

January 23, 2023

Fifth Circuit Round- Up: **Shaping Business Law at the Circuit and National Level**

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GIBSON DUNN

MCLE Certificate Information

- Approved for 1.0 hours General PP credit.
- CLE credit form must be submitted by **Monday, January 30th**.
- Form Link: https://gibsondunn.qualtrics.com/jfe/form/SV_es3HawK8AxLdEWy
- Please direct all questions regarding MCLE to CLE@gibsondunn.com.

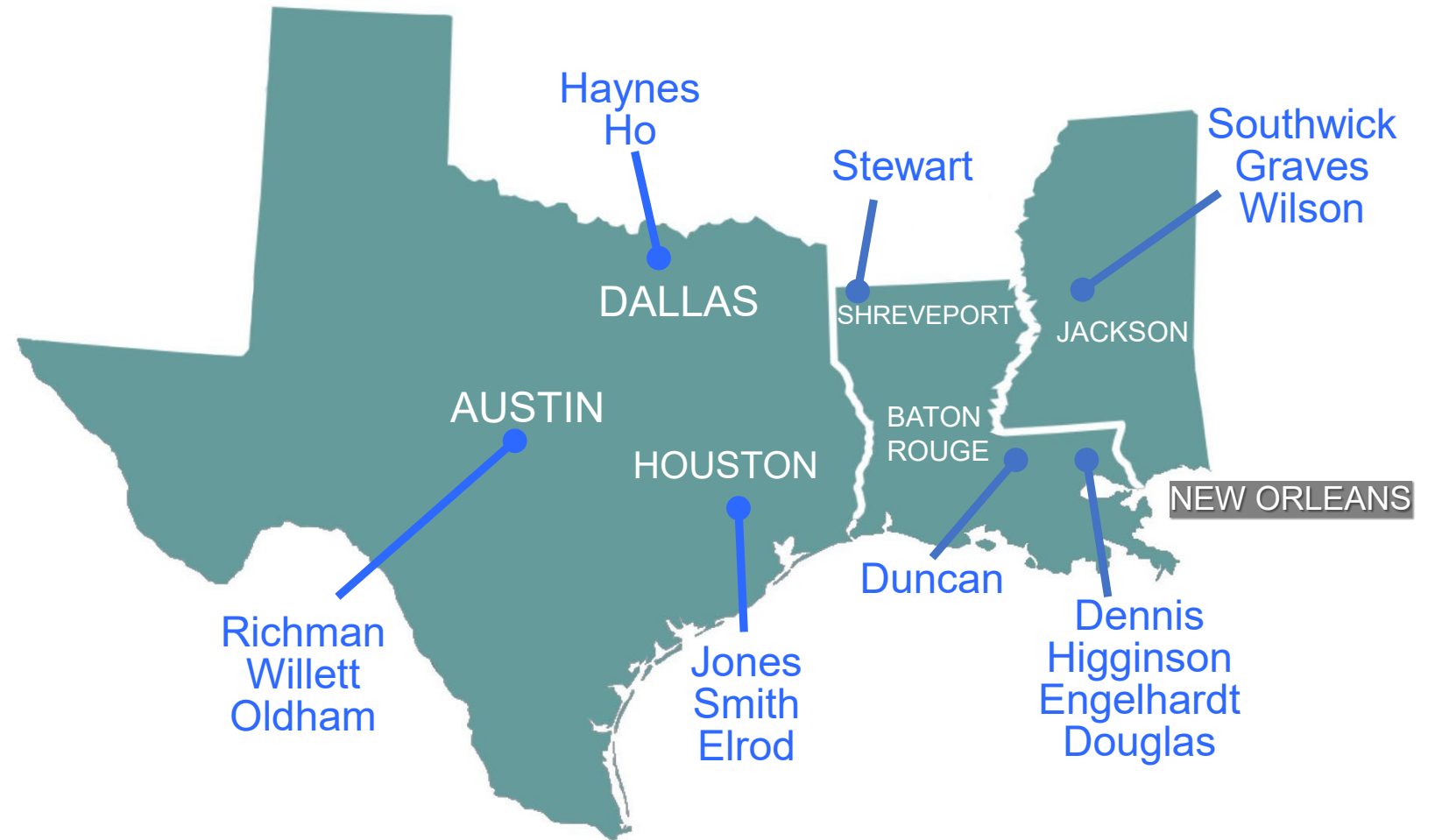
CA5 Administrative Law Cases at SCOTUS

- *S.E.C. v. Cochran*, No. 21-1239 (argued November 7, 2022)
- *National Federation of Independent Business v. Occupational Health & Safety Administration (OSHA)*, 142 S. Ct. 661 (2022)
- *Biden v. Texas*, 142 S. Ct. 2528 (2022)
- *Collins v. Yellen*, 141 S. Ct. 1761 (2021)



COMPOSITION OF THE COURT

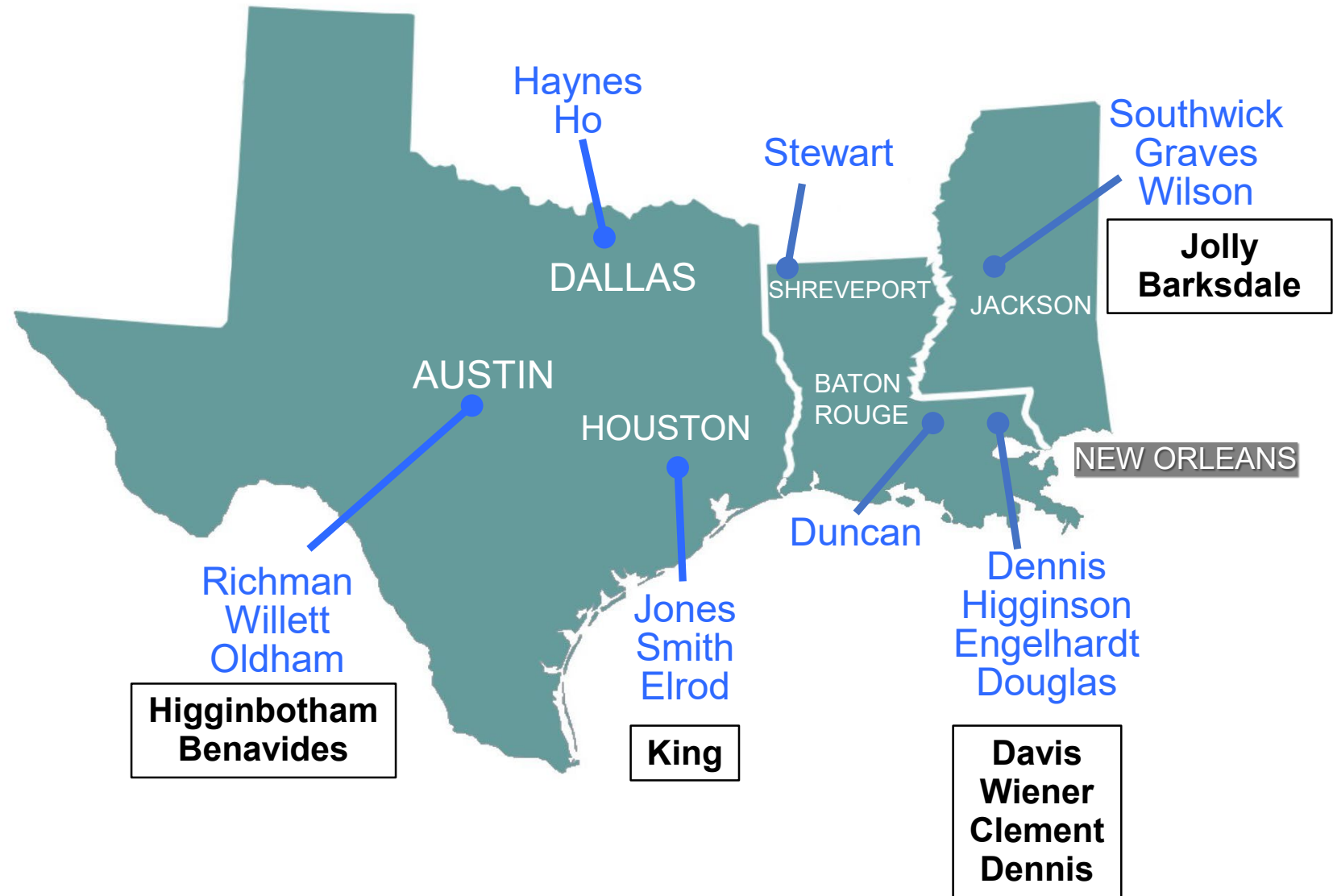
Fifth Circuit Judges



Fifth Circuit Judges

Active Judges – 16

Active Senior Judges – 9

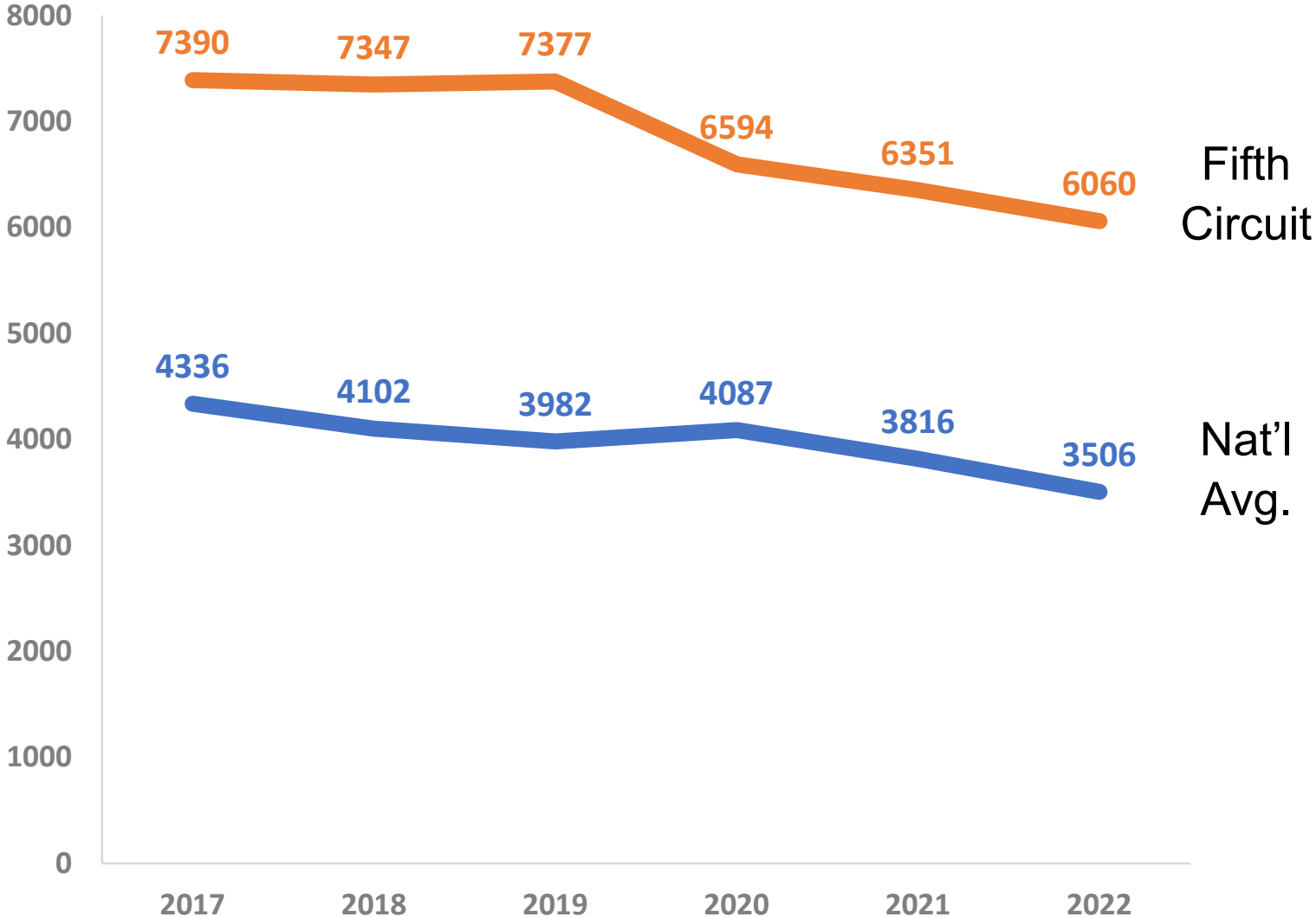


STATISTICS

Filings, Oral Argument, Opinions, Affirmances, Workloads

New Appeals Filed

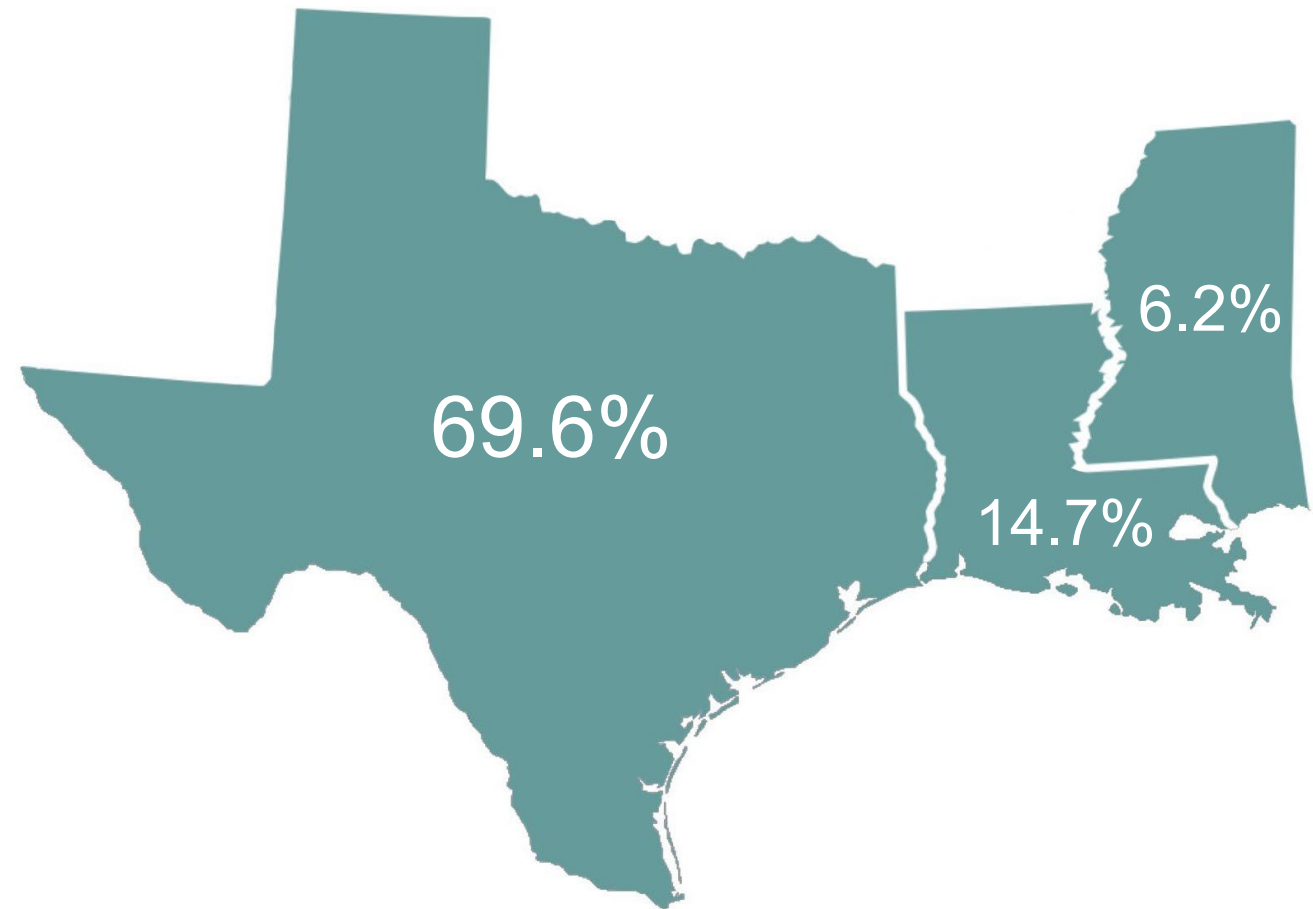
United States Court of Appeals for the Fifth Circuit, Clerk's Annual Report, July 2021 – June 2022



New Appeals Filed

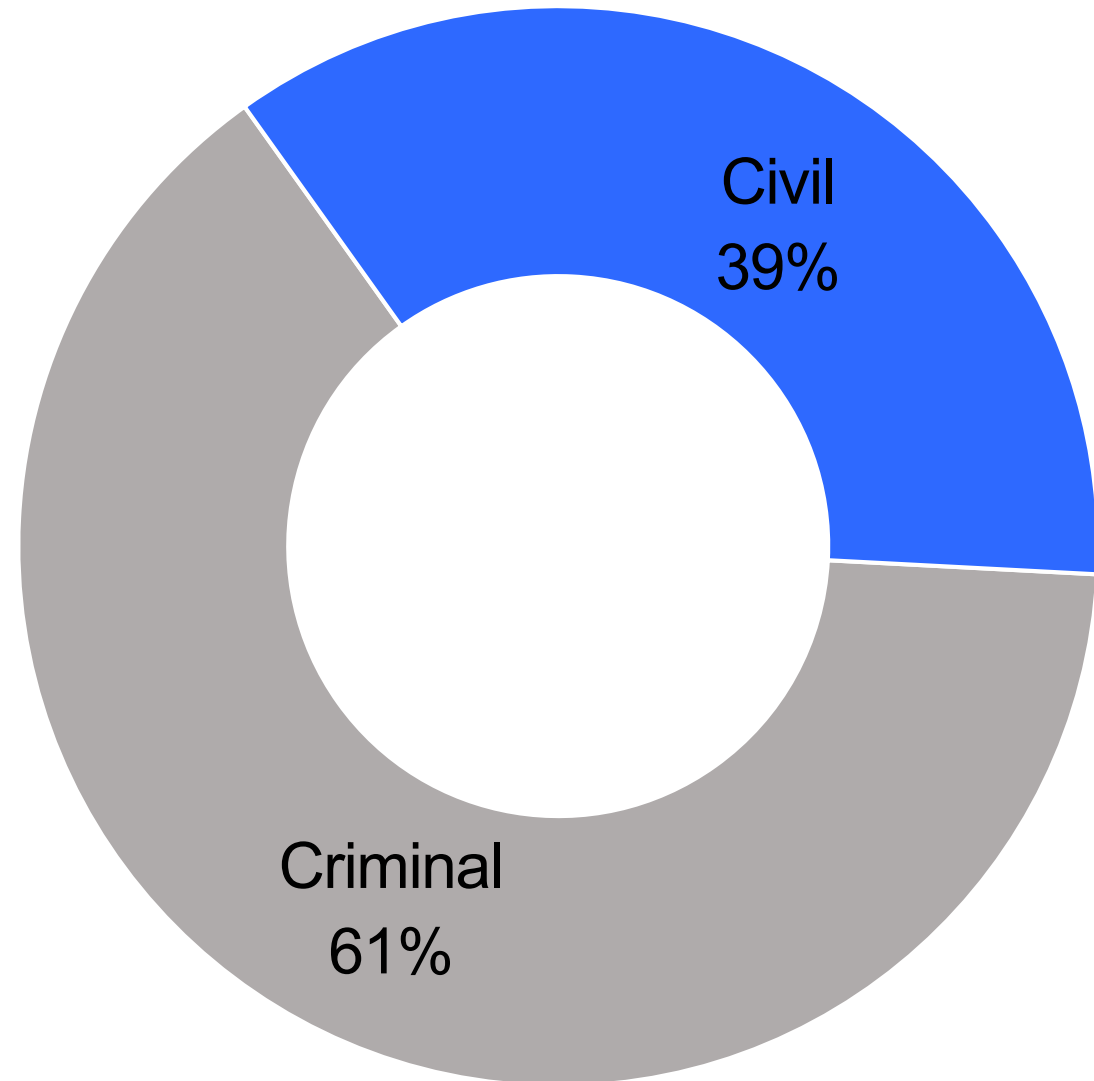
United States Court of Appeals for the Fifth Circuit, Clerk's Annual Report, July 2021 – June 2022

2022 Appeals Source



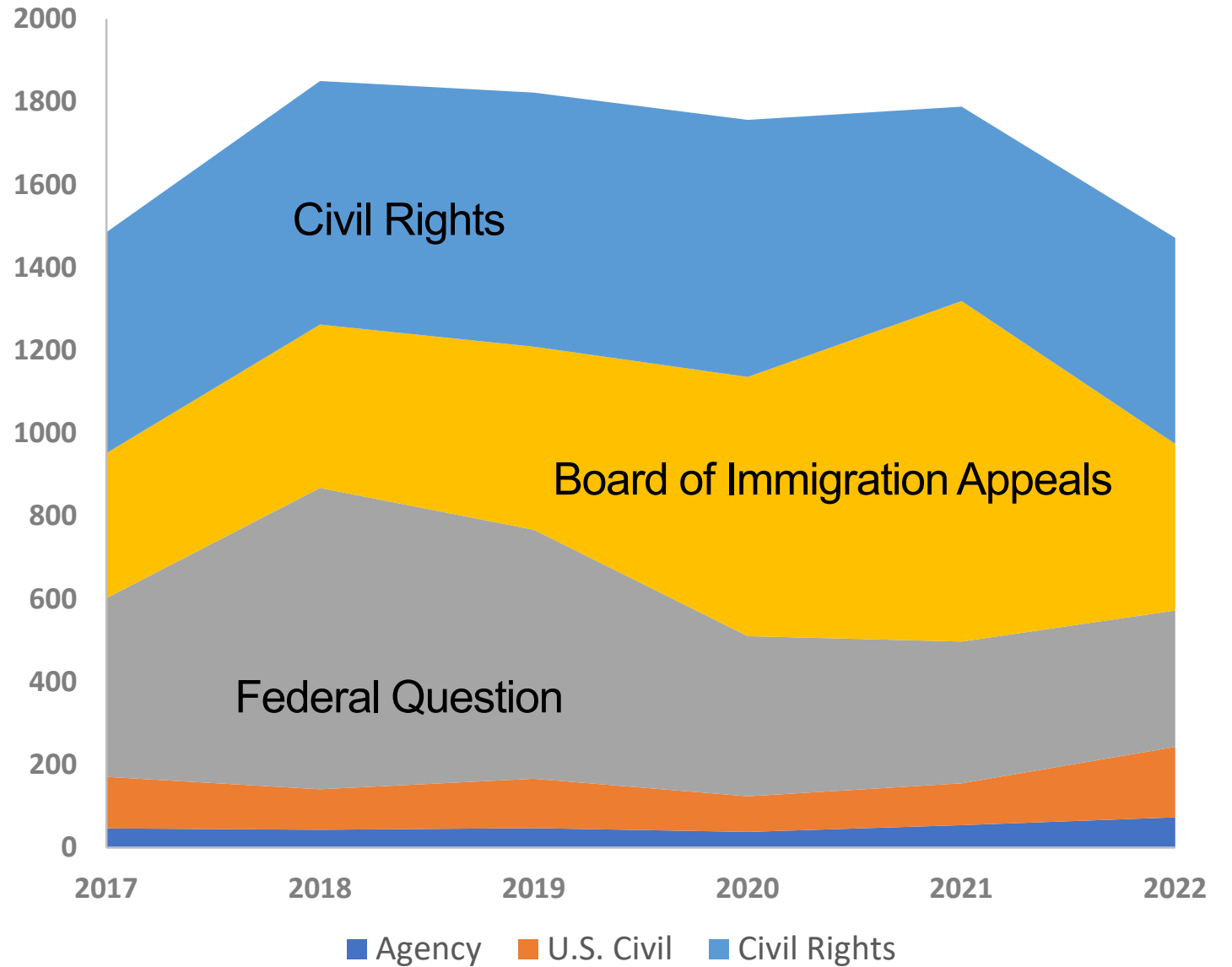
New Appeals Filed

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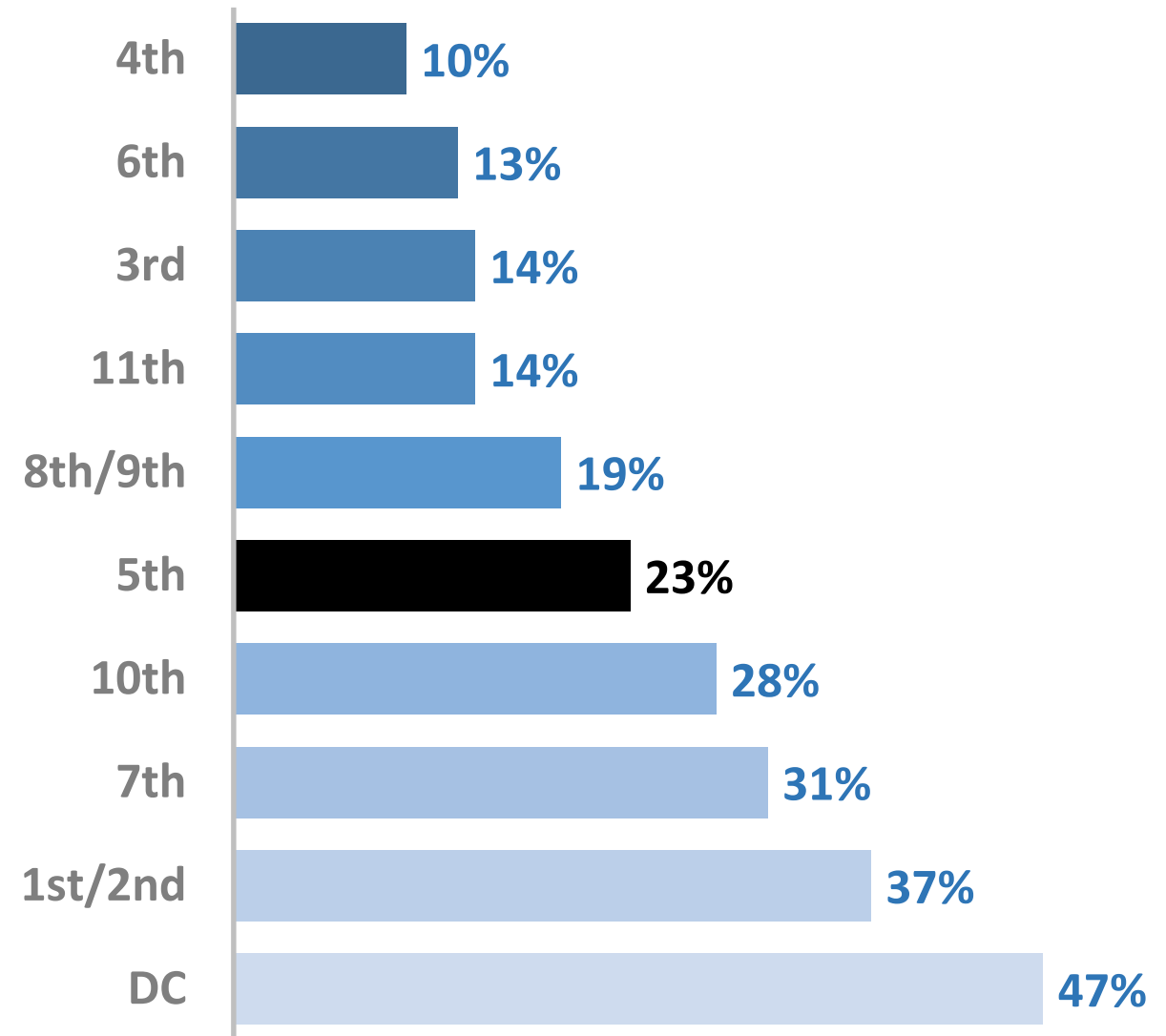
New Civil Appeals Filed

United States Court of Appeals for the Fifth Circuit, Clerk's Annual Report, July 2021 – June 2022



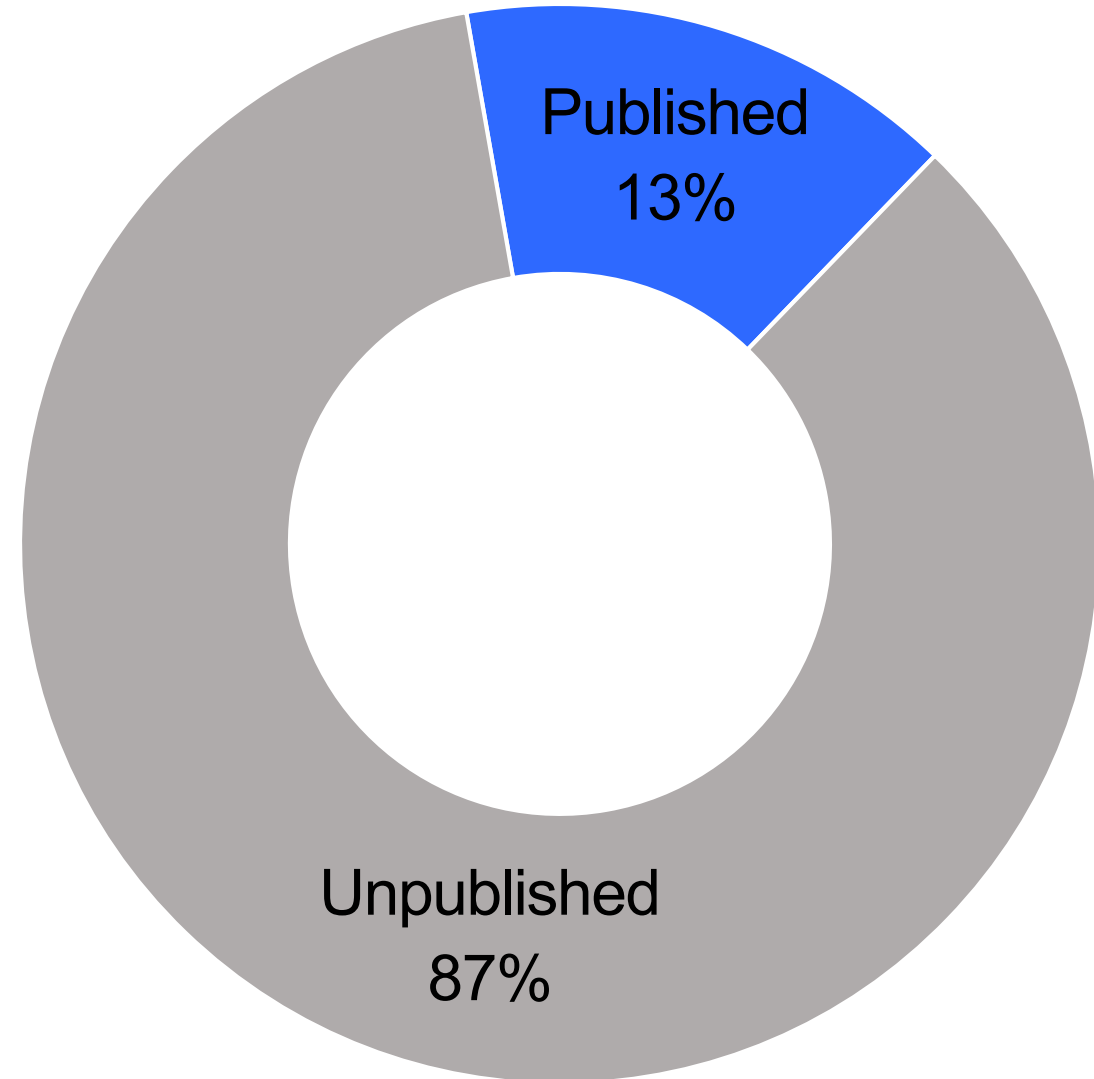
Oral Argument in All Cases

Administrative Office of the U.S. Courts, *Cases Terminated on the Merits After Oral Arguments or Submission on Briefs* (Table B-10), 2020 – 2021



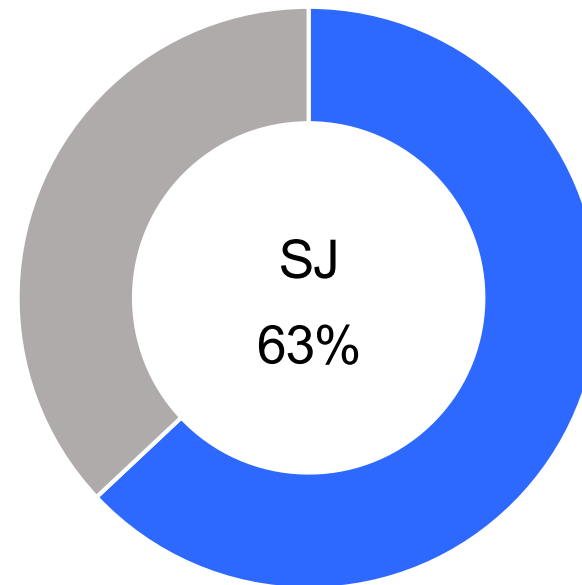
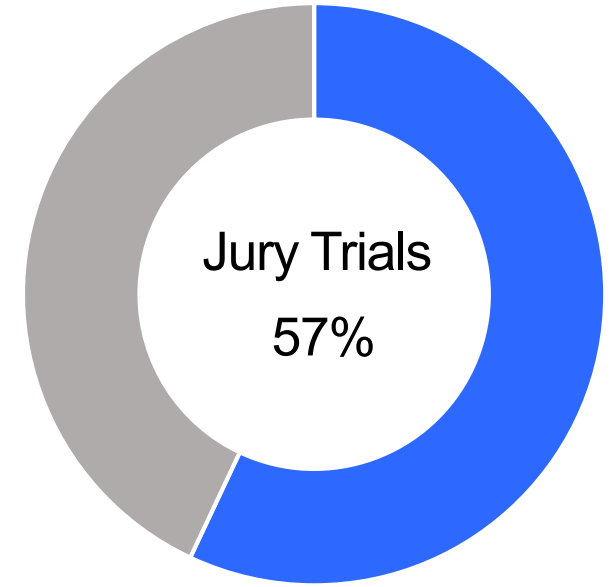
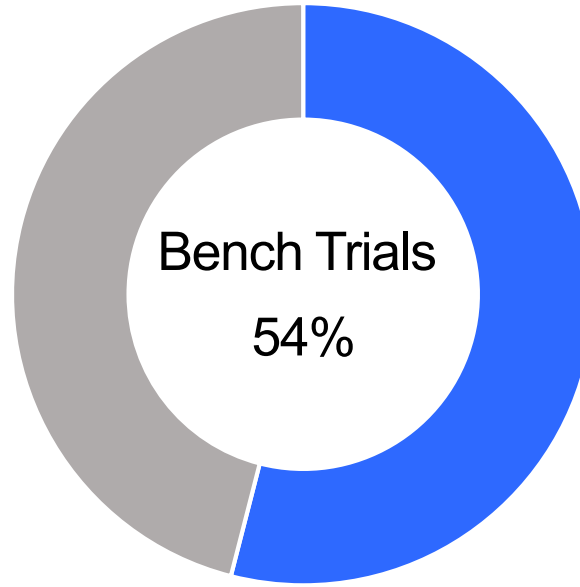
Opinions Issued

United States Court of Appeals for the Fifth Circuit, Clerk's Annual Report, July 2021 – June 2022



Affirmance Rates in Private Civil Appeals

William Peterson, *Fifth Circuit
Statistics*, 28th Annual Conference on
State and Federal Appeals (UT CLE),
2018



Annual Workload per Active Judge

United States Court of Appeals for the
Fifth Circuit, Clerk's Annual Report,
July 2021 – June 2022

Opinions	140
Participation in Add'l Opinions	280
Petitions for Rehearing En Banc	168
Motions	796

DECISIONS

Administrative Law, Statutory Interpretation, Constitutional Law, Class Actions, Personal Jurisdiction, Judicial Methodology

Jarkesy v. S.E.C.

34 F.4th 446 (5th Cir. 2022), *pet. for rehearing en banc denied* (Davis (dissenting), Elrod, Oldham, JJ).

- Seventh Amendment jury-trial right applied to SEC enforcement action because it was not the type that can be assigned to agency adjudication under the public-rights doctrine.
- Enforcement action violated Article I because Congress gave the SEC no intelligible principle for deciding between in house-courts and Article III courts.
- Statutory removal restrictions for SEC Administrative Law Judges violate the Take Care Clause.
- Remedy: SEC's judgment vacated, case remanded for a jury trial.



Community Financial Services Association v. Consumer Financial Protection Bureau

51 F.4th 616 (5th Cir. 2022), *cert. pending* (Willett, Engelhardt, Wilson, JJ.)

- CFPB's self-funding structure violates the Appropriations Clause.
- Remedy: Rule vacated.



National Horsemen's Benevolent & Protective Association v. Black

53 F.4th 869 (5th Cir. 2022), *pet. for rehearing en banc pending* (King, Duncan, Engelhardt, JJ.)

- Horseracing Integrity and Safety Act violates “private” nondelegation doctrine.
- Remedy: Statute declared unconstitutional.



Louisiana v. Biden

55 F.4th 1017 (5th Cir. 2022) (Graves (dissenting), Willett, Engelhardt, JJ.)

Statutory
Interpretation

*The Major
Questions Doctrine*

- LA, MS, IN challenge to fed contractor COVID vax mandate.
 - Would cover 20 percent of workforce.
- Aff'd preliminary injunction: “To allow this mandate to remain in place would be to ratify an ‘enormous and transformative expansion in’ the President’s power under the Procurement Act.”



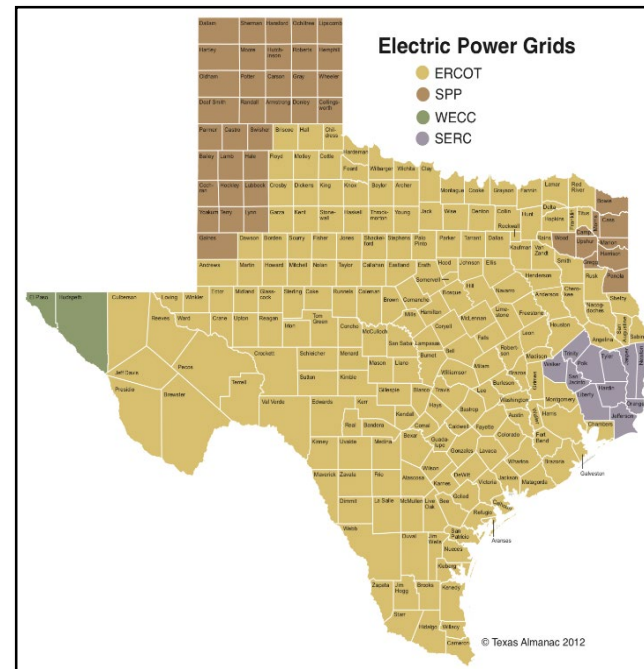
NextEra Energy Capital Holdings v. Lake

48 F.4th 306 (5th Cir. 2022), cert. pending (Dennis, Elrod (partial dissent), Costa, JJ.)

Constitutional Law

*Dormant
Commerce Clause*

- TX law requiring physical presence (incumbency) to build transmission lines facially discriminates against interstate commerce.



Hignell-Stark v. City of New Orleans

46 F.4th 317 (5th Cir. 2022) (Smith, Wiener, Southwick, JJ.)

Constitutional Law

*Dormant
Commerce Clause*

- Ordinance requiring residency to operate short-term rentals violates DCC.



NetChoice, L.L.C. v. Paxton

49 F.4th 439 (5th Cir. 2022), *cert. pending* (Jones (concurring), Southwick (partial dissent), Oldham, JJ.)

- TX HB20 bars viewpoint censorship by social media companies.
- NetChoice challenged on First Amendment grounds.
- Rev'd preliminary injunction: “we reject the idea that corporations have a freewheeling First Amendment right to censor what people say.”



Earl v. The Boeing Co.

53 F.4th 897 (5th Cir. 2022), *pet. for rehearing en banc pending* (Smith, Duncan, Oldham, JJ.)

- Boeing 737 MAX customers lacked standing to sue for alleged fraud related to the 737 MAX's safety defects because no physical or economic injury.



Douglass v. NYK

46 F.4th 226 (5th Cir. 2022) (en banc, 12-5), *cert. pending*

- **Majority:** Richman, Jones, Smith, Stewart, Dennis, Southwick, Haynes, Costa, Ho, Duncan, Engelhardt, Wilson
- **Concurrence:** Costa, Ho
- **Dissents:** Elrod, Graves, Higginson, Willett, Oldham
Higginson
Oldham
- The Fifth Amendment due process test for personal jurisdiction requires the same “minimum contacts” with the United States as the Fourteenth Amendment requires with a state.

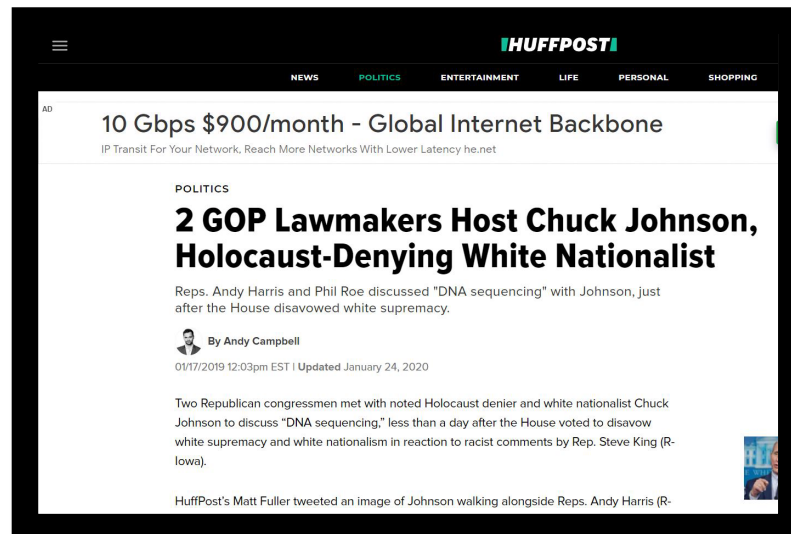


Johnson v. *HuffingtonPost.com*

21 F.4th 314 (5th Cir. 2021), *cert. denied* (King, Smith, Haynes (dissenting), JJ.)









Personal
Jurisdiction

- A website's selling ads and merchandise to all comers cannot alone give rise to specific personal jurisdiction.



The Fifth Circuit is Not a *Monolith*

- 16 active judges: 12 Republican appointees; 4 Democrat appointees.

Reagan	 
Clinton	
Bush (43)	   
Obama	 
Trump	     
Biden	



Hewitt v. Helix Energy Solutions Group, Inc.

15 F.4th 289 (5th Cir. 2021) (en banc, 12-6), cert. granted



- Employee had to be paid time-and-a-half for overtime despite earning \$200k/yr because pay computed on daily basis.

Majority

JAMES C. HO, *Circuit Judge*, joined by SMITH, STEWART, HAYNES, GRAVES, HIGGINSON, COSTA, WILLETT, DUNCAN, ENGELHARDT, OLDHAM, and WILSON, *Circuit Judges*:



Dissent

EDITH H. JONES, *Circuit Judge*, joined by OWEN, *Chief Judge*, and WIENER, ELROD, and SOUTHWICK, *Circuit Judges*, dissenting:

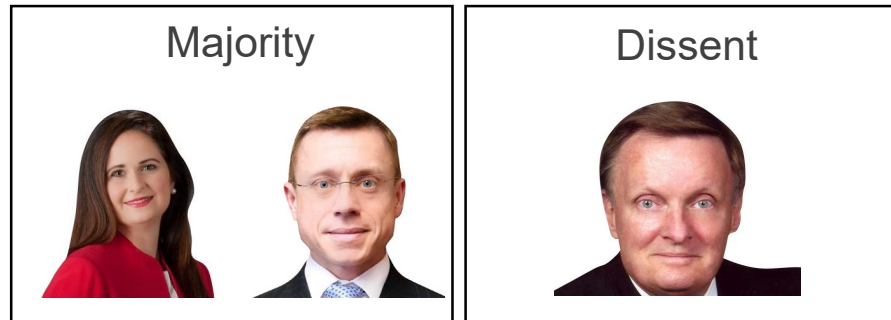


Sambrano v. United Airlines

45 F.4th 839 (5th Cir. 2021), rehearing en banc denied (13-4)

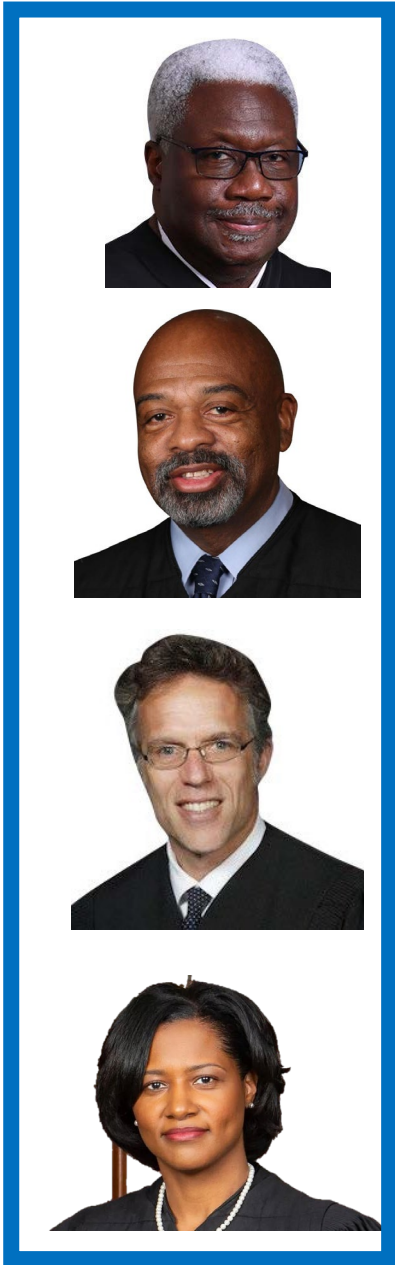


- Title VII (religion) challenge to United's COVID vax policy.
- Divided panel rev'd denial of preliminary injunction.



In the en banc poll, four judges voted in favor of rehearing (Judges Smith, Higginson, Costa, and Willett), and thirteen judges voted against rehearing (Chief Judge Richman and Judges Jones, Stewart, Dennis, Elrod, Southwick, Haynes, Graves, Ho, Duncan, Engelhardt, Oldham, and Wilson).

- Concurring in the denial of rehearing en banc, Judge Ho:
- “The message is apparently this: Judges ought to be more deferential to corporate prerogatives. Like the panel majority, I disagree.”



Takeaway



QUESTIONS?