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increase of AG activism, federal courts have also more frequently ordered nationwide injunctions. Suing the federal government and obtaining
nationwide injunctions has allowed AGs to rise in political prominence and shape national policies.

Nationwide injunctions have been hotly debated among jurists, scholars, and policymakers. Conversations about nationwide injunctions have focused primarily on courts; however, states and AGs play an important role in shaping criticism of the remedy. States and AGs have unique attributes, advantages, and incentives that enable them to frequently sue the federal government and successfully obtain nationwide injunctions from courts. Those advantages are enhanced when states litigate together in multistate actions.

Over the past three presidential administrations, AGs have frustrated executive actions through multistate litigation. A distinctive Republican AG activism arose during the Obama administration after relatively modest litigation by Republicans against previous Democratic administrations. During the Obama administration, Republican AGs halted the administration’s Clean Power Program and deferred immigration initiatives by suing the federal government.

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4. An injunction is a “nationwide injunction” when it “controls the federal defendant’s conduct against everyone, not just against the plaintiff.” See Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 419 n.5, 425 (2017). The term “nationwide injunction” is an imperfect term for the phenomenon because it emphasizes territorial breadth where the real point of distinction is that the injunction applies to nonparties. Despite its potential to confuse, this Article uses the term “nationwide injunctions” because it is the name that courts repeatedly use when issuing this type of injunction. See Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1071 (2018).


8. See Dishman, supra note 1, at 508–09.

9. Id.

10. See id.

11. See Nolette, supra note 3, at 357–62.

dramatic upswing in an already rising trend of lawsuits brought by states.\textsuperscript{13} During the Trump administration, Democratic AGs obtained nationwide injunctions of the travel bans, Public Charge Rule, and repeal of the Deferred Action for Childhood Arrivals ("DACA") program.\textsuperscript{14} During the Biden administration, Republican AGs have returned to their Obama-era litigation playbook. From the outset, Republican AGs have challenged Biden administration executive actions in areas of climate change, immigration, and COVID-19 vaccine mandates.\textsuperscript{15}

Combating the COVID-19 pandemic has been one of the most significant issues facing the Biden administration. However, the administration’s efforts to counter the pandemic through vaccine mandates for workers have been met with swift state resistance as Republican AGs challenge them in federal courts across the country.

\section*{II. MULTISTATE CHALLENGES TO FEDERAL VACCINE MANDATES}

As the COVID-19 pandemic dragged on despite access to vaccines, on September 9, 2021, President Biden announced “a new plan to require more Americans to be vaccinated.”\textsuperscript{16} As part of that plan, President Biden introduced a series of federal actions aimed at increasing vaccination rates. The administration’s goal was for “vaccine requirements” to apply to “100 million Americans – two-thirds of all workers.”\textsuperscript{17} More specifically, President Biden announced planned coordinated agency action through the Occupational Safety and Health Administration ("OSHA") to apply to employers with over one hundred employees, Health and Human Services ("HHS") to apply to healthcare workers, and an executive order to apply to federal contractors.\textsuperscript{18} Shortly thereafter, Republican AGs representing twenty-four states wrote President Biden a letter in opposition to the planned OSHA rule and threatened to challenge it in court.\textsuperscript{19} Once federal vaccine

\begin{thebibliography}{9}
\bibitem[13]{13} See Multistate Litigation Database, supra note 2.
\bibitem[14]{14} See Nolette & Provost, supra note 1, at 470.
\bibitem[15]{15} See Dishman, supra note 1, at 364.
\bibitem[17]{17} See id.
\bibitem[18]{18} See id.
\bibitem[19]{19} See Letter from Alan Wilson, Att’y Gen., South Carolina, et al., to Joseph R. Biden, President, U.S. (Sept. 16, 2021), http://ago.wv.gov/Documents/AGs%20letter%20to%20Pres.%20Biden%20on%20vaccine%20mandate%20FINAL%20(02715056xD2C781).PDF [http://perma.cc/XY6Y-BXN4]. All but two of the country’s Republican AGs signed the letter. The AGs representing Idaho and Tennessee were not signatories to the letter; however, they both became parties to litigation challenging the Occupational Safety and Health Administration ("OSHA") mandate. See Bob Mercer, \textit{Ravnsborg Joins Other Republican AGs in Threat to Sue President Biden over Vaccine Mandate},
mandates became effective, states quickly filed multistate lawsuits in courts across the country seeking injunctive relief to thwart vaccination mandates. Republican AGs were largely successful in their efforts, with the administration ultimately withdrawing the broadest OSHA mandate and undermining a coordinated nationwide vaccination initiative.

A. OSHA VACCINE MANDATE

Consistent with President Biden’s announcement, OSHA promulgated an Emergency Temporary Standard (“ETS”) on November 5, 2021.20 The ETS required employers of one hundred or more employees to either require their employees to be vaccinated or wear masks and test weekly.21 An ETS takes immediate effect when published in the Federal Register, bypassing the sixty-day notice and comment process.22 OSHA is authorized to issue an ETS when (1) “employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards” and when (2) “the emergency standard is necessary to protect employees from such danger.”23 OSHA estimated that 84.2 million workers would be subject to the mandate.24

The same day the ETS was published in the Federal Register, Republican AGs filed petitions for review in multiple circuit courts of appeal across the country.25 Republican AGs formed several multistate coalitions and brought challenges in the Fifth,26 Sixth,27 Seventh,28 Eighth,29 and


21. See id. at 61,402.
25. See Lieb et al., supra note 19. Petitions for review are required to be filed directly in a United States circuit courts of appeals. See 29 U.S.C. § 655(f).
27. Indiana was the only state to bring suit in the Seventh Circuit. See Petition for Rev. at 1, Mass. Bldg. Trades Council v. U.S. Dep’t of Lab. (In re MCP No. 165), 21 F.4th 357 (6th Cir. 2021) (No. 21-4090) (filed in Seventh Circuit, Indiana v. Occupational Safety & Health Admin., No. 21-3066, and consolidated in the Sixth Circuit).
Eleventh Circuit Courts of Appeal. Ultimately, every Republican AG challenged the ETS and sought to stay its enforcement. Labor unions and other organizations filed petitions for review in the remaining circuits, until a petition was filed in every circuit court of appeals in the country. Pursuant to statute, the Judicial Panel on Multidistrict Litigation (“JPML”) held a lottery to determine which circuit court of appeals would hear a consolidated challenge to the ETS.

The day after the ETS was published, on November 6, 2021, the Fifth Circuit Court of Appeals ordered a stay “pending briefing and expedited judicial review.” Four days prior to the lottery, the Fifth Circuit issued an opinion staying the ETS on a nationwide basis. The Fifth Circuit found that the mandate likely exceeded OSHA’s statutory authority and was not properly tailored to the risks facing different types of workers and workplaces. The Fifth Circuit also raised constitutional concerns that the ETS exceeded the federal government’s authority under the Commerce Clause to regulate noneconomic activity that “falls squarely within the States’ police power.” In determining that irreparable harm would occur absent a stay, the Fifth Circuit noted the states’ “interest in seeing their constitutionally reserved police power over public health policy defended from federal overreach.” As a result of the Fifth Circuit’s nationwide stay, other circuits avoided ruling on stays prior to JPML’s lottery.

The JPML randomly selected the Sixth Circuit Court of Appeals to hear the consolidated challenges to the ETS. Once in the Sixth Circuit, OSHA moved to dissolve the Fifth Circuit’s stay. Challengers opposed that request.

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32. See 28 U.S.C. § 2112. When multiple petitions for review of a single agency order are filed in at least two courts of appeals within ten days after issuance of the order, the agency must notify the Judicial Panel on Multidistrict Litigation. The panel must then, “by means of random selection, designate one court of appeals, from among the courts of appeals in which petitions for review have been filed . . . and shall issue an order consolidating the petitions for review in that court of appeals.” Id.


34. Id. at 611–12, 615–16.

35. Id. at 617.

36. Id. at 618.


38. See id. 28 U.S.C. § 2112(a)(4) allows a court of appeals chosen through the multicircuit lottery to modify, revoke, or extend a stay that a court of appeals issued before the lottery.
and asked the Sixth Circuit to consider both the stay and the merits of the challenges en banc from the outset rather than through a three-judge panel. The request for an en banc hearing was denied in an evenly divided 8-8 vote.\textsuperscript{39} On December 17, 2021, a three-judge panel dissolved the Fifth Circuit’s stay.\textsuperscript{40} In a split panel, the Sixth Circuit held that OSHA’s mandate was likely consistent with the agency’s statutory and constitutional authority.\textsuperscript{41} Specifically, with respect to the states, the Sixth Circuit found that federalism concerns were not at issue in this case because Congress, in adopting the Occupational Safety Health Act, decided that the federal government would take the lead in regulating the field of occupational health.\textsuperscript{42} Furthermore, the Sixth Circuit found that the ETS is permissible under the Commerce Clause because it focused on economic activity directed at private employers rather than noneconomic activity that encroached on states’ police powers.\textsuperscript{43}

Several challengers immediately petitioned the Supreme Court to reinstate the stay while the merits of the dispute were heard by the Sixth Circuit. Days later, the Supreme Court agreed to hear argument on two consolidated applications.\textsuperscript{44} On January 13, 2022, the Supreme Court stayed the ETS, holding that the applicants for the stay were likely to succeed on the merits that OSHA lacked authority to impose the mandate.\textsuperscript{45} In a per curiam opinion, the Court found that the mandate failed to distinguish between an occupational risk and a risk of daily living that is untethered from the workplace.\textsuperscript{46} The Court reasoned that allowing OSHA to regulate a risk of daily life “would significantly expand OSHA’s regulatory authority without clear congressional authorization.”\textsuperscript{47} The Supreme Court stated that a more narrowly tailored regulation may pass muster if it was limited to workplaces where COVID-19 poses a special danger such as for “risks associated with working in particularly crowded or cramped environments.”\textsuperscript{48}

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\textsuperscript{39} \textit{See} \textit{In re MCP No. 165, 20 F.4th 264, 271 (6th Cir. 2021)}. Nearly sixty challengers requested the Sixth Circuit hear the case en banc. \textit{See id.} at 265–66.
\textsuperscript{40} \textit{Mass. Bldg. Trades Council, 21 F.4th at 366}.
\textsuperscript{41} \textit{See id.} at 369–72, 384–87.
\textsuperscript{42} \textit{See id.} at 385–86.
\textsuperscript{43} \textit{See id.} at 386.
\textsuperscript{44} The Supreme Court consolidated two applications—“one from the National Federation of Independent Business, and one from a coalition of States [led by Ohio]—and heard expedited argument on January 7, 2022.” \textit{Nat’l Fed’n of Indep. Bus. v. U.S. Dept’ of Lab.}, 142 S. Ct. 661, 664 (2022) (per curiam).
\textsuperscript{45} \textit{See id.} at 664–65.
\textsuperscript{46} \textit{See id.} at 665–66.
\textsuperscript{47} \textit{See id.} at 665. “Although Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly.” \textit{Id.} at 666.
\textsuperscript{48} \textit{Id.} at 666.
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Justice Gorsuch wrote a concurring opinion, joined by Justices Thomas and Alito. Justice Gorsuch relied on the major questions doctrine and found that OSHA’s mandate regulate an issue of vast national significance without clear authorization from Congress. Justice Gorsuch reasoned that the major questions doctrine preserves the separation of powers and ensures that elected representatives make decisions of national significance. He argued that OSHA could not trace its authority to issue a nationwide mandate to any clear congressional authorization, and if OSHA did have the power under the law it relied upon, “that law would likely constitute an unconstitutional delegation of legislative authority.” Justice Gorsuch summarized, “[u]nder the law as it stands today, that power [to respond to the pandemic] rests with the States and Congress, not OSHA.”

Justice Breyer authored a dissenting opinion, joined by Justices Sotomayor and Kagan. Justice Breyer argued that OSHA has the authority to issue the ETS. He reasoned that OSHA’s actions fall within the core of the agency’s mission to “‘protect employees’ from ‘grave danger’ that comes from ‘new hazards’ or exposure to harmful agents.” Justice Breyer pointed out that the mandate encourages vaccination but permits employers to adopt a masking or testing policy instead. Justice Breyer addressed the majority’s argument about the connection of the risk to the workplace as opposed to daily life and argued that the statute is indifferent as to whether the risk also exists outside the workplace. He argued that COVID-19 poses special risks in most workplaces and employees have less control over their environment when in the workplace.

Upon return to the Sixth Circuit, the Biden administration withdrew the ETS and moved to dismiss the case based on mootness. Obtaining a stay at

49. Justice Gorsuch described the major questions doctrine as the expectation for “‘Congress to speak clearly’ if it wishes to assign to an executive agency decisions of ‘vast economic and political significance.’” Id. at 667. The nondelegation doctrine, closely related to major questions doctrine, prevents Congress from delegating its legislative powers to unelected officials. Id. at 669. Justice Gorsuch argued that the nondelegation doctrine protects the separation of powers and forces congress to act and be accountable. Id. at 669.
50. Id. at 667–68.
51. Id. at 669.
52. Id.
53. Id. at 670.
54. Id. at 674–75 (Breyer, J., dissenting).
55. See id. at 670 (quoting 29 U.S.C. § 655(c)(1)). Congress enacted the Occupational Safety and Health Act “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve human resources.” Id. (quoting U.S.C. § 651(b)). “To that end, the Act empowers OSHA to issue ‘mandatory occupational and health standards applicable to businesses affecting interstate commerce.’” Id. at 671 (quoting U.S.C. § 651(b)(3)).
56. See id. at 671.
57. See id. at 673.
58. See id. at 674.
59. See Bruce Rolfsen & Robert Iafolla, Biden’s Shot-or-Test Rule Abandoned After Supreme
the Supreme Court and a withdrawal of the ETS was a substantial victory for Republican AGs. The OSHA mandate was the broadest of the administration’s vaccine mandates, and Republican AGs delivered a significant blow to the Biden administration’s efforts to address one of the most critical issues of his presidency. However, the victory for Republican AGs was not total. The same day the Court issued the stay of the OSHA mandate, the Court stayed preliminary injunctions against the HHS vaccine mandate, allowing it to go into effect.

B. HHS VACCINE MANDATE

The same day the OSHA mandate became effective, the Secretary of HHS issued an interim final rule adding a new requirement for participation in Medicare and Medicaid—that healthcare facilities ensure that all staff receive the COVID-19 vaccination.\(^60\) If a healthcare provider failed to comply with the vaccination requirement, it may be subjected to “civil money penalties, denial of payment for new admissions, or termination of its Medicare [or] Medicaid provider agreement.”\(^61\) “According to [the Center for Medicare and Medicaid Services (“CMS”)], the CMS mandate regulates over 10.3 million healthcare workers in the United States,” 2.4 million of whom are currently unvaccinated.\(^62\)

States swiftly challenged the HHS mandate in district courts across the country. The first multistate action filed was a coalition of states led by Missouri,\(^63\) followed by one led by Louisiana.\(^64\) Florida and Texas, each acting alone, also challenged the interim rule in federal district courts.\(^65\) All of the states challenging the HHS mandate were led by Republican AGs, with the exception of one.\(^66\) The outcomes of states’ challenges to the HHS

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\(^{60}\) See Medicare and Medicaid Programs; Omnibus COVID–19 Health Care Staff Vaccination, 86 Fed. Reg. 61555, 61561 (Nov. 5, 2021). The Rule allowed exceptions for medical and religious reasons. Id. at 61569. The Secretary issued the rule as an interim final rule, rather than going through the typical notice-and-comment process, after finding “good cause” that it should be made effective immediately. Id. at 61586.

\(^{61}\) See id. at 61574.


\(^{64}\) The following states joined Louisiana in the action: Montana, Arizona, Alabama, Georgia, Idaho, Indiana, Mississippi, Oklahoma, South Carolina, Utah, West Virginia, Kentucky, and Ohio. See Louisiana v. Becerra, 571 F. Supp. 3d at 516, 525.


\(^{66}\) Information on Current AGs, STATE LITIG. & AG ACTIVITY DATABASE, https://attorneys general.org/ag-office-information/information-on-current-ag/ [http://perma.cc/RY2Q-DLVG]; Iowa
mandate varied in the district courts with respect to obtaining preliminary injunctions. The first to decide the issue, a district court in Florida, refused to issue a preliminary injunction altogether. In contrast, a district court in Missouri issued a preliminary injunction, but limited it to the states participating in the lawsuit. And finally, a district court in Louisiana issued a nationwide preliminary injunction.

The district court in Florida v. HHS flatly denied the state’s motion for a preliminary injunction. The court found that Florida failed to show it would be irreparably injured without an injunction because the state’s arguments that the rule would result in healthcare staff shortages were speculative. The court rejected the argument that Florida’s sovereignty would be irreparably damaged because the rule preempted a state statute that prohibited COVID-19 vaccine mandates. As a result, the court denied Florida’s motion for a preliminary injunction. Florida appealed the district court’s denial of its motion for preliminary injunction to the Eleventh Circuit Court of Appeals.

The district court in Missouri v. Biden came to a different conclusion and ordered a preliminary injunction but limited its scope to the states participating in the lawsuit. The court held that the states were likely to succeed on its claim that HHS lacked statutory authority for the rule. The court reasoned that Congress must use clear language if it seeks to disrupt the balance of power between states and the federal government, and such clarity did not exist to warrant HHS’s encroachment on states’ police powers to regulate public health. The court in Missouri found that states had demonstrated irreparable injury based on the states’ sovereign, quasi-sovereign, and propriety interests. Specifically, the court found the interim rule would irreparably injure states’ sovereign interests in enforcing state statutes prohibiting vaccine mandates and states’ quasi-sovereign interests in protecting the health and well-being of their citizens. The court limited the

was the only state with a Democratic AG that joined the action at the behest of the Republican governor. See infra note 166.

67. Florida v. Dep’t of Health & Hum. Servs., 571 F. Supp. 3d at 1271. Florida was the last to file suit, but the district court was the first to decide the issue of the preliminary injunction.
68. See Missouri v. Biden, 571 F. Supp. 3d at 1104.
70. See Florida v. Dep’t of Health & Hum. Servs., 571 F. Supp. 3d at 1271.
71. See id. at 1274.
72. See id. at 1275.
73. See id.
74. See Missouri v. Biden, 571 F. Supp. 3d at 1104.
75. See id. at 1086–89.
76. See id. at 1088–89.
77. See id. at 1099–102.
78. See id. at 1100. The court did not recognize the bar the Supreme Court set in Massachusetts v. Mellon, prohibiting states to bring parens patriae actions against the federal government to vindicate
preliminary injunction to the states participating in the action, and the federal
government appealed. The Eighth Circuit Court of Appeals denied the
federal government’s motion to stay the injunction.79

The district court in Louisiana v. Becerra, took a different approach
than either of the district courts in Missouri and Florida and ordered a
nationwide injunction.80 The district court in Louisiana found that the states
had standing to challenge the HHS mandate under the special solicitude
doctrine81 and listed other cases where states had brought lawsuits against
the Biden administration and courts invoked the doctrine to find standing for
states.82 The court also based its standing decision on states’ unique ability
to act as parens patriae “in protecting [their] citizens from being required to
submit to vaccinations.”83 Additionally, the court found that “states have
standing to regulate matters they believe they control, to attack preemption
of state law by a federal agency, and to protect the enforcement of state
law.”84

After finding standing in Louisiana, the court held that the states were
likely to prevail on the argument that the interim rule exceeded HHS’s
authority.85 Similar to the reasoning in Missouri, the court found that
Congress did not delegate authority to HHS for a vaccine mandate because
Congress must clearly delegate powers when the agency action “would
radically readjust the balance of state and national authority.”86 Recognizing
that public health and vaccination traditionally fall within the states’ powers,
the court found that the states “ma[d]e a strong case that the CMS mandate
violates States’ police powers.”87 The court also recognized that the interim
rule preempted state and local laws prohibiting COVID-19 vaccine mandates
and found that the states demonstrated irreparable injury because preemption

their quasi-sovereign interests in protecting their citizens’ rights. See Massachusetts v. Mellon, 262 U.S.
447, 485 (1923).
LEXIS 16240 (5th Cir. 2022). In the Texas challenge, the district court initially stayed the action once
the Louisiana district court issued a nationwide injunction that applied to Texas. See Texas v. Becerra,
575 F. Supp. 3d 701, 711 (N.D. Tex. 2021) (granting a preliminary injunction with respect to Texas
following the Fifth Circuit’s limitation of the nationwide injunction).
81. The Supreme Court established the special solicitude doctrine in Massachusetts v. EPA, finding
that states were entitled to special solicitude in the standing analysis when they were asserting a
procedural right and protecting their quasi-sovereign interests. See Massachusetts v. EPA, 549 U.S. 497,
520 (2007).
82. See Louisiana v. Becerra, 571 F. Supp. 3d at 529.
83. See id. at 530.
84. See id.
85. See id. at 535–37.
86. See id. at 541.
87. See id.
encroached on their police powers.\textsuperscript{88}

The district court in \textit{Louisiana} ordered a nationwide injunction due to the national scope of the vaccine mandate and the need for uniformity.\textsuperscript{89} The court considered limiting the injunction to the participating states, as was done in the \textit{Missouri} case, but rejected that approach since “there are unvaccinated healthcare workers in other states who also need protection.”\textsuperscript{90} The court exempted from the nationwide injunction the ten plaintiff states that were already under a preliminary injunction from the \textit{Missouri} case.\textsuperscript{91} However, the court did not address the Florida district court’s denial of an injunction even though the \textit{Louisiana} nationwide injunction had the result of providing Florida injunctive relief, despite the district court’s denial of that same relief.\textsuperscript{92} The federal government appealed the nationwide injunction to the Fifth Circuit Court of Appeals and sought a stay of the injunction pending appeal.\textsuperscript{93}

While the \textit{Louisiana} case was pending appeal in the Fifth Circuit, the Eleventh Circuit addressed Florida’s appeal of the denial of its motion for a preliminary injunction. As an initial matter, the Eleventh Circuit had to address whether the appeal was moot in light of the nationwide injunction ordered by the district court in \textit{Louisiana}.\textsuperscript{94} The Eleventh Circuit pointed out that the Louisiana district court failed to acknowledge the Florida district court’s ruling denying Florida a preliminary injunction.\textsuperscript{95} Even though the \textit{Louisiana} nationwide injunction applied to Florida, the Eleventh Circuit nonetheless found that the case was not moot because the court found it was likely that the Fifth Circuit would limit the injunction.\textsuperscript{96} The Eleventh Circuit criticized the nationwide scope of the \textit{Louisiana} injunction, reasoning that complete relief could be provided to the states by limiting the injunction to participating states.\textsuperscript{97} The Eleventh Circuit raised concerns that nationwide injunctions undermine percolation and comity among courts.\textsuperscript{98} It agreed with the Florida district court that the state failed to show that the agency lacked statutory authority and that the state would suffer irreparable injury.\textsuperscript{99} Furthermore, the court rejected the state’s parens patriae argument on behalf

\begin{itemize}
\item \textsuperscript{88} See id. at 541–42.
\item \textsuperscript{89} See id. at 543.
\item \textsuperscript{90} See id.
\item \textsuperscript{91} See id. at 543–44.
\item \textsuperscript{92} See Florida v. Dep’t of Health & Hum. Servs., 19 F.4th 1271, 1279 (11th Cir. 2021).
\item \textsuperscript{93} See Louisiana v. Becerra, 20 F.4th 260, 262 (5th Cir. 2021).
\item \textsuperscript{94} See Florida v. Dep’t of Health & Hum. Servs., 19 F.4th at 1280.
\item \textsuperscript{95} See id. at 1279–80.
\item \textsuperscript{96} See id. at 1281.
\item \textsuperscript{97} See id. at 1283.
\item \textsuperscript{98} See id. at 1285–86.
\item \textsuperscript{99} See id. at 1287–89, 1291–93.
\end{itemize}
of unvaccinated Florida healthcare workers.\textsuperscript{100} Thus, the Eleventh Circuit denied Florida’s motion for an injunction pending appeal.\textsuperscript{101}

After the Eleventh Circuit’s decision, the Fifth Circuit considered the government’s appeal in the \textit{Louisiana} case and limited the district court’s nationwide injunction to apply only to participating states.\textsuperscript{102} In limiting the scope of the injunction, the Fifth Circuit acknowledged that other courts had considered the issue and that “[p]rinciples of judicial restraint control here.”\textsuperscript{103} The Fifth Circuit also acknowledged that “the many states that have not brought suit may well have accepted and even endorsed the vaccination rule.”\textsuperscript{104} The Fifth Circuit posed the question “whether one district court should make a binding judgment for the entire country.”\textsuperscript{105} The Fifth Circuit distinguished its own precedent affirming nationwide injunctions and stated its precedent “does not hold that nationwide injunctions are required or even the norm.”\textsuperscript{106} Because the Fifth Circuit found that the HHS Secretary would likely prevail on limiting the scope of the injunction, the Fifth Circuit stayed the injunction outside of the participating states.\textsuperscript{107}

The federal government filed applications with the Supreme Court asking the Court to stay the preliminary injunctions in the \textit{Missouri} and \textit{Louisiana} cases, and the Supreme Court consolidated the cases.\textsuperscript{108} In contrast to the OSHA mandate opinion issued on the same day, the Supreme Court stayed the preliminary injunctions in the HHS case, allowing the mandate to go into effect.\textsuperscript{109} In an unsigned per curiam opinion, the Supreme Court found that the government was likely to prevail on its claim that the rule falls within the authority that Congress conferred on HHS and CMS.\textsuperscript{110}

Justice Thomas wrote a dissenting opinion, joined by Justices Gorsuch, Barrett, and Alito arguing that HHS lacked statutory authority to issue the interim rule based on federalism concerns.\textsuperscript{111} Justice Thomas reasoned that

\textsuperscript{100} \textit{Id.} at 1287, 1292–93.

\textsuperscript{101} \textit{Id.} at 1293.


\textsuperscript{103} \textit{Id.}

\textsuperscript{104} \textit{Id.}

\textsuperscript{105} \textit{Id.}

\textsuperscript{106} \textit{Id.}

\textsuperscript{107} \textit{Id.} at 262–63.

\textsuperscript{108} \textit{Id.}

\textsuperscript{109} \textit{Id.} at 654–55.

\textsuperscript{110} \textit{Id.} at 652.

\textsuperscript{111} \textit{Id.} at 658 (Thomas, J., dissenting). Justice Alito also wrote a dissenting opinion in the case arguing that the interim rule was unlawful because it did not follow proper procedure such as a showing
“[v]accine mandates also fall squarely within a State’s police power . . . If Congress had wanted to grant CMS authority to impose a nationwide vaccine mandate, and consequently alter the state-federal balance, it would have said so clearly. It did not.”112

Unlike with the OSHA mandate, the federal government has been successful in defending its vaccine requirement for healthcare workers in the Supreme Court. Nevertheless, AG challenges to the mandate stalled federal efforts to roll out a coordinated national vaccination policy for workers.

C. FEDERAL CONTRACTOR MANDATE

The same day as President Biden’s vaccination speech, September 9, 2021, the White House issued Executive Order 14042.113 According to the Department of Labor, “workers employed by federal contractors” make up “approximately one-fifth of the entire U.S. labor force.”114 The Executive Order mandated that the Safer Federal Workforce Task Force (“Task Force”)115 provide guidance regarding “adequate COVID safeguards” which would apply to all federal contractors and subcontractors.116 The Executive Order provided that the guidance would be mandatory at all “contractor and subcontractor locations” as long as the Director of Office of Management and Budget (“OMB”) approved it and determined that it would “promote economy and efficiency in Federal contracting.”117 On September 24, 2021, the Task Force issued its guidance for federal contractors and subcontractors of “good cause” to bypass the notice-and-comment requirement. See id. at 659–60 (Alito, J., dissenting).

112. Id. at 658 (Thomas, J., dissenting).

117. See id.
requiring all contractors to be fully vaccinated by January 18, 2022, unless they are “legally entitled to an accommodation.” After the Guidance was issued, the OMB made a determination pursuant to the Executive Order that the Guidance would promote “economy and efficiency” under the Federal Property and Administrative Services Act (“FPSA”). The Executive Order assigns the Federal Acquisition Regulatory Counsel (“FARC”) with amending the policies and procedures that govern drafting and procurement processes of federal contracts. On September 30, 2021, the FARC issued a memo with guidance to assist agencies in including vaccine mandates in federal contracts.

Republican AGs organized multistate coalitions to challenge the Executive Order in federal district courts across the country and successfully obtained nationwide and limited preliminary injunctions. The first district court to issue a preliminary injunction was the District Court for the Eastern District of Kentucky. In Kentucky v. Biden, state litigants’ unique status played an important role in the court’s standing analysis and its decision that states would be likely to succeed on the merits. The district court relied on the special solicitude standing and parens patriae doctrines, both doctrines that uniquely apply to states. The district court held that the states were likely to prevail on the merits that the President exceeded his statutory authority under the FPSA. The court also expressed federalism and Tenth Amendment concerns that a federal vaccine mandate “intrudes on an area that is traditionally reserved to the states.” The court recognized concerns raised by Supreme Court Justices regarding nationwide injunctions and determined that the scope of the injunction would be limited to states participating in the lawsuit. The federal government appealed the preliminary injunction to the Sixth Circuit Court of Appeals.

The Sixth Circuit Court denied the federal government’s motion to stay the injunction pending appeal. The Sixth Circuit corrected the district


123. See id. at 722.

124. See id. at 733–34.

125. See id. at 729.

126. See id. at 734, (participating states are Kentucky, Ohio, and Tennessee).

court’s misapplication of the parens patriae doctrine and found that the federal government was likely to succeed on the standing argument that the states do not have parens patriae standing to litigate on behalf of citizenry against the federal government. However, the Sixth Circuit found that states could sue to vindicate their own sovereign and quasi-sovereign interests and held that the President likely exceeded his authority under the FPSA. In so doing, the Sixth Circuit reasoned that Congress must use “exceedingly clear language if it wishes to significantly alter the balance between federal and state power” and pointed out that public health has been part of states’ traditional police powers. The merits of the appeal are currently being litigated in the Sixth Circuit while the mandate is stayed.

Prior to the Sixth Circuit reviewing Kentucky v. Biden, a district court in Georgia ordered a nationwide injunction of the federal contractor vaccine mandate. Like the Kentucky case, the district court in Georgia v. Biden found that the plaintiffs were likely to succeed in their argument that the President exceeded his authority under the FPSA. The court refused to limit the scope of the injunction to the participating states because a trade association with nationwide membership intervened in the action. Since the trade association had members in every state, the court reasoned that a nationwide injunction was necessary to provide complete relief and avoid confusion. The Eleventh Circuit Court of Appeals denied the government’s request to stay the nationwide injunction, finding that the federal government would not be irreparably injured by the injunction staying in place. However, on appeal the Eleventh Circuit ultimately limited the scope of the injunction to only the participating states. The Eleventh Circuit stated that “nationwide injunctions push against the boundaries of judicial power” and “[w]e are both weary and wary of this drastic form of relief.” The Eleventh Circuit found that “the district court relied on improper considerations to justify [a] nationwide injunction” and that a limited injunction adequately protected the interests of the state and trade association parties. Thus, the circuit court vacated the nationwide

128. See id. at 596–98.
129. See id. at 604.
130. See id. at 609.
132. See id. at 1343.
133. See id. at 1356.
134. See id.
136. See Georgia v. President of the U.S., 46 F. 4th 1283, 1308 (11th Cir. 2022).
137. Id. at 1303.
138. Id. at 1307.
preliminary injunction and limited the scope of the injunction to the parties.139

Shortly after the Eleventh Circuit’s decision, on August 31, 2022, the Task Force announced that it would not be enforcing Executive Order 14042 in order “[t]o ensure compliance with an applicable preliminary nationwide injunction, which may be supplemented, modified, or vacated, depending on the course of ongoing litigation.”140 Other district courts, faced with state challenges to the Executive Order, have ordered injunctions limited to participating states.141 However, they did so with the backdrop of a nationwide injunction in place from the district court in Georgia v. Biden. Appeals to the federal contractor mandates are still pending in the Fifth, Sixth, and Eighth Circuit Court of Appeals.

By challenging vaccine mandates, Republican AGs disrupted the Biden administration’s efforts to address the COVID-19 pandemic and shaped national vaccine policy. The ability of states to obtain injunctions, in particular nationwide injunctions, was pivotal to Republican AGs’ strategy to halt vaccine mandates. While the administration successfully defended the HHS mandate, injunctions issued in the OSHA and federal contractor cases undermined the administration’s efforts to implement a nationally coordinated vaccine program for workers until the federal government ultimately abandoned the policies.

III. STATE LITIGANTS AND LITIGATORS IN VACCINE MANDATE LITIGATION

Vaccine challenges highlight the unique strengths of states and AGs in litigation against the federal government. State litigants have distinctive attributes and advantages that have enabled them to successfully challenge federal actions and obtain nationwide injunctions.142 And state litigators, AGs, are well-positioned and incentivized to sue the federal government on politically salient issues like vaccine mandates.143 State advantages are

139. Id. at 1308. The Eleventh Circuit affirmed an injunction enjoining the federal government “from enforcing the mandate against the plaintiffs—the seven plaintiff States and their agencies and members of Associated Builder and Contractors—and to the extent it bars the federal government from considering a bidder’s compliance with the mandate when deciding whether to grant a contract to a plaintiff or to a nonparty bidder.” Id.
142. See Dishman, supra note 1, at 383.
143. See id. at 393.
enhanced when states litigate together in multistate actions, as they did in the vaccine mandate cases. During recent presidential administrations, AGs have effectively shaped national policy through bringing multistate actions and obtaining nationwide injunctions. In the context of vaccine litigation, states opposing the mandates shaped national policy by frustrating the Biden administration’s efforts to roll out coordinated national vaccine policies.

State litigants have unique advantages vis-à-vis private litigants in obtaining the nationwide injunctions that played an important role in state vaccine challenges. States have the unique ability to establish standing in federal courts through the special solicitude doctrine and states relied on that doctrine to establish standing in vaccine mandate cases. For example, in Louisiana v. Becerra, the court ordered a nationwide injunction of the HHS vaccine mandate after relying on the special solicitude doctrine.

Multistate actions allow states tremendous flexibility in forum selection since only one participating state need demonstrate standing and proper venue. This flexibility allows states to sue with other states outside of their district and circuit courts to select potentially more favorable jurisdictions. Circuit court forum shopping took center stage in the OSHA vaccine mandate challenges. Since the OSHA challenges were required to initially be filed in federal circuit courts of appeal rather than federal district courts, state litigants could directly choose which circuit court they wanted to hear their challenge. In these cases, states in traditionally more liberal leaning circuits joined multistate actions outside of their circuits. For example, every state led by a Republican AG located in the Ninth Circuit Court of Appeals joined a multistate action in a different circuit court of appeals. The forum selection by Republican AGs sheds light on how AGs consider the ideological leanings of their own circuit courts and other circuit courts. Below is a table showing the states that joined actions outside of their geographic circuit and the circuit they chose to file in.

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144. See id. at 383.
145. See id. at 359; Nolette & Provost, supra note 1, at 470.
146. See Dishman, supra note 1, at 390.
149. See Massachusetts v. EPA, 549 U.S. at 518.
TABLE 1. Circuit Court Forum Selection in OSHA Mandate Litigation by Republican AGs

<table>
<thead>
<tr>
<th>State</th>
<th>Regional Circuit</th>
<th>Circuit Filed</th>
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<tbody>
<tr>
<td>South Carolina</td>
<td>Fourth</td>
<td>Fifth</td>
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<tr>
<td>Utah</td>
<td>Tenth</td>
<td>Fifth</td>
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<td>Idaho</td>
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<td>Kansas</td>
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<td>Oklahoma</td>
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<tr>
<td>West Virginia</td>
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<td>Arizona</td>
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<td>Wyoming</td>
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In other vaccine mandate challenges, states selected district courts in multistate actions following a similar pattern. In the HHS vaccine mandate challenges, states joined actions in the Western District of Louisiana and the Eastern District of Missouri. In the federal contractor mandate cases, states joined actions in the Western District of Louisiana, Eastern District of Missouri, Southern District of Georgia, and Eastern District of

152. The following states joined Louisiana: Montana, Arizona, Alabama, Georgia, Idaho, Indiana, Mississippi, Oklahoma, South Carolina, Utah, West Virginia, Kentucky, and Ohio. See Louisiana v. Becerra, 571 F. Supp. 3d at 525 n.1.


156. Georgia was joined by Alabama, Idaho, Kansas, South Carolina, Utah, and West Virginia. See Georgia v. Biden, 574 F. Supp. 3d 1337, 1342–43 (S.D. Ga. 2021), vacated in part, 46 F.4th 1283 (11th
Kentucky. Similar to the OSHA mandate cases, states located in the First, Fourth, Ninth, and Tenth Circuits and led by Republican AGs joined actions in district courts located in the jurisdictions of the Fifth, Sixth, Eighth, and Eleventh Circuits rather than filing in district courts in their regional circuit. State litigants have wide discretion and flexibility in selecting a forum and states used that ability to their advantage in challenging vaccine mandates.

State litigants also have a distinct advantage to make federalism arguments to challenge vaccine mandates. States challenged federal authority to mandate vaccines based on states’ traditional police power over public health. States successfully argued that if Congress intended to disrupt the balance of power between the federal government and states that it would need to delegate power clearly. The lack of clarity in the authority to regulate vaccines, states argued, meant that agencies lacked the power to regulate in an area traditionally reserved to states. States also successfully argued they suffered irreparable injuries when the federal government encroached on their powers, such as when federal mandates preempted states from enforcing state laws prohibiting vaccine mandates. States’ unique status as parens patriae led them to argue that they had the ability to sue the federal government on behalf of the health and welfare of their residents. States are foreclosed from bringing a parens patriae action asserting their quasi-sovereign interests on behalf of their citizenry against the federal government under the Supreme Court case Massachusetts v. Mellon. However, states asserted parens patriae standing against the federal government, among other standing theories, in some district courts notwithstanding the prohibition in Mellon.

As state litigators, AGs are particularly well-suited to sue the federal government, including challenging vaccine mandates. AGs have considerable experience litigating cases against the federal government and seeking nationwide injunctions. This experience is particularly important in mounting swift litigation challenges that involve expedited litigation in district courts, courts of appeal, and the Supreme Court. States’ ability to quickly enjoin vaccine mandates dealt a blow to the Biden administration’s

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159. Id. at 607; Missouri v. Biden, 571 F. Supp. 3d 1079, 1086–87 (E.D. Mo. 2021).
163. See Louisiana v. Becerra, 571 F. Supp. 3d at 530; see also Mellon, 262 U.S. at 485–86.
164. See Dishman, supra note 1, at 394–95.
efforts to implement its COVID-19 policies. Actions against the federal government are highly partisan, allowing AGs to rely on established partisan networks and the support of like-minded organizations.\(^{165}\)

Challenges to vaccine mandates were also highly partisan with overwhelming participation by Republican AGs. Only one Democratic AG, Iowa’s Tom Miller, filed suit in the OSHA mandate case, and he only did so at the behest of the state’s Republican governor.\(^{166}\) Ultimately every state represented by a Republican AG challenged at least one of the vaccine mandates. Indeed, statements by Republican AGs in the vaccine challenges showed the politicized nature of the litigation.\(^{167}\) AGs have broad discretion in choosing which cases to pursue against the federal government.\(^{168}\) Like litigation against prior administrations, the vaccine mandate cases involved a highly divisive and salient political issue. AGs have political incentives to target highly salient political issues and seek nationwide injunctions to impose their policy preferences outside their state borders.\(^{169}\)

### IV. FUTURE OF MULTISTATE ACTIONS AND NATIONWIDE INJUNCTIONS

Vaccine challenges reveal emerging trends in multistate actions and shed light on the future of nationwide injunctions. These challenges highlighted criticisms of nationwide injunctions. They also offer a potential pathway for reform by considering a lottery system in multistate cases seeking nationwide injunctions as remedies.

One emerging trend highlighted by vaccine challenges is that states are pursuing multiple multistate actions in several forums as opposed to combining in a single jurisdiction. Vaccine mandate litigation involved highly fractured multistate litigation with Republican AGs forming several

\(^{165}\) See Nolette, supra note 3, at 471–72.

\(^{166}\) See Ian Richardson, Iowa Joins 10 States in Lawsuit Challenging New Federal COVID Vaccine Rule for Large Employers, DES MOINES REG. (Nov. 5, 2021, 4:00 PM), http://www.desmoines register.com/story/news/politics/2021/11/05/ iowa-joins-lawsuit-against-biden-administration-over-covid-vaccine-mandate/6298010001 [http://perma.cc.X98A-YFKV] (“In a statement, Miller said he was filing at the behest of Reynolds, a Republican: ‘It is my duty, under the law, to prosecute or defend any actions in court when requested by the governor.’”).

\(^{167}\) See, e.g., RAGA Statement on OSHA Vaccine Mandate Victory at SCOTUS, REPUBLICAN ATT’YS GEN. Ass’n (Jan. 13, 2022), http://republicanags.com/2022/01/13/raga-statement-on-osha-vaccine-mandate-victory-at-scotus [http://perma.cc.3MZ4-VJ95] (“We’ve never seen an administration try to weaponize the federal bureaucracy the way the Biden administration has. We’re grateful the Supreme Court agrees with us that no president has the authority to mandate vaccines for private employers. The rule of law won today. Our republic won today.”).


coalitions of like-minded states and pursuing their challenges in multiple jurisdictions. This pattern contrasts with states organizing into a single action opposing the federal government. Multistate litigation against the Obama administration was often organized into a single action led by either a single state or group of states and joined by other ideologically aligned states.\(^{170}\) For example, *Texas v. United States*, the case challenging the Obama administration’s Deferred Action for Parents of Americans (“DAPA”) and extended DACA programs, was led by Texas and joined by twenty-six other states.\(^{171}\) During the Trump administration, some multistate actions were splintered into several actions in multiple jurisdictions, such as those challenging the repeal of DACA programs.\(^{172}\)

In the context of vaccine litigation, challenges to the OSHA mandate were filed by Republican AGs in five circuit courts of appeal. Challenges to the HHS and federal contractor mandates were filed by multistate coalitions in multiple district courts.\(^{173}\) This dispersal strategy allows states to access multiple potential friendly jurisdictions and increase the likelihood that states will obtain a nationwide injunction. However, the strategy is not without risk. Multiple actions may dilute the power of the statement of many states joining in a single action against the federal government. It may also cause courts to be more wary of ordering nationwide injunctions to avoid conflict and preserve comity with other courts hearing challenges.

Vaccine mandate litigation has demonstrated another emerging trend of courts becoming more cautious about ordering nationwide injunctions and instead issuing more limited injunctions that only apply to the states participating in the action.\(^{174}\) Courts considering vaccine mandate challenges discussed criticisms of the nationwide injunction when limiting the scope of relief sought by states.\(^{175}\) Even the Fifth Circuit, which issued a nationwide stay of the OSHA vaccine mandate, narrowed the scope of a nationwide injunction in the HHS vaccine mandate case. The Fifth Circuit recognized a conflict in *Louisiana v. Biden* when a Louisiana district court ordered a nationwide injunction after a district court in Florida denied that very same relief.\(^{176}\) The Fifth Circuit stated that prior decisions affirming nationwide

\(^{170}\) See Nolette & Provost, supra note 1, at 476; Dishman, supra note 1, at 366–71.


\(^{172}\) Multiple multistate actions were filed during the Trump administration in response to the repeal of DACA and the Public Charge Rule. See Dishman, supra note 1, at 368, 375.

\(^{173}\) See supra Sections II.A–B.


\(^{175}\) See *Louisiana v. Becerra*, 20 F.4th 260, 263–64 (5th Cir. 2021); Florida v. Dep’t of Health & Hum. Servs., 19 F.4th 1271, 1285 (11th Cir. 2021).

\(^{176}\) See *Louisiana v. Becerra*, 20 F.4th at 263.
injunctions “do[] not hold that nationwide injunctions are required or even the norm.”177 The Eleventh Circuit, in affirming a district court’s refusal to grant an injunction of the HHS mandate, discussed its concerns about nationwide injunctions with respect to percolation and comity.178 In the federal contractor mandate, the Eleventh Circuit limited a nationwide injunction, citing concerns about comity, percolation, and “the proper functioning of our federal court system.”179 Ironically, states may undermine their efforts to obtain a nationwide injunction by filing in multiple jurisdictions as courts become more cautious about ordering the remedy when similar challenges are being pursued in other jurisdictions.

Courts have demonstrated their ability to navigate the potential for conflicting injunctions through principles of comity, judicial restraint, and reliance on the appeals process.180 Courts hearing vaccine mandate challenges referred to the fact that other courts were hearing challenges and, as a result, narrowed the scope of the injunction to only apply to participating states.181 In the past, courts considering the scope of the injunction have found that multiple states participating justified ordering a nationwide injunction to provide complete relief to states and national consistency.182 But in the vaccine mandate cases, courts were often less willing to order nationwide injunctions to states when there were multiple state challenges pending in other courts. Instead of multistate participation being used to broaden the scope of the injunction, state borders became a limiting factor resulting in injunctions that solely applied to participating states. In fact, in Georgia v. Biden, it was only the intervention of a trade organization with national membership that justified to the court a nationwide scope of the injunction, rather than the participation of multiple states.183

There are interesting implications for multiple multistate actions, each with potential injunctions that apply to participating states. Patchwork preliminary injunctions put the federal government in a position that requires it to consider either how to implement policies that are enjoined in some states, but not others, or whether to halt implementation altogether until the litigation is resolved. Narrower injunctions may still serve states’ interest in halting a nationwide rollout of a policy or at least its application in their home state. It is yet to be seen how these new trends will amplify or decrease states’ ability to shape national policy through litigation, but AG litigation against

177. Id.
178. See Florida v. Dep’t of Health & Hum. Servs., 19 F.4th at 1285.
179. Georgia v. President of the U.S., 46 F.4th 1283, 1303 (11th Cir. 2022).
180. See Dishman, supra note 1, at 403; Frost, supra note 4, at 1106–07.
182. See Dishman, supra note 1, at 392–93.
the federal government will likely continue at high levels for the remainder of the Biden administration and in future administrations.

The vaccine mandate litigation offers a potential pathway for reform to address criticisms of the nationwide injunction. The OSHA mandate cases required a statutory lottery system that consolidated federal challenges to OSHA’s vaccine mandate. The ETS statute involved in the OSHA mandate requires a lottery to be held when challenges are filed in a certain number of circuit courts of appeal, and the cases are consolidated before a single circuit selected by the lottery. The lottery provided uniformity and efficiency by allowing a single circuit court to make a decision, which could be appealed to the Supreme Court. It also mitigated the consequences of forum shopping by including all circuit courts where an action was filed in the lottery.

Similarly, implementing a lottery in multistate actions where states are seeking nationwide injunctions could address forum shopping criticisms. A lottery system would broaden the pool of judges who could hear nationwide injunction cases, which would address concerns about highly strategic forum and judge shopping. A lottery system would be preferable to designating a particular court to hear nationwide injunction cases. Designating a particular court, such as the United States District Court for the District of Columbia, would further politicize the appointments to that court. However, if a lottery system is adopted and nationwide injunctions may be heard by multiple district courts, the lottery system should not increase politicizing any particular district court appointment.

However, the OSHA mandate lottery reveals an important aspect of lottery system design, which is how the lottery pool can be strategically broadened by competing litigation goals. For example, challenges to the OSHA mandate were initially filed in more conservative leaning circuit courts of appeal until labor unions and other parties filed challenges in liberal leaning circuit courts of appeal, broadening the lottery pool to extend to all of the circuit courts of appeal. Designing a lottery system where any challenge to a particular federal action in which the parties seek a nationwide injunction would encourage the proliferation of the filing of lawsuits in order to vastly broaden the district courts in the pool. In the OSHA context, there were only twelve regional circuits in the lottery. However, there are ninety-
four districts, which provide a vastly broader array of courts for parties to strategically file in to increase the pool. This could result in flooding courts with cases that are filed for the purpose of broadening the lottery pool, burdening courts with duplicative litigation. It would also severely undermine states’ ability to make forum choices at all as a state may be forced to litigate outside the jurisdiction of any state party and in a forum that is not convenient for the state to litigate.

A lottery system would need to balance the ability of states to choose a convenient forum and discourage problematic strategic forum and judge shopping that are exacerbated by states seeking nationwide injunctions. A potential lottery system could include district court judges in any federal district court of any participating state in a multistate action. This system would preserve some forum choice and convenience for plaintiffs since one state would be litigating in its “home” district. At the same time, it would drastically increase the pool of district court judges that could hear a multistate case seeking a nationwide injunction. State litigants would be much more selective about a multistate litigation strategy if the forum pool were increased to every participating state. To the extent that courts that issue nationwide injunctions are outliers among the judiciary, a wider pool of judges chosen by lottery increases the chance that decisions about nationwide injunctions will not be made on the margins. It also incentivizes parties to seek narrower remedies because states would only be subject to the lottery if they were seeking a nationwide injunction.

More modestly, a lottery could include all the district court judges in the state where the litigation was filed and a nationwide injunction was sought. In some instances, there is only one active judge in a particular division. There is incentive to judge shop when there are high chances states will be assigned a particular judge. States have actively filed in such divisions seeking nationwide injunctions. Judge shopping could be disrupted by including all sitting district court judges in a lottery when states are seeking nationwide injunctions. If state litigants were subject to a lottery of all active sitting district court judges in the state, regardless of the division where they file suit, there would be less incentive to judge shop within the state. This type of lottery would preserve a state’s forum choice but would make it less likely that a state could judge shop by litigating in a particular division. It also incentivizes the parties to seek narrower remedies if they do not want to be subject to the lottery. By reducing the ability of states to engage in highly strategic forum and judge shopping, it reduces the politicization and polarization effects of nationwide injunctions.

189. See Dishman, supra note 1, at 399.
CONCLUSION

State challenges to vaccine mandates are consistent with trends in multistate litigation that have occurred in recent prior presidential administrations. However, at the same time, these challenges shed light on emerging trends in multistate litigation and the future of nationwide injunctions. Multistate litigation in the future may be increasingly splintered and courts may be more wary of ordering nationwide injunctions. Lottery systems, such as the one that occurred in the OSHA mandate challenge, offer a potential reform to address some criticisms of nationwide injunctions.