

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL.,
Applicants,

v.

STATE OF TEXAS AND STATE OF LOUISIANA,
Respondents.

To the Honorable Samuel Anthony Alito, Jr.,
Associate Justice of the United States and
Circuit Justice for the Fifth Circuit

**MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF
STEPHEN I. VLADECK AS AMICUS CURIAE IN SUPPORT OF
APPLICANTS**

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Professor Stephen I. Vladeck (“Amicus” or “Professor Vladeck”) respectfully moves under Supreme Court Rule 37.2 for leave (1) to file the attached brief as amicus curiae in support of the Emergency Application filed on July 8, 2022, seeking a stay of the judgment entered by the Southern District of Texas on June 10, 2022 imposing a nationwide vacatur of September 2021 guidance issued by the Secretary of Homeland Security to carry out his statutory responsibility to set “national immigration enforcement policies and priorities.” 6 U.S.C. § 202(5).*

By email on July 12, 2022, Amicus sought consent from the parties to file a brief in support of the emergency applications. The United States takes no position on the motion. Texas consents to the motion so long as the brief is filed before 5 pm on July 13, 2022. As of the filing of this motion, counsel for Louisiana had not yet responded to the request for consent.

Amicus curiae Stephen I. Vladeck holds the Charles Alan Wright Chair in Federal Courts at the University of Texas School of Law. He is the author of dozens of academic and popular articles about how federal courts doctrines shape the behavior of parties in challenges to government policies, relevant examples of which include *The Demise of Merits-Based Adjudication in Post-9/11 National Security Litigation*, 64 Drake L. Rev. 1035 (2016); *Pendent Appellate Bootstrapping*, 16 Green Bag 2d 199 (2013); and *Texas Judge’s Covid Mandate Ruling Exposes Federal ‘Judge-Shopping’ Problem*, MSNBC

* No counsel for a party authored this motion in whole or in part, and no person other than amicus or its counsel made a monetary contribution to fund the motion or brief.

Daily, Jan. 11, 2022. He has also written extensively about the recent uptick in emergency appellate litigation arising from challenges to government policies, including his forthcoming book, *The Shadow Docket* (Basic Books 2023); *The Supreme Court, 2018 Term — Essay: The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123 (2019); and *F.D.R.’s Court-Packing Plan Had Two Parts. We Need to Bring Back the Second*, N.Y. Times, Jan. 7, 2022. And Professor Vladeck has testified before Congress on these topics on multiple occasions, most recently before a September 2021 hearing of the Senate Judiciary Committee.

Permitting the filing of the proposed brief would offer an important perspective to this Court: Professor Vladeck has studied the federal courts for more than fifteen years. Most recently, he has studied the ways courts may be abused by litigants to promote and facilitate partisan political agendas. This case is a perfect example of this phenomenon. The proposed brief provides data to the Court to aid its understanding of how judge-shopping occurs, impairs the public interest, and if unchecked, can damage the credibility of the federal judiciary as a whole. The proposed brief argues that the Court can and should consider a litigant’s judge-shopping in determining whether the public interest favors a stay. Accordingly, the proposed brief offers a perspective that is different from and not redundant with the Application.

Respectfully submitted this 13th day of July, 2022.

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INTERESTS OF AMICUS CURIAE¹

Amicus curiae Stephen I. Vladeck holds the Charles Alan Wright Chair in Federal Courts at the University of Texas School of Law. He is the author of dozens of academic and popular articles about how federal courts doctrines shape the behavior of parties in challenges to government policies, relevant examples of which include *The Demise of Merits-Based Adjudication in Post-9/11 National Security Litigation*, 64 Drake L. Rev. 1035 (2016); *Pendent Appellate Bootstrapping*, 16 Green Bag 2d 199 (2013); and *Texas Judge’s Covid Mandate Ruling Exposes Federal ‘Judge-Shopping’ Problem*, MSNBC Daily, Jan. 11, 2022. He has also written extensively about the recent uptick in emergency appellate litigation arising from challenges to government policies, including his forthcoming book, *The Shadow Docket* (Basic Books 2023); *The Supreme Court, 2018 Term — Essay: The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123 (2019); and *F.D.R.’s Court-Packing Plan Had Two Parts. We Need to Bring Back the Second*, N.Y. Times, Jan. 7, 2022. And Professor Vladeck has testified before Congress on these topics on multiple occasions, most recently before a September 2021 hearing of the Senate Judiciary Committee.

Professor Vladeck has studied the federal courts for more than fifteen years. Most recently, he has studied the ways courts may be abused by litigants to promote and facilitate partisan political agendas. This case illustrates this phenomenon. Professor Vladeck is interested in providing data to the Court to aid its understanding of how judge-

¹ No counsel for a party authored this motion in whole or in part, and no person other than amicus or its counsel made a monetary contribution to fund the motion or brief.

shopping occurs, impairs the public interest, and if unchecked, can damage the credibility of the federal judiciary as a whole. The Court can and should consider a litigant's judge-shopping in determining whether the public interest favors a stay. Here, Texas's litigation conduct supports the stay sought by the Applicants.

SUMMARY OF ARGUMENT

Four years ago, the Chief Justice issued an extraordinary statement on Thanksgiving eve: "We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for."²

This case arises as part of one party's deliberate strategy of judge-shopping, a strategy that undermines public faith in the independence of the judiciary. Specifically, the State of Texas has abused the federal courts by intentionally and repeatedly filing lawsuits against the federal government in district court divisions staffed entirely, or almost entirely, by judges appointed during presidencies of the Texas Attorney General's and Governor's party. Those judges have repeatedly issued nationwide injunctions against virtually every challenged action taken by the Biden administration. This case represents a low-water mark in that effort—enjoining the executive's most basic exercise

² Robert Barnes, *Rebuking Trump's Criticism of 'Obama judge,' Chief Justice Roberts Defends Judiciary as 'Independent'*, Wash. Post (Nov. 21, 2018), <https://wapo.st/3RoId4F>.

of statutory and constitutional enforcement discretion in the area of immigration law.³ The facts and data underlying Texas’s recent litigation demonstrate that this is indeed a tactic—and not merely a coincidence.

In considering whether to stay the decision of the Southern District of Texas, this Court considers the public interest. *See Nken v. Holder*, 556 U.S. 418, 435-36 (2009) (describing public interest factor for a stay). Texas’s transparent judge-shopping tactics disserve the public interest and support a stay. If litigants like Texas are regularly able to obtain nationwide injunctions from judges who they have literally hand-picked to hear their complaints, it should go without saying that public faith in the independence of the federal judiciary will be undermined.

ARGUMENT

I. **This Lawsuit Exemplifies Texas’s Practice of Shopping for its Preferred Judges to Enjoin Federal Action Nationwide.**

As the United States observes, the Texas Attorney General recently boasted of having “filed his 11th immigration-related lawsuit against the Biden Administration—the 27th overall against Biden.”⁴ Among those 27 cases, the Texas Attorney General appears to have filed 19 cases in the Texas district courts and on behalf of Texas, the

³ Texas’s judge-shopping is materially different from the litigation of states in past administrations. As Applicants note, during President Trump’s tenure, states regularly filed lawsuits seeking to enjoin federal government policies. But the courts in which those lawsuits were often filed—such as the Eastern and Southern Districts of New York, the District of Maryland, the District of Hawaii, and the Northern District of California—do not have single-judge districts and therefore could have been heard by any number of judges.

⁴ Application at 4 (quoting Press Release, Att’y Gen. of Tex., *AG Paxton Again Sues Biden Over Border* (Apr. 28, 2022), <https://bit.ly/3ALmvBY>).

Governor, or the Attorney General himself.⁵ Of those 19 lawsuits, judges appointed during Republican presidencies are presiding in all but one.⁶ This situation is no coincidence—Texas has intentionally filed its cases in a manner designed to all but foreclose having to appear before judges appointed during Democratic presidencies, including by not filing a single case where the Texas state government is actually located—the Austin Division of the Western District of Texas.

There are 677 federal district judges assigned to 94 district courts across the country. Between full-state districts and larger multi-district states, some of those districts are physically enormous. The Western District of Texas, for example, runs from El Paso to east of Austin and down to the Mexican border—more than 92,000 square miles. Thus, Congress has further subdivided some district courts into as many as seven smaller “divisions.” *See, e.g.*, 28 U.S.C. § 124(d) (noting that the Western District of Texas “comprises seven divisions”). And, critically, the district courts are free to allocate the work within and across divisions as they see fit. *See* 28 U.S.C. § 137(a).

In a suit against the United States, Congress has said that venue lies, *inter alia*, in a district in which “a substantial part of the events or omissions giving rise to the claim occurred” or in which “the plaintiff resides if no real property is involved in the action.”

⁵ Attached to this filing as an Appendix is a chart identifying: the 19 cases, the division and district in which Texas initially filed the lawsuit, the judge appointed to the lawsuit, the party of the President at the time of the judge’s appointment, the number of judges in the division, and the percent of the division’s new civil cases assigned to judges appointed during Republican presidencies. The Appendix also includes citations to each of the District’s division of work orders in place at the times that Texas filed its lawsuits.

⁶ *See id.*

28 U.S.C. § 1391(e)(1)(B)-(C). But the Code does not establish where within a subdivided district an action must be brought, leaving the determination instead to “the rules and orders of the court.” 28 U.S.C. § 137(a) (delegating authority to divide the business of the district court).

Each of Texas’s four federal district courts is divided into divisions named for the city in which the courthouse is located. The Texas district courts divide their respective business by designating which of the district’s judges receive the cases in each division. Within multiple-judge divisions, cases are still subject to random assignment, with a standing order dictating at what proportion the random assignment should send a case to each of the division’s judges. Thus, for example, in the Northern District of Texas, civil cases filed in the Dallas Division are randomly assigned to 11 different district judges at percentages ranging from five to 10 percent of new filings per judge.⁷

In other divisions, however, civil cases are assigned to only one, two, or three judges. Of the seven divisions in the Northern District of Texas, for example, five divisions have one judge hearing all or most cases.⁸ Thus, while the divisional approach in theory can ensure random assignment, it does not necessarily do so in practice. In its

⁷ Special Order No. 3-340 (N.D. Tex. June 21, 2021), <https://www.txnd.uscourts.gov/sites/default/files/orders/3-340.pdf> (addressing Dallas Division).

⁸ See Special Order No. 3-330 (N.D. Tex. Aug. 9, 2019), <https://www.txnd.uscourts.gov/sites/default/files/orders/03-330.pdf> (assigning 64, 67, and 67 percent of civil cases to single judge in Lubbock, Abilene, and San Angelo Divisions, respectively); Special Order 3-327 (N.D. Tex. July 3, 2019), <https://www.txnd.uscourts.gov/sites/default/files/orders/3-327.pdf> (assigning 95 percent of Amarillo Division civil cases to one judge), Special Order 3-310 (N.D. Tex. Nov. 29, 2019), <https://www.txnd.uscourts.gov/sites/default/files/orders/03-310.pdf> (assigning 85 percent of cases in Wichita Falls Division to single judge).

recent lawsuits challenging federal policies, Texas has consistently exploited this situation, filing *exclusively* in those small divisions where it can all but guarantee which judge will hear its case. This case exemplifies this practice of Texas hand-selecting its judges.

A. Texas Abuses the Orders Assigning Divisional Casework to Virtually Ensure Judges Appointed During Democratic Presidencies Do Not Hear Texas's Cases.

Texas is unwilling to bring its lawsuits in locations where they may be heard by judges appointed by Democratic presidents. Instead, Texas has exclusively filed suits challenging federal policies, including this one, in divisions where all or nearly all cases are assigned to judges appointed by Republican presidents. In fact, almost without exception, Texas has filed its cases in districts presided over entirely or almost entirely by judges appointed by President Trump.

First, Texas has litigated exclusively in divisions with three or fewer judges. That is, of the 19 lawsuits filed by the Texas Attorney General in Texas's federal courts against the federal government since President Biden's inauguration, not one was filed in a district where more than three judges preside over new civil cases. And Texas filed just four of the 19 cases in courthouses with more than two judges.

This is more than forum-shopping, it is thinly veiled judge-shopping. Each of the 19 cases was filed in a division that assigns all or virtually all cases to judges appointed during Republican presidencies. Twelve of the 19 cases were filed in divisions where judges appointed during Republican presidencies preside over *100 percent* of newly filed civil cases. The remaining seven cases were filed in divisions where judges appointed

during Republican presidencies preside over 95 percent of new civil cases. Put another way, Texas has filed 19 lawsuits against the federal government without ever risking more than a five-percent chance of having the matter initially assigned to a judge appointed by a Democratic president.

It would be one thing if that pattern were unavoidable, e.g., if every single judge in a single district court, and not just a single division, had been appointed by presidents of the same party. But that's not true of any of the district courts in Texas; and it's not true of any of the larger divisions within those district courts. Texas is *choosing* to file cases hundreds of miles away from the state capital, typically with no explanation for why a challenge to immigration policy, for example, should be heard anywhere other than either the state capital or in courthouses close to the international border.

This case is a perfect example of Texas shopping for judges. The U.S. District Court for the Southern District of Texas spans forty-three counties and includes the cities of Houston, Corpus Christi, and Laredo. Texas filed this particular suit in the Victoria Division of the Southern District of Texas. Victoria is neither Texas's state capital nor is it on the border, nor does it have any particular connection to the Guidance adopted by Secretary Mayorkas in September 2021 at issue in this case. Texas's Amended Complaint in the case does not contain a single allegation tying Victoria to its lawsuit, claiming only that venue lies "because the State of Texas is a resident of this judicial district, and a

substantial part of the events or omissions giving rise to Plaintiffs’ claims occurred in this District.”⁹

So why did Texas file this lawsuit in Victoria? Although the Southern District of Texas has 19 authorized judgeships—the fifth-most of any district in the country—the Victoria Division has exactly one district judge to whom new civil cases are assigned: Judge Drew B. Tipton, appointed in 2020 by President Trump. This lawsuit is one of five that Texas has filed against the federal government in the Victoria Division which was then assigned to Judge Tipton.¹⁰ By filing this case in Victoria, Texas was able to select not just the *location* for its lawsuit, but the *specific* federal judge who would decide this case: a judge Texas likely believed would enjoin the Guidance—and who in fact did so, even as other courts have rejected similar challenges.¹¹ *See, e.g., Arizona v. Biden*, No.

⁹ First Am. Compl. ¶ 21, *Texas v. United States*, No. 21-cv-16 (S.D. Tex. Oct. 22, 2021), ECF No. 109. The Complaint also asserts that venue is proper under Section VIII of the Texas Agreement, which also does not mention Victoria or connect Victoria to Texas’s claims.

¹⁰ *Texas v. United States*, No. 6:21-cv-3 (S.D. Tex. Jan. 22, 2021) (Tipton, J., presiding); *Texas v. United States*, No. 6:21-cv-16 (S.D. Tex. Apr. 6, 2021) (Tipton, J., presiding); *Missouri v. Biden*, No. 7:21-cv-420 (S.D. Tex. Oct. 21, 2021) (Alvarez, J., presiding), *originally filed as* No. 6:21-cv-52 (S.D. Tex.) (Tipton, J., presiding); *Texas v. Biden*, No. 6:22-cv-4 (S.D. Tex. Feb. 10, 2022) (Tipton, J., presiding); *Texas v. Wallensky*, No. 6:22-cv-13 (S.D. Tex. Apr. 22, 2022) (Tipton, J., presiding).

¹¹ Texas’s efforts to place cases before Judge Tipton were exceptionally on display in *Missouri v. Biden*, No. 7:21-cv-420 (S.D. Tex. Oct. 21, 2021), a case challenging the federal government’s decision not to build a border wall. Prior to Texas’s filing, the Texas General Land Office (“the *GLO* lawsuit”) filed a lawsuit in McAllen, Texas, the Division serving a portion of the land on which the border wall would have been built. The court randomly assigned the *GLO* lawsuit to Judge Micaela Alvarez, appointed in 2004 by President George W. Bush. Several months after the *GLO* lawsuit was filed, Texas filed *Missouri v. Biden*. As the court later found, compared to the *GLO* lawsuit, *Missouri* sued “functionally identical” defendants, seeking “markedly similar” relief, and raising

22-2372, __ F.4th __, 2022 WL 2437870 (6th Cir. July 5, 2022) (reversing injunction against the same Guidance at issue in this case). In other words, when Texas filed this lawsuit, it had a 100% chance of drawing Judge Tipton—a fact it knew when it filed.

B. No Readily Apparent Alternative Explanation Explains Texas’s Conduct.

Consideration of where Texas has *not* filed its lawsuits bolsters the conclusion that Texas is deliberately judge-shopping. First, despite being both the seat of its state government and the location of the Attorney General’s Office, Texas has not filed *any* of its lawsuits against the Biden Administration in Austin. This is no coincidence: Half of new cases filed in Austin are assigned to a judge appointed by President Obama.¹²

Second, Texas is not litigating based on the location of most of its residents. Texas has only filed three of its lawsuits against the federal government in a division serving any of Texas’s ten largest cities.¹³ In those three cases, Texas filed in the Fort Worth

“fundamental questions [that were] the same” *Tex. Gen. Land Off. v. Biden*, No. 7:21-cv-272, 2021 WL 5588160, at *3-4 (S.D. Tex. Nov. 29, 2021) (granting motion to consolidate earlier filed border wall lawsuit with Texas’s subsequent lawsuit). Despite those overlaps, Texas instead filed *Missouri* in the Victoria Division, receiving Judge Tipton. Worse still, Texas’s civil cover sheet made no mention of any related cases, including the *GLO* lawsuit. Subsequently, the United States moved to consolidate *Missouri* with the *GLO* lawsuit and the *GLO* lawsuit was transferred to the McAllen Division. *Id.* at *1.

¹² See Amended Order Assigning the Business of the Court Items IV(a) and IX(a) (W.D. Tex. May 10, 2021), <https://bit.ly/3IFt5Mg> (assigning 50 percent of civil docket to Judge Lee Yeakel, who was appointed during a Republican administration, and the remaining 50 percent to Judge Robert Pitman, who was appointed during a Democratic Administration).

¹³ See *Texas v. Biden*, No. 4:21-cv-579 (N.D. Tex. Apr. 22, 2021) (filed in Fort Worth Division) and *Paxton v. Richardson*, No. 4:22-cv-143 (N.D. Tex. Feb. 24, 2022) (same). As of 2017, Texas’s 10 largest cities were: Houston, San Antonio, Dallas, Austin, Fort Worth, El Paso, Arlington, Corpus Christi, Plano, and Laredo. *Population Estimates of Texas Cities 2010-2017, Arranged in Descending Order*, Texas State Library & Archives Comm’n (rel. May 2018), <https://www.tsl.texas.gov/ref/abouttx/popcity6.html>. Of those

division of the Northern District of Texas, a three-judge division in which no judge appointed during a Democratic administration is regularly assigned civil cases.¹⁴ The Fort Worth Division courthouse is only 12 miles away from the Dallas Division courthouse, where 11 judges appointed by a mix of Democratic and Republican presidents receive civil case assignments.¹⁵ Texas has not filed a single lawsuit in the Dallas Division.

Third, proximity to the border also does not explain Texas's division selections for its eight immigration-related Texas-based lawsuits. Texas did not originally file any of its immigration-related suits within 150 miles of the border. Of particular note is Texas's case concerning the Migrant Protection Protocols ("MPP").¹⁶ Texas filed that case in Amarillo, *over 400 miles* from the nearest segment of the United States-Mexico border.¹⁷

cities, Houston, San Antonio, Dallas, Austin, Fort Worth, El Paso, Corpus Christi, Laredo, and Plano have federal court houses. The Fort Worth courthouse serves Arlington (Tarrant County).

¹⁴ Special Order No. 3-337 (N.D. Tex. May 25, 2020), <https://www.txnd.uscourts.gov/sites/default/files/orders/SO3-337.pdf> (establishing division of work for Fort Worth Division).

¹⁵ Special Order No. 3-340 (N.D. Tex. June 21, 2021), <https://www.txnd.uscourts.gov/sites/default/files/orders/3-340.pdf> (addressing Dallas Division).

¹⁶ *See generally Texas v. Biden*, No. 2:21-cv-67 (N.D. Tex. Apr. 13, 2021).

¹⁷ Texas's conduct also demonstrates that its preference for the Amarillo Division is tied to its desire to appear before Judge Kacsmayk, appointed in 2019 by President Trump. In January of 2022, Texas filed a lawsuit against the federal government concerning the Central American Minor Refugee and Parole Program. *Texas v. Biden*, No. 3:22-cv-780 (N.D. Tex. Jan. 28, 2022) (originally numbered 2:22-cv-14). Texas originally filed the lawsuit in the Amarillo Division, where Judge Kacsmayk receives 95 percent of new civil cases, with the remaining five percent assigned to Chief Judge Barbara Lynn, a 1999 appointee of President Clinton. *See* Special Order No. 3-327 (July 3, 2019), <https://www.txnd.uscourts.gov/sites/default/files/orders/3-327.pdf> (addressing Amarillo Division). Initially, Texas did not identify any related cases on its civil cover sheet. *See* Civil Cover Sheet at 1, *Texas v. Biden*, Case No. 2:22-cv-14-M (N.D. Tex. Jan. 28, 2022), ECF No. 1-1 (providing no information in Section VIII. "Related Case(s) if any"). Against

Texas filed in Amarillo even though the MPP program proceedings actually took place in three Texas border cities with federal courthouses (El Paso, Laredo, and Brownsville).¹⁸ Texas passed over those jurisdictions to file in Amarillo. And, again, that is no coincidence: at present, in El Paso, Laredo, and Brownsville, 42 percent,¹⁹ 100 percent,²⁰ and 50 percent²¹ of cases, respectively, are assigned to judges appointed during Democratic administrations.

Finally, Texas's filing decisions in immigration cases cannot be explained based on the location of undocumented people. Undocumented people in Texas tend to live overwhelmingly in Texas's largest cities. A 2017 Pew study showed that the majority of

the 1-in-20 odds, the court randomly assigned the matter to Chief Judge Lynn. After the assignment, Texas filed an amended cover sheet, now contending that the matter was related to a pending case before Judge Kacsmaryk. *See* Am. Civil Cover Sheet at 1, *Texas v. Biden*, No. 2:22-cv-14-M (N.D. Tex. Jan. 31, 2022), ECF No. 3 (identifying as related Northern District of Texas case No. 2:21-cv-67). The United States opposed the claimed relation, noting that Texas's action constituted "an abuse of the case-relation mechanism to subvert the impartial assignment of cases . . ." Defs.' Resp. to Pls.' Notice of Related Cases at 5, *Texas v. Biden*, No. 2:22-cv-14-M (N.D. Tex. Feb. 1, 2022), ECF No. 9. And because the matters were "not sufficiently related" and "no party reside[d] in the Amarillo Division," the case remained with Chief Judge Lynn. Order at 1, *Texas v. Biden*, No. 2:22-cv-14-M (N.D. Tex. Mar. 29, 2022), ECF No. 28.

¹⁸ *See Explanation of the Decision to Terminate the Migrant Protection Protocols*, Dep't of Homeland Sec. at 6 n.18 (Oct. 29, 2021), <https://bit.ly/3c8Rqh0> (identifying El Paso, Laredo, and Brownsville as locations Texas for MPP hearings).

¹⁹ *See* Amended Order Assigning the Business of the Court Items VIII(a), XV(a) (W.D. Tex. May 10, 2021), <https://bit.ly/3IFt5Mg> (assigning 29 percent of El Paso cases to Judge Guaderrama and 13 percent of El Paso cases to Judge Briones, both appointed during Democratic presidencies).

²⁰ *See, e.g.*, General Order No. 2022-13 at 2-3 (S.D. Tex. June 30, 2022), <https://www.txs.uscourts.gov/district/genord> (continuing to provide in most-recent work order that Laredo cases be divided 50/50 between Judges Saldaña and Marmolejo, both appointed during Democratic presidencies).

²¹ *Id.* at 3 (assigning 50 percent of Brownsville cases to Judge Olvera, who was appointed during a Democratic presidency).

this country’s 11.1 million undocumented persons live in metropolitan areas, with about 575,000 in Houston and 475,000 in Dallas-Fort Worth.²² Again, Texas has not filed a single lawsuit in Dallas, nor in Houston, where 1/5 and 1/3 of new civil cases, respectively, are assigned to judges appointed during Democratic administrations.²³

II. Texas’s Strategy of Deliberately Shopping for Judges Counsels in Favor of a Stay.

In deciding whether to grant a stay, this Court weighs the public interest. *Nken*, 556 U.S. at 435-36. A judiciary that is perceived as being independent is undoubtedly in the public interest. As the Chief Justice noted in his 2021 Year-End Report on the Federal Judiciary, “Decisional independence is essential to due process, promoting impartial decision-making, free from political or other extraneous influence.”²⁴ In the very same report, the Chief Justice singled-out the phenomenon of judge-shopping in patent cases—in which patent litigants have taken advantage of the very same quirk in Texas procedure to file a wildly disproportionate percentage of patent suits in the Waco Division of the Western District of Texas.²⁵ As the Chief Justice suggested, although Congress has given the district courts broad discretion to manage their dockets, “the Judicial Conference has long supported the random assignment of cases and fostered the role of

²² Jeffrey S. Passel & D’Vera Cohn, *20 Metro Areas are Home to Six-in-Ten Unauthorized Immigrants in U.S.*, Pew Rsch. Ctr. (Mar. 11, 2019), <https://pewrsr.ch/3bX0Kob>.

²³ See Special Order No. 3-340 (June 21, 2021), <https://www.txnd.uscourts.gov/sites/default/files/orders/3-340.pdf> (addressing Dallas Division); see also General Order No. 2022-13 (assigning cases to Southern District divisions, including Houston Division).

²⁴ Chief Justice John G. Roberts, Jr., *2021 Year-End Report on the Federal Judiciary* at 1 (Dec. 2021), <https://bit.ly/3IFzWoY>.

²⁵ See J. Jonas Anderson & Paul R. Gugliuzza, *Federal Judge Seeks Patent Cases*, 71 Duke L.J. 419 (2021).

district judges as generalists capable of handling the full range of legal issues. . . . Reconciling these values is important to public confidence in the courts.”²⁶ Obviously, that public confidence is jeopardized when hand-picked district judges are allowed to dictate national policy. *See also Arizona v. Biden*, 31 F.4th 469, 484 (6th Cir. 2022) (Sutton, J., concurring) (explaining that nationwide injunctions, *inter alia*, “sometimes give States victories they did not earn,” and “incentivize forum shopping”).

While there is surely more that Congress can do to prevent judge-shopping, the courts may also act to curb the practice. In considering the various public interests that weigh in favor and against a stay, the Court may decide that a party’s blatant judge-shopping counsels against the public interest—especially when, as here, there is no countervailing explanation for that party’s litigation behavior. *See, e.g., Redman v. Javitch Block, LLC*, No. 3:21-CV-37, 2021 WL 7448734, at *2 (N.D. W. Va. Nov. 2, 2021) (“[T]he public interest lies in judicial economy and avoiding forum, or judge, shopping, which is best served by the Court’s Order remanding the case to state court and not issuing a stay of that Order.”), *appeal docketed*, No. 21-2236 (4th Cir. Nov. 3, 2021); *Ellsworth v. Schneider Nat’l Carriers, Inc.*, No. 5:20-cv-01699, 2021 WL 3417641, at *2 (C.D. Cal. June 14, 2021) (considering forum-shopping a public interest factor as part of the court’s stay analysis). Indeed, courts in many different contexts have held that forum-shopping weighs against the public interest. *See, e.g., Atl. Marine Constr. Co. v. U.S. Dist.*

²⁶ *2021 Year-End Report on the Federal Judiciary* at 5. Speaking at the time of venue for patent cases, the Chief Justice noted that “Senators from both sides of the aisle have expressed concern that case assignment procedures allowing the party filing the case to select a division of a district court might, in effect, enable the plaintiff to select a particular judge to hear a case.” *Id.*

Ct. for W. Dist. of Tex., 571 U.S. 49, 65 (2013) (explaining that a 1404(a) transfer to enforce a forum-selection clause has “public-interest considerations,” including to discourage “gamesmanship” such as the “creat[ion] or multipl[ication] of opportunities for forum shopping” (internal quotation marks omitted)); *Ferens v. John Deere Co.*, 494 U.S. 516, 527-28 (1990) (explaining that public interest considerations weighing against a transfer include the possibility that the movants are forum-shopping).

By granting a stay here based in part on the public interest against judge-shopping, the Court will discourage parties from engaging in such judge-shopping in the future and send a strong message about the importance of public confidence in the independence of the judiciary. On the other hand, should the Court sit by silently while Texas hand-selects judges to challenge federal action, future administrations will almost certainly face similar judge-shopping from politically adverse states—and the credibility of the federal judiciary as a whole will suffer.

The conflicting Fifth and Sixth Circuit decisions on the Guidance reflect the enduring truth of the Chief Justice’s statement about the import of the independent federal judiciary on Thanksgiving eve four years ago. Texas’s litigation strategy undermines it. Because the public interest favors it, this Court should grant the Application.

CONCLUSION

The Court should grant the Application.

Dated: July 13, 2022

Respectfully submitted,

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APPENDIX A

APPENDIX A

List of Texas Challenges to Federal Policy in Texas District Courts

| Case name (in order of filing date) | Case Number | Policy or Action Challenged | Original Filing Div. (District) | Original Presiding Judge | President's Party at Judge's Appointment (President) | Number of Judges in Div. Receiving New Civil Cases | Percentage of Div.'s New Civil Cases Assigned to Judges Appointed During Republican Presidencies |
|-------------------------------------|--|--|---------------------------------|--------------------------|--|--|--|
| Texas v. United States | 6:21-cv-3 | Temporary deportation moratorium | Victoria (S.D.) | Tipton | Republican (Trump) | 1 | 100 |
| Texas v. Biden | 3:21-cv-65 | Revocation of permit for building pipeline | Galveston (S.D.) | Brown | Republican (Trump) | 1 | 100 |
| Texas v. United States | 6:21-cv-16 | Memorandum establishing DHS enforcement priorities | Victoria (S.D.) | Tipton | Republican (Trump) | 1 | 100 |
| Texas v. Biden | 2:21-cv-67 | Termination of Migrant Protection Protocols | Amarillo (N.D.) | Kacsmaryk | Republican (Trump) | 2 | 95 |
| Texas v. Biden | 4:21-cv-579 | Certain exceptions to policy expelling persons pursuant to public health directive | Ft. Worth (N.D.) | Pittman | Republican (Trump) | 3 | 100 |
| Texas v. Yellen | 2:21-cv-79 | Statutory limitation on use of funds in COVID-19 legislation | Amarillo (N.D.) | Kacsmaryk | Republican (Trump) | 2 | 95 |
| Texas v. Brooks-Lasure | 6:21-cv-191 | Rescission of Medicaid program waiver | Tyler (E.D.) | Barker | Republican (Trump) | 2 | 100 |
| Texas v. EEOC | 2:21-cv-194 | Guidance regarding application of nondiscrimination laws | Amarillo (N.D.) | Kacsmaryk | Republican (Trump) | 2 | 95 |
| Missouri v. Biden | 7:21-cv-420 (originally 6:21-cv-52) ¹ | Termination of certain border wall construction | Victoria (S.D.) | Tipton | Republican (Trump) | 1 | 100 |
| Texas v. Biden | 3:21-cv-309 | COVID-19 vaccine mandate for federal contractors | Galveston (S.D.) | Brown | Republican (Trump) | 1 | 100 |

¹ Respondents initially filed this matter in the Victoria Division; however, the matter was subsequently transferred to a different division and judge following a determination that the matter was related to, and should be consolidated with, an earlier-filed case by other plaintiffs.

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List of Texas Challenges to Federal Policy in Texas District Courts

| Case name (in order of filing date) | Case Number | Policy or Action Challenged | Original Filing Div. (District) | Original Presiding Judge | President's Party at Judge's Appointment (President) | Number of Judges in Div. Receiving New Civil Cases | Percentage of Div.'s New Civil Cases Assigned to Judges Appointed During Republican Presidencies |
|-------------------------------------|--|---|---------------------------------|--------------------------|--|--|--|
| Texas v. Becerra | 2:21-cv-229 | COVID-19 vaccine mandate for certain healthcare professionals | Amarillo (N.D.) | Kacsmaryk | Republican (Trump) | 2 | 95 |
| Texas v. Becerra | 5:21-cv-300 | COVID-19 vaccine mandate for Head Start programs | Lubbock (N.D.) | Hendrix | Republican (Trump) | 3 | 97 |
| Abbott v. Biden | 6:22-cv-3 | COVID-19 vaccine mandate for National Guard members | Tyler (E.D.) | Barker | Republican (Trump) | 2 | 100 |
| Texas v. Biden | 3:22-cv-780 (originally 2:22-cv-14) ² | Central American Minors Program | Amarillo (N.D.) | Lynn | Democrat (Clinton) | 2 | 95 |
| Texas v. Biden | 6:22-cv-4 | Increased minimum wage for federal contractors | Victoria (S.D.) | Tipton | Republican (Trump) | 1 | 100 |
| Van Duyne v. CDC | 4:22-cv-122 | Requiring masks for public transportation | Ft. Worth (N.D.) | O'Connor | Republican (G.W. Bush) | 3 | 100 |
| Paxton v. Richardson | 4:22-cv-143 | Regulation of firearm suppressors | Ft. Worth (N.D.) | Pittman | Republican (Trump) | 3 | 100 |
| Texas v. Wallensky | 6:22-cv-13 | Termination of policy expelling persons pursuant to public health directive | Victoria (S.D.) | Tipton | Republican (Trump) | 1 | 100 |
| Texas v. Mayorkas | 2:22-cv-94 | Changes to credible fear screening of asylum seekers | Amarillo (N.D.) | Kacsmaryk | Republican (Trump) | 2 | 95 |

² The Court later transferred this matter to the Dallas Division. Chief Judge Lynn's assignment occurred at the initial filing in Amarillo, and remained unchanged with the transfer to Dallas. The case number changed following transfer as the Northern District numbers cases by division.

APPENDIX B

Appendix B – Texas Federal District Court Division-of-Work Orders in Effect During Relevant Timeframes

Northern District

- Dallas Division
 - July 5, 2021 – present
 - Special Order No. 3-340 (N.D. Tex. June 21, 2021), <https://www.txnd.uscourts.gov/sites/default/files/orders/3-340.pdf>
 - September 28, 2020 – July 4, 2021
 - Special Order No. 3-339 (N.D. Tex. Sep. 28, 2020), <https://www.txnd.uscourts.gov/sites/default/files/orders/3-339.pdf>
- Fort Worth Division
 - May 25, 2020 – present
 - Special Order No. 3-337 (N.D. Tex. May 25, 2020), <https://www.txnd.uscourts.gov/sites/default/files/orders/SO3-337.pdf>
- Lubbock, Abilene, and San Angelo Divisions
 - August 9, 2019 – present
 - Special Order No. 3-330 (N.D. Tex. Aug. 9, 2019), <https://www.txnd.uscourts.gov/sites/default/files/orders/03-330.pdf>
- Amarillo Division
 - July 3, 2019 – present
 - Special Order 3-327 (N.D. Tex. July 3, 2019), <https://www.txnd.uscourts.gov/sites/default/files/orders/3-327.pdf>
- Wichita Falls Division
 - Nov. 29, 2016 – present
 - Special Order No. 3-310 (N.D. Tex. Nov. 29, 2016), <https://www.txnd.uscourts.gov/sites/default/files/orders/03-310.pdf>

Eastern District

- December 16, 2021 – present
 - General Order Assigning Civil & Criminal Actions, Gen. Order 21-19 (Dec. 16, 2021), <https://www.txed.uscourts.gov/sites/default/files/goFiles/GO%2021-19%20Assigning%20Civil%20and%20Criminal%20Actions.pdf>
- April 30, 2021 – December 16, 2021
 - General Order Assigning Civil & Criminal Actions, Gen. Order 21-08 (Apr. 30, 2021), <https://www.txed.uscourts.gov/sites/default/files/goFiles/GO%2021-08%20Assigning%20Civil%20and%20Criminal%20Actions.pdf>
- June 15, 2020 – April 30, 2021
 - General Order Assigning Civil & Criminal Actions, Gen. Order 20-14 (June 15, 2020), <https://www.txed.uscourts.gov/sites/default/files/goFiles/GO%2020-14%20Assigning%20Criminal%20and%20Civil%20Actions.pdf>

Southern District

- **Note:** The internet addresses provided for the Southern District Orders automatically trigger a download of a PDF copy of the corresponding court order
- July 1, 2022 - present
 - Third Am. Division of Work Order for 2022, Gen. Order 2022-13 (S.D. Tex. June 30, 2022),
<https://www.txs.uscourts.gov/file/6532/download?token=jQaaRfvg>.
- April 11, 2022 – June 30, 2022
 - Second Am. Division of Work Order for 2022, Gen. Order 2022-8 (S.D. Tex. Apr. 11, 2022),
<https://www.txs.uscourts.gov/file/6408/download?token=rbaJpcjK>.
- April 1, 2022 – April 10, 2022
 - Am. Division of Work Order for 2022, Gen. Order 2022-6 (S.D. Tex. Mar. 31, 2022), <https://www.txs.uscourts.gov/file/6406/download?token=8LA7NKhC>
- January 1, 2022 – March 31, 2022
 - Division of Work Order, Gen. Order 2022-1 (S.D. Tex. Dec. 30, 2021),
<https://www.txs.uscourts.gov/file/6352/download?token=GxFxj2EG>.
- June 1, 2021 – December 31, 2021
 - Third Am. Division of Work Order, Gen. Order 2021-10 (S.D. Tex. May 27, 2021), <https://www.txs.uscourts.gov/file/6043/download?token=RxHEyGiv>.
- April 1, 2021 – May 31, 2021
 - Second Am. Division of Work Order, Gen. Order 2021-7 (S.D. Tex. Apr. 1, 2021),
<https://www.txs.uscourts.gov/file/5973/download?token=qYAcMMSQ>.
- March 4, 2021 – March 31, 2021
 - Am. Division of Work Order, Gen Order 2021-4 (S.D. Tex. Mar. 4, 2021),
<https://www.txs.uscourts.gov/file/5908/download?token=hyDceGID>.
- January 1, 2021 – March 3, 2021
 - Division of Work Order, Gen. Order 2021-1 (S.D. Tex. Dec. 31, 2020),
<https://www.txs.uscourts.gov/file/5798/download?token=dDvvri0x>.

Western District

- May 10, 2021 – present
 - Amended Order Assigning the Business of the Court (W.D. Tex. May 10, 2021), <https://www.txwd.uscourts.gov/wp-content/uploads/Standing%20Orders/District/Amended%20Order%20Assigning%20Business%20of%20the%20Court%20051021.pdf>.
- Mar. 8, 2021 – May 10, 2021
 - Amended Order Assigning the Business of the Court (W.D. Tex. Mar. 8, 2021), <https://www.txwd.uscourts.gov/wp-content/uploads/Standing%20Orders/District/Amended%20Order%20Assigning%20Business%20of%20the%20Court%20030821.pdf>.