

Chamber of Commerce's Wins Offer Playbook on Rule Challenges (1)

By Evan Weinberger, K. Sophie Will and Thomas Gleason 2024-08-07T05:00:41000-04:00

- Texas courts are prime venues for US Chamber of Commerce
- Supreme Court rulings may increase rule challenges

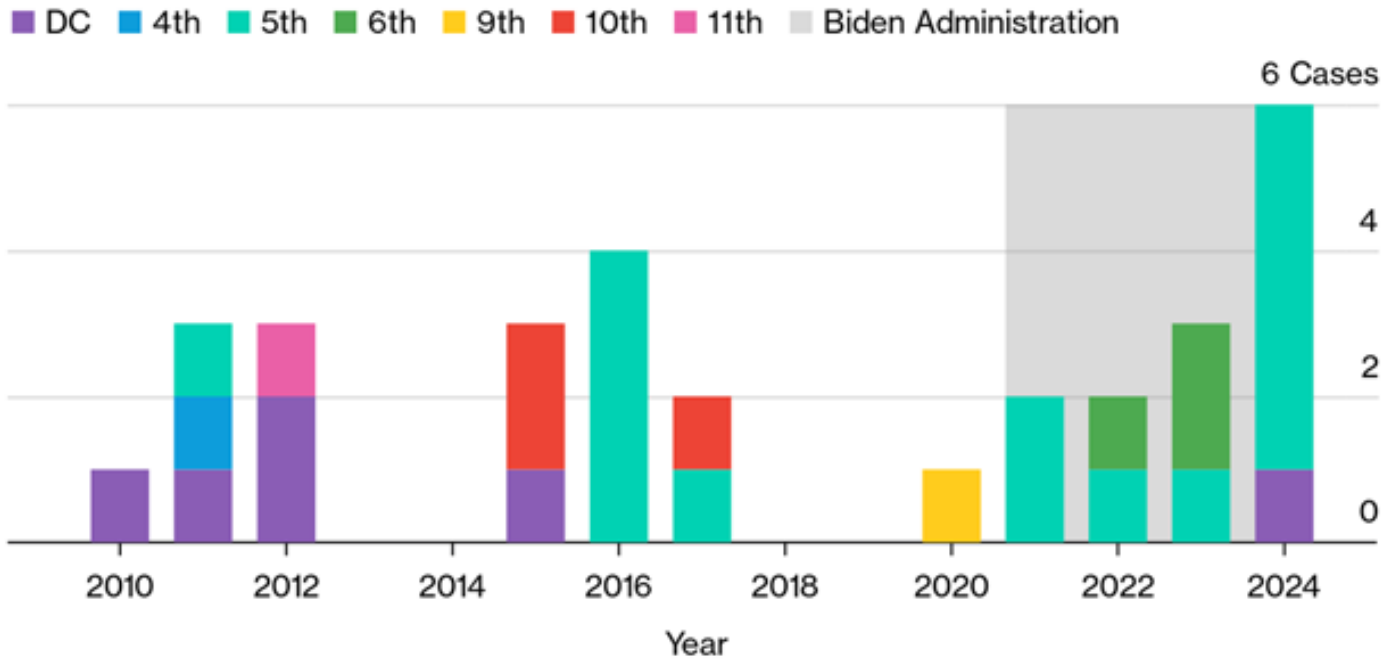
Picking the right court has never been more key to challenging agency rules, thanks to a pair of Supreme Court rulings. For a preview of how a forum shopping strategy will play out post-*Loper Bright* and *Corner Post*, the US Chamber of Commerce's shift to Texas from the D.C. Circuit is instructive.

The Chamber, a regular foe of federal regulations, has found increasing success in recent years in the Republican-dominated Texas courts, according to a Bloomberg Law review of such cases, and that success may provide fuel for future challenges to Biden administration regulations in the Lone Star State.

Since the beginning of the Biden administration in 2021, the Chamber has filed most of its federal rule challenges in Texas district courts—nine of 13 cases—and more cases overall in the first six months of 2024 than in any single year for the past 15 years.

US Chamber of Commerce Favors Fifth Circuit for Rules Challenges

Out of the 13 rules challenges the Chamber has brought in district courts since 2021, the majority have been brought in Texas.



Source: Data compiled by Bloomberg Law

Note: Data includes district court cases filed from June 30, 2009 through June 30, 2024, grouped by circuit.

Bloomberg Law

This move to Texas is a shift from the more traditional location for such cases in the Washington, D.C., federal district court, where the defendant—the federal government—is based and has been seen by some litigants as having the most experience handling federal rules.

The Chamber has been rewarded for that strategy, with federal judges in Texas overturning three regulations and putting a hold on others without upholding any since 2016. Republican appointees dominate the district and appellate judge panels.

The US Court of Appeals for the Fifth Circuit hasn't overturned any lower court decisions siding with the Chamber since 2016, though some cases are still pending in the district and appellate courts.

“The Fifth Circuit is generally inclined to construe statutes in a way that kind of reins in agencies,” said David Coale, a Texas appellate lawyer at Lynn Pinker Hurst & Schwegmann LLP.

Forum shopping by lawyers isn't new, and groups of all ideological leanings and interests use this strategy to get their desired ruling. But now that the US Supreme Court has made it easier to challenge [new](#) and [existing](#) rules through their rulings in *Loper Bright Enterprises v. Raimondo* and *Corner Post Inc. v. Board of Governors of the Federal Reserve System* this most recent term, Texas is [primed](#) to be the top destination for challenges to federal rules brought by the Chamber and other industry groups.

"If you think you have an even marginally better chance in one area over another, you go there," said Tara Leigh Grove, a professor at the University of Texas School of Law.

Fifth Circuit's Rise

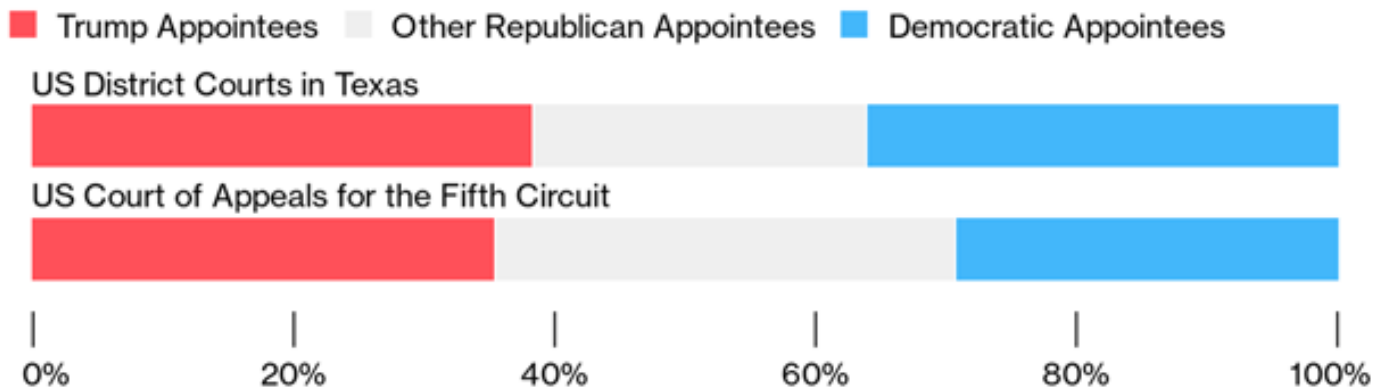
The Fifth Circuit gained prominence during the pandemic as a place to challenge federal rules when its judges overturned vaccine mandates.

"Until the pandemic, even though you had a much more conservative court, I don't really think they had a body of cases or a body of precedents that really moved the needle one way or another," Coale said.

The six Trump-appointed judges to the Fifth Circuit got some cases under their belt, and lawyers began to see rulings on similar cases to their own, Coale said. That meant litigators could be more sure of their chances in the circuit.

Republican Appointees Dominate Fifth Circuit Courts

Of the active Article III judges, most were appointed by GOP presidents, with nearly 40% appointed solely by former President Donald Trump.



Source: Ballotpedia

Bloomberg Law

The Federal Trade Commission's bid to ban noncompete agreements is currently bogged down in litigation in Dallas, and Securities and Exchange Commission Chair Gary Gensler's ambitious regulatory agenda has run aground repeatedly in Texas. Hedge funds [created](#) a trade group, the National Association of Private Fund Managers, in a Fort Worth office building just to bring cases against SEC rules within the Fifth Circuit.

Biden administration labor and employment rules, environmental regulations, health regulations, and other federal actions have also seen lawsuits filed in Texas.

The expansion of administrative law cases outside of Washington reflects the courts' growing comfort with administrative law challenges, said Daryl Joseffer, the executive vice president and chief counsel at the US Chamber of Commerce's Litigation Center.

Courts around the country, particularly in Texas, now have more experience with those types of cases, he said.

"As a result, it's no longer the case that you need to go to D.C. to get a knowledgeable, experienced court to handle administrative issues," Joseffer said.

Along with sympathetic judges, the Fifth Circuit and its district courts use procedural tools and other methods to attract cases, said Tony Carrk, executive director of Accountable.US, which released a

[report](#) in April criticizing the Chamber for “cherry-picking venues to avoid having their lawsuits heard by a fair and neutral federal judge.”

The Fifth Circuit has twice [overturned](#) a lower court decision transferring a challenge to a Consumer Financial Protection Bureau’s credit card late fee rule filed by the Chamber, the American Bankers Association, the Consumer Bankers Association, and three Texas trade groups from the federal district court in Fort Worth, Texas, to Washington.

Judge Mark Pittman of the Northern District of Texas both times found that no banks directly affected by the rule are based in Fort Worth while the CFPB, the national trade groups, and their lawyers are all based in D.C. Pittman also cited the Northern District of Texas’ heavy caseload as another reason for transferring the case to Washington. That wasn’t convincing to the Fifth Circuit.

The CFPB last month asked Pittman to [transfer](#) the case to Washington for a third time.

Texas courts and the Fifth Circuit have made other moves to assert jurisdiction.

The Northern District of Texas isn’t [abiding](#) by a new policy from the Judicial Council, the federal judiciary’s policy arm, calling for more randomization of judge selection to avoid judge shopping. It also enacted a local rule in June [delaying](#) the transfer of any case out of the circuit by 21 days.

Behind the critique of the shift in litigation out of Washington, and the idea of judge shopping in general, is “a fair amount of hypocrisy,” Joseffer said.

“Case after case, it seems to us, it’s the government that’s really trying to forum shop here,” he said, noting that the government has repeatedly attempted to get cases transferred back to Washington.

Post-Election Outlook

With the *Corner Post* and *Loper Bright* decisions opening more regulations to lawsuits, the migration to friendly forums may increase in the coming months and years.

“We’re not happy with the change in law, but that’s the law,” said Allison Zieve, the director of Public Citizen Litigation Group, the litigation arm of the progressive activist group Public Citizen. “And it

applies to all of us, so we'll take advantage of it to the extent we possibly can.”

The Fifth Circuit is not facing as many vacancies in the near future as it did under Trump. Of the 17 judges currently sitting on the appeals court, two were appointed in the 1980s and one in 1994, making them ripe for retirement. Those judges may put it off to avoid being replaced by a politically opposite president, Coale said.

But the election could impact votes on whether to rehear cases, he said. En banc votes, as they are called, bring together all the circuit's active appellate judges.

In recent months, Fifth Circuit judges appointed by Republican presidents have lost en banc votes by [sometimes wide margins](#) as some occasionally join a voting bloc of judges appointed by Democratic presidents. The circuit is also [eyeing](#) a record number of en banc votes this year.

“Given that Trump had so much impact the last go-around, even if there aren't very many vacancies to fill in the federal courts, it doesn't take very many on top of what we already have to make a pretty big impact,” Coale said.

At the district court level, which has 56 judge seats, there are nine vacancies and five judges who were appointed in or before 1994.

Even if Trump wins the presidential election, industry trade associations may continue their push to eliminate regulations finalized in the Biden administration's waning days well into 2025. And unless Congress moves to change venue rules, the Fifth Circuit will continue to welcome those cases.

If Congress wants to force all federal regulatory challenges into Washington, D.C., courtrooms, “it can easily do so,” a Fifth Circuit panel said in a May order denying the transfer of the credit card late fee suit to Washington. “But it hasn't.”

How We Did It

Case information was downloaded from Bloomberg Law on July 26, 2024, and included district court cases which were filed between June 30, 2009, and June 30, 2024, in which the US Chamber of Commerce was listed as a plaintiff. Cases with a monetary demand were not included.

Bloomberg Law reporters then read the complaints of each of the 43 cases to determine whether the Chamber was challenging a federal rule. Any rules challenges that were directly filed to an appeals court were not included in this analysis. Challenges to executive orders and procedural guidance were also not included; however, instances of agency guidance operating as a rule were included.

Reporters then determined the ruling on the district, appellate, and Supreme Court levels by reading docket entries on Bloomberg Law. Rulings were determined based on case disposition. Temporary orders, such as preliminary injunctions, were not considered in determining a ruling.

Each case was sorted by filing year as well as the court and circuit in which it was originally filed.

The US Supreme Court cases on agency regulations are [Loper Bright Enterprises v. Raimondo](#) , U.S., No. 22-451, Opinion 6/28/24 and [Corner Post Inc. v. Board of Governors of the Federal Reserve System](#) , U.S., No. 22-1008, Opinion 7/1/24 .

(Updates with developments in CFPB litigation in 21st paragraph. A previous version corrected the subtitle in the first chart.)

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