A A L S

FEDERAL COURTS SECTION NEWSLETTER

August 8, 2023

ANNOUNCEMENTS

2024 Annual Meeting Program

In his dissent in *New State Ice Co. v. Liebmann* in 1932, Justice Louis Brandeis famously wrote that a single state may "serve as a laboratory"—conducting experiments that could then be considered by the rest of the country. An analogous phenomenon is arguably occurring at the federal courts of appeals today.

Though all part of the same middle tier of review within the larger federal judiciary, the thirteen courts of appeals are quite different from each other in critical ways. Specifically, they vary along key case management metrics—how often they hear oral argument in appeals and how often cases are submitted on the briefs; how often appeals result in published opinions and how often they result instead in unpublished orders. Beyond even the processes by which they decide appeals, there are key differences in the norms and cultures of these courts, resulting in different "personalities." But unlike with the idealized laboratories of democracy, the "results" of these different experiments are not well known outside of the courts, and sometimes even within the courts themselves.

With panelists including Professors Alli Larsen, Marin K. Levy, and Merritt McAlister, this panel will consider the extent of the variation across the courts of appeals today and, critically, assess how the different experiments across appellate adjudication have fared and where more experimentation would be beneficial.

Calls for Nominations

Daniel J. Meltzer Award

The AALS Section on Federal Courts is pleased to announce that it is seeking nominations for the new Daniel J. Meltzer Award, which is designed to honor the life and work of the late Professor Meltzer. The Award will recognize a professor of Federal Courts who has exemplified over the course of their career Professor Meltzer's excellence in teaching, careful and ground-breaking scholarship, engagement in issues of public importance, generosity as a colleague, and overall contribution to the field of Federal Courts. Eligible nominees are those who are full-time faculty members at AALS member or affiliate schools and have not served as an officer of the Federal Courts Section in the two previous years. It is not required that the award be given out in any particular year, and it may not be given out more frequently than every three years.

Nominations (and questions about the award) should be directed to Professor Merritt McAlister (mcalister@law.ufl.edu). Without exception, all nominations must be received by 11:59 p.m. (EDT) on *September 29, 2023*. Nominations will be reviewed by a prize committee consisting of Professors Amanda Frost (University of Virginia School of Law), Tara Leigh Grove (University of Texas School of Law), Marin K. Levy (Duke University

School of Law), Merritt McAlister (University of Florida Levin College of Law), and James Pfander (Northwestern Pritzker School of Law). If the committee decides to make the award, it will be announced at the Federal Courts Section program at the 2024 AALS Annual Meeting.

Best Untenured Article Award

The AALS Section on Federal Courts is pleased to announce the annual award for the best article on the law of federal jurisdiction by a full-time, untenured faculty member at an AALS member or affiliate school—and to solicit nominations (including self-nominations) for the prize to be awarded at the 2024 AALS Annual Meeting.

The purpose of the award program is to recognize outstanding scholarship in the field of Federal Courts by untenured faculty members. To that end, eligible articles are those specifically in the field of Federal Courts that were published by a recognized journal during the twelve-month period ending on September 1, 2023 (date of actual publication determines eligibility). Eligible authors are those who, at the close of nominations (i.e., as of September 15, 2023), are untenured, full-time faculty members at AALS member or affiliate schools, and have not previously won the award. Nominations (and questions about the award) should be directed to Professor Merritt McAlister at the University of Florida Levin College of Law (mcalister@law.ufl.edu).

Without exception, all nominations must be received by 11:59 p.m. (EDT) on *September 15, 2023*. Nominations will be reviewed by a prize committee comprised of Professors Rachel Bayefsky (University of Virginia School of Law), Paul Gugliuzza (Temple University Beasley School of Law), Marin K. Levy (Duke University School of Law), Merritt McAlister (University of Florida Levin College of Law), and Fred Smith (Emory University School of Law), with the result announced at the Federal Courts Section program at the 2024 AALS Annual Meeting.

NEW SCHOLARSHIP

We had an excellent response to this feature last year and look forward to publicizing your work again! If you're a Section member and would like information about a Federal Courts article, essay, or book you published in 2023 included in the next issue of the newsletter, email the citation and a summary *of no more than 200 words* to Katherine Mims Crocker (kmcrocker@wm.edu) and Celestine Richards McConville (mcconvil@chapman.edu) by January 1, 2024.

IN THE SUPREME COURT

Here are descriptions of decided cases and cases in which the Court has granted certiorari that appear to present Federal Courts issues. Material new to this issue appears in blue type. There are hyperlinks to lower-court decisions and argument transcripts.

DECIDED CASES

***Axon Enterprise, Inc. v Federal Trade Commission*, 143 S. Ct. 890 (2023) (Decision below: 986 F.3d 1173 (9th Cir. 2021)) (Argument transcript);**

***Securities & Exchange Commission v. Cochran*, 143 S. Ct. 890 (2023) (Decision below: 20 F.4th 194 (5th Cir. 2021)) (Argument transcript)**

The Securities Exchange Act (SEA) and the Federal Trade Commission Act (FTCA) establish administrative-review procedures directing parties challenging certain agency action to seek relief first with the relevant agency (Securities and Exchange Commission or Federal Trade Commission), with judicial review in a federal circuit court.

Applying the "three considerations" developed in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), Justice Kagan, joined by all Justices except Justice Gorsuch, ruled that Congress did not intend the SEA or FTCA administrative-review procedures to displace federal district-court jurisdiction under 28 U.S.C. § 1331 for claims raising constitutional challenges to an agency's structure. Structural constitutional claims can therefore proceed directly to federal district court.

Although joining Justice Kagan's opinion, Justice Thomas picked up his pen in concurrence to continue a discussion he began in earlier cases articulating his understanding of the distinction between public and private rights and whether the latter can ever be adjudicated by a non-Article III tribunal. Justice Gorsuch concurred in the judgment, rejecting the use of *Thunder Basin* (or, presumably, any other test) to determine whether Congress *implicitly* stripped § 1331 jurisdiction from district courts. In his view, § 1331 granted jurisdiction and Congress failed to "*actually* carve out [an] exception" in either SEA or FTCA.

***Cruz v. Arizona*, 143 S. Ct. 650 (2023) (Decision below: 487 P.3d 991 (Ariz. 2021)) (Argument transcript)**

For many years the Arizona Supreme Court rejected capital defendants' requests under *Simmons v. South Carolina*, 512 U.S. 154 (1994), to inform the jury of parole ineligibility, reasoning that *Simmons* did not apply in Arizona. In a summary reversal, *Lynch v. Arizona*, 578 U.S. 613 (2016), the Justices rejected the Arizona Supreme Court's position, holding that *Simmons* does, indeed, apply in Arizona.

Thereafter, an Arizona capital inmate whose conviction became final after *Simmons* and before *Lynch* filed a petition for state postconviction relief under *Lynch*. The Arizona Supreme Court denied the petition under Arizona Rule of Criminal Procedure 32.1(g), which precludes postconviction relief for claims that could have been raised on direct appeal, absent a "significant change in the law." The court explained that "Rule 32.1(g) requires a significant change in the law, . . . not a significant change in the *application* of the law." Because *Lynch* applied *Simmons*—a "clearly established" rule—no significant change in the law occurred to trigger relief under Rule 32.1(g).

The Supreme Court granted cert to consider whether the Arizona Supreme Court's procedural ruling was adequate and independent to support the court's judgment. Justice Sotomayor, writing for a 5–4 majority, held that the Arizona Supreme Court's application of Rule 32.1(g) was "one of those exceptional cases" where a state-court procedural ruling "does not constitute an adequate ground to preclude this Court's review of a federal question." As an appellate decision that overruled state-court precedent that refused to apply *Simmons*, *Lynch* was the "archetype" of "significant change" under Arizona law. *Lynch* required Arizona courts to apply a rule they had steadfastly refused to apply. Sotomayor remarked: "It is hard to imagine a clearer break from the past."

In dissent, Justice Barrett argued that the state-law ground was adequate because it addressed a "question of first impression: whether a 'significant change' occurs when an intervening decision reaffirms existing law, but rectifies an erroneous application of that law." The majority rejected this argument as "miss[ing] the point," which was that *Lynch* overruled Arizona precedent.

It is worth noting that despite its conclusion that the state-law ground posed no obstacle to its exercise of jurisdiction over the *Lynch* claim, the Court did not address that claim. Instead, it vacated the judgment below and remanded the case, baffling some Court-watchers.

***Department of Education v. Brown*, 143 S. Ct. 2343 (2023) (Decision below: 2022 WL 16858525 (N.D. Tex. 2022)) (Argument transcript);**

***Biden v. Nebraska*, 143 S. Ct. 2355 (2023) (Decision below: 52 F.4th 1044 (8th Cir. 2022)) (Argument transcript)**

In August 2022, the Biden Administration announced a program purportedly authorized by the HEROES Act that would cancel up to $20,000 in student-loan debt for qualifying borrowers. Numerous parties filed suit seeking to block the program, including two individual borrowers in one action and six states in another. In *Department of Education v. Brown*, the district court granted summary judgment in favor of the individual borrowers and vacated the program. The Fifth Circuit denied the Administration's request for a stay pending appeal. In *Biden v. Nebraska*, the district court dismissed for lack of standing. The Eighth Circuit disagreed, concluding that Missouri, at least, probably had standing and granting a nationwide injunction pending appeal. The Court granted cert before judgment in both cases.

In an opinion by Justice Alito in *Brown*, the Supreme Court unanimously held that the individual borrowers, who did not qualify for the maximum amount of loan forgiveness, lacked standing on traceability grounds. In particular, because the borrowers argued that the program at issue was unlawful under the HEROES Act, their claimed injury depended on the Administration not providing them loan relief under a separate statute (the Higher Education Act of 1965). This was insufficient for standing, the Court concluded, because "the Department's decision to give *other* people relief under a *different* statutory scheme did not *cause* respondents not to obtain the benefits they want."

In *Biden v. Nebraska*, a divided Court held that Missouri had standing. Chief Justice Roberts wrote the majority opinion for himself and Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett. They concluded that the program injured the Missouri Higher Education Loan Authority (MOHELA) because it would lose about $44

million per year in fees from accounts it would have serviced but for the loan forgiveness. The majority then reasoned that MOHELA was an instrumentality of Missouri such that the injury to the former counted as an injury to the latter. MOHELA, the Court said, "was created by the State to further a public purpose, is governed by state officials and state appointees, reports to the State, and may be dissolved by the State." The fact that MOHELA could sue and be sued in its own name did not counteract this conclusion. The Court went on to invalidate the program on the merits.

Justice Barrett concurred, addressing the merits. Justice Kagan dissented, joined by Justices Sotomayor and Jackson. "In every respect," the dissent said, "the Court today exceeds its proper, limited role in our Nation's governance." On standing, Kagan argued that it was improper to impute MOHELA's injury to Missouri itself. MOHELA, Kagan observed, can contract with other entities, holds all assets and debts separately from the state, and (again) can sue and be sued in its own name. "In the statutory scheme," the dissent concluded, "independence is everywhere"—such that "[s]tate law created MOHELA, but in so doing set it apart."

***Financial Oversight & Management Board for Puerto Rico v. Centro de Periodismo Investigativo, Inc.*, 143 S. Ct. 1176 (2023) (Decision below: 35 F.4th 1 (1st Cir. 2022)) (Argument transcript)**

Assuming without deciding that Puerto Rico and, by extension, the Financial Oversight and Management Board for Puerto Rico enjoy sovereign immunity, the Court held, 8–1, that Congress did not abrogate that immunity in the Puerto Rico Oversight, Management, and Economic Stability Act of 2016 (PROMESA).

Justice Kagan's majority opinion explained that abrogation requires "unmistakably clear" statutory language, which the Court has found in two situations: "when a statute says in so many words that it is stripping immunity from a sovereign entity" and "when a statute creates a cause of action and authorizes suit against a government on that claim." PROMESA involved neither situation. The Court rejected Respondent's argument that PROMESA's judicial review provisions reveal a clear intent to abrogate. It reasoned that such provisions, which grant the district court jurisdiction in "any action against the Oversight Board, and any action otherwise arising out of" PROMESA, 48 U.S.C. § 2126(a), and which authorize (and prohibit) certain remedies, "serve a function" even in the absence of abrogation (i.e., waiver by Puerto Rico or abrogation by a separate statute).

Justice Thomas dissented, taking the majority to task for failing to address whether Puerto Rico in fact possesses the same sovereign immunity that belongs to the states and concluding that the Board failed to carry its burden to establish such immunity.

***Haaland v. Brackeen*, 143 S. Ct. 1609 (2023) (Decision below: 994 F.3d 249 (5th Cir. 2021)) (Argument transcript)**

The Indian Child Welfare Act of 1978 (ICWA) governs child-custody proceedings involving Native American children. Three states and seven individuals challenged the act, and the district court granted declaratory relief holding various provisions unconstitutional. The en banc Fifth Circuit affirmed in part and reversed in part, upholding some ICWA provisions but holding that some commandeered state governments in violation of the Tenth Amendment and that some established impermissible preferences in violation of the Fifth Amendment's equal-protection principles.

The Court rejected all the challengers' claims—including on standing grounds in some instances. Justice Barrett wrote for a 7–2 Court. Chief Justice Roberts and Justices Sotomayor, Kagan, Gorsuch, Kavanaugh, and Jackson joined the majority opinion. The Court held that no plaintiff had standing to bring an equal-protection challenge to ICWA's placement preferences—under which (among other things) "Indians from any tribe . . . outrank unrelated non-Indians for both adoption and foster care"—or a nondelegation challenge to the provision permitting tribes to reorder such preferences.

As for the equal-protection challenge, the Court held that the individual plaintiffs had not shown a likelihood that judicial relief would redress the "racial discrimination" they alleged the placement preferences inflicted because "[t]he state officials who implement ICWA [we]re 'not parties to the suit.'" Nor could Texas (the only state plaintiff at this stage of the litigation) challenge the placement preferences, for several reasons. States do not have equal-protection rights themselves and cannot sue the federal government to advance their citizens' rights as *parens patriae*. Third-party standing was unavailable because Texas suffered no qualifying injury of its own and its citizens faced no impediments to protecting their own interests. The alleged conflict be-

tween ICWA and Texas law was not a cognizable injury. And Texas's alleged monetary harms flowed not from the placement preferences, but from other statutory provisions.

As for the nondelegation challenge, the individual plaintiffs raised no standing arguments, and Texas's absence of injury from the placement preferences translated into an absence of injury from the ability of tribes to alter such preferences.

Justice Gorsuch concurred, and Justices Sotomayor and Jackson joined him in part. This opinion did not address the standing issues. Justice Kavanaugh also concurred to emphasize that ICWA may still be vulnerable on equal-protection grounds. "Courts, including ultimately this Court," Kavanaugh said, "will be able to address the equal protection issue when it is properly raised by a plaintiff with standing—for example, by a prospective foster or adoptive parent or child in a case arising out of a state-court foster care or adoption proceeding."

Justices Thomas and Alito each filed a solo dissent disagreeing with the merits portion of the majority opinion.

***Health & Hospital Corp. v. Talevski*, 143 S. Ct. 1444 (2023) (Decision below: 6 F.4th 713 (7th Cir. 2021)) (Argument transcript)**

The wife of an Indiana nursing-facility resident sued the state-run facility and related parties, alleging violations of the Federal Nursing Home Reform Act (FNHRA). FNHRA was enacted to set standards of care for Medicaid-funded institutions under Congress's Spending Clause authority. The plaintiff sued under 42 U.S.C. § 1983, which the Supreme Court has occasionally read to establish a cause of action for statutory claims (in addition to constitutional claims). The district court dismissed the suit on the ground that § 1983 does not provide a cause of action for the alleged FNHRA violations. The Seventh Circuit reversed, concluding that FNHRA creates qualifying rights and does not include a comprehensive enforcement scheme, rendering § 1983 relief available.

Justice Jackson wrote the opinion for a 7-member majority affirming the judgment below. The Court reasoned that the phrase "and laws" in § 1983 (which allows plaintiffs to sue for the violation of "rights, privileges, or immunities secured by the Constitution and laws") is not limited to civil-rights statutes or any other particular type of laws and thus does not categorically exclude statutes enacted under Congress's spending power, like FNHRA. The Court proceeded to hold that the pertinent provisions of FNHRA (1) unambiguously confer individual rights and (2) do not demonstrate an intent to preclude § 1983 relief through express language or an incompatible enforcement scheme, such that the plaintiff's suit could proceed.

Justice Gorsuch concurred to note that "there are other issues lurking here that petitioners failed to develop fully—whether legal rights provided for in spending power legislation like the Act are 'secured' as against States in particular and whether they may be so secured consistent with the Constitution's anti-commandeering principle.'" Justice Barrett, joined by Chief Justice Roberts, filed a concurring opinion agreeing with the majority's reasoning but seeking to emphasize certain doctrinal limits, including that "§ 1983 actions are the exception—not the rule—for violations of Spending Clause statutes" (because federal termination of state funding represents the "typical remedy") and that "a wide range of contextual clues" can demonstrate that "a statute forecloses recourse to § 1983."

In a solo dissent, Justice Thomas argued that "a *conditional* exercise of the spending power is nothing more than a contractual offer" and cannot form the basis of a § 1983 suit because "any 'rights' that may flow from that offer are 'secured' only by the offeree's acceptance and implementation, not federal law itself." Justice Alito also dissented, joined by Thomas, to argue that FNHRA's "reticulated remedial regime" forecloses recourse to § 1983.

***Jones v. Hendrix*, 143 S. Ct. 1857 (Decision below: 8 F.4th 683 (8th Cir. 2021)) (Argument transcript)**

Marcus DeAngelo Jones was convicted of possessing a firearm as a felon under 18 U.S.C. § 922(g). Later, the Supreme Court held in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), that this statute applies only when a defendant knew both that that they possessed a firearm and that they were a felon (or had some other relevant status). The Eighth Circuit had previously rejected this reasoning, but after *Rehaif*, Jones attempted to rely on it to challenge his conviction. He was unable to file a collateral attack under 28 U.S.C. § 2255 because he had already sought relief under that statute, which in § 2255(h) limits second or successive motions to certain situations involving "newly discovered evidence" or "a new rule of constitutional law" (and not, as in this case, a new rule of statutory law). Accordingly, Jones filed a habeas petition under 28 U.S.C. § 2241, which—pursuant to the "saving

clause" in § 2255(e)—remains available where "the remedy by [§ 2255] motion is inadequate or ineffective to test the legality of [a prisoner's] detention."

The district court held that the saving clause did not apply and dismissed the habeas petition for lack of jurisdiction. The Eighth Circuit affirmed, reasoning among other things that Jones could have previously pressed a *Rehaif*-type argument in hopes of succeeding before the en banc Court of Appeals or the Supreme Court.

In an opinion by Justice Thomas, a 6–3 majority held that the limitation on second or successive motions to claims involving newly discovered evidence or new rules of constitutional law does not make § 2255 "inadequate or ineffective" with respect to claims involving intervening changes in statutory law, rendering § 2241 relief unavailable in such circumstances. The majority reasoned that § 2255(h) "enumerate[s] two—and only two—conditions in which a second or successive § 2255 motion may proceed," which produces a "straightforward negative inference" that no other conditions can lead to a similar remedy. The saving clause, the Court went on, "preserves recourse to § 2241 in cases where unusual circumstances make it impossible or impracticable to seek relief in the sentencing court, as well as for challenges to detention other than collateral attacks on a sentence." The majority rejected multiple counterarguments, including by applying an originalist approach to the Suspension Clause. "At the founding," the Court said, "a sentence after conviction 'by a court of competent jurisdiction' was 'in *itself* sufficient cause' for a prisoner's continued detention."

Justices Sotomayor and Kagan filed a joint dissent. They argued that Congress meant for the saving clause to ensure that the scope of the § 2255 remedy matched the scope of the habeas remedy it replaced. This principle should allow the saving clause to operate in this context, they contended, because the kind of claim Jones raised "is cognizable at habeas, where we have long held that federal prisoners can collaterally attack their convictions in successive petitions if they can make a colorable showing that they are innocent under an intervening decision of statutory construction." Ultimately, Sotomayor and Kagan would have remanded "for the lower courts to consider the petitioner's claim under the proper framework."

Justice Jackson dissented separately. In addition to advancing an argument similar to Sotomayor and Kagan's with respect to the saving clause, Jackson argued that § 2255(h) is insufficiently clear to block second or successive motions asserting previously unavailable statutory-innocence claims in the first place. Jackson also argued that constitutional-avoidance principles counsel allowing such claims to proceed. Here, she cited both the Eighth Amendment, stating that "[t]here is a nonfrivolous argument that the Constitution's protection against 'cruel and unusual punishment' prohibits the incarceration of innocent individuals," and the Suspension Clause, arguing that even under the majority's approach, historically "the writ could issue . . . when a person was incarcerated for noncriminal behavior."

***Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 143 S. Ct. 1689 (2023) (Decision below: 33 F.4th 600 (1st Cir. 2022)) (Argument transcript)**

The Bankruptcy Code expressly strips "governmental unit[s]" of sovereign immunity. 11 U.S.C. § 106(a). The Code defines the term "governmental unit" to mean

> United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

Id. § 101(27). Justice Jackson, writing for a 7-member majority, concluded that the Code's abrogation extends to federally recognized Indian tribes, even though the definition of "governmental unit" does not expressly include them. The Court emphasized that "the clear-statement rule [for abrogation] is not a magic-words requirement." The Code's "definition of 'governmental unit' exudes comprehensiveness from beginning to end" and therefore includes all governments. Because "[t]ribes are indisputably governments, . . . § 106(a) unmistakably abrogates their sovereign immunity."

Justice Thomas concurred in the judgment. In his view, "to the extent that tribes possess sovereign immunity at all, that immunity does not extend to 'suits arising out of a tribe's commercial activities conducted beyond its territory.'" Because the instant suit involved a tribe's off-territory commercial conduct, the tribe lacked immunity.

In dissent, Justice Gorsuch argued that Congress did not intend to eliminate sovereign immunity because it did not "expressly mention[] Indian tribes [any]where in the statute."

***Moore v Harper*, 143 S. Ct. 2065 (2023) (Decision below: 868 S.E.2d 499 (N.C. 2022)) (Argument transcript)**

Plaintiffs filed suit in state court challenging North Carolina's 2021 congressional districting maps as unlawful partisan gerrymandering under the state constitution. In *Harper I*, the North Carolina Supreme Court agreed with the plaintiffs, enjoining use of the 2021 maps and remanding the case for the selection of new maps. The Supreme Court granted cert on the federal question whether the Constitution's Elections Clause grants state legislatures authority to regulate federal elections, unrestricted by state judicial review.

While cert was pending, remand proceedings continued in state court. In *Harper II*, the North Carolina Supreme Court upheld the trial court's adoption of new maps. On rehearing in *Harper III*, the North Carolina Supreme Court (after a membership change following an intervening election) changed its mind, withdrew its remedial ruling in *Harper II*, "overruled" *Harper I* (but left *Harper I*'s judgment enjoining the 2021 maps intact), and dismissed the case as nonjusticiable under the state constitution's political-question doctrine.

Writing for a 6–3 majority, Chief Justice Roberts concluded that the *Harper I* appeal was not moot because *Harper III* did "nothing to alter the effect of the judgment in *Harper I* enjoining the use of the 2021 maps" and that "[a]s a result, the legislative defendants' path to complete relief runs through this Court." The Chief Justice also pointed to a "trigger provision" in state law, under which the 2021 maps would "become 'effective'" upon the Supreme Court's reversal of *Harper I*. The Court went on to hold that "[t]he Elections Clause does not insulate state legislatures from the ordinary exercise of state judicial review."

As relevant to the justiciability point, Justice Thomas, joined by Justices Alito and Gorsuch, dissented. Thomas argued that once *Harper III* overruled *Harper I* and dismissed the case with prejudice under the state constitution's political-question doctrine, the dispute became moot because "[t]he federal defense [on which the Court granted cert] no longer makes any difference to this case."

***United States v. Texas*, 143 S. Ct. 1964 (2023) (Decision below: 40 F.4th 205 (5th Cir. 2022)) (Argument transcript)**

At the request of Texas and Louisiana, a federal district court vacated guidance issued in September 2021 by the Secretary of Homeland Security regarding "national immigration enforcement policies and priorities." Both the district court and the Fifth Circuit denied a stay pending appeal.

The Court disposed of the case on standing grounds. Writing for himself, Chief Justice Roberts, and Justices Sotomayor, Kagan, and Jackson, Justice Kavanaugh treated the case as a straightforward application of the principle that a plaintiff "lacks a judicially cognizable interest" to challenge prosecutorial policies as they pertain to other parties. The district court's conclusion that the federal government's failure to arrest more noncitizens imposed monetary costs on the states did not displace this principle, the majority reasoned.

Justice Gorsuch concurred in the judgment, joined by Justices Thomas and Barrett. Gorsuch would have located the justiciability problem in the redressability element of standing. He pointed to 8 U.S.C. § 1252(f)(1), which provides that "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of" various immigration laws, including those at issue here. And he argued that vacating the guidelines did not provide a workaround because prosecutors have inherent enforcement discretion. In addition, Gorsuch questioned the propriety of courts vacating agency actions under the Administrative Procedure Act (APA). Justice Barrett also concurred in the judgment, joined by Gorsuch. Barrett criticized multiple aspects of the Court's reasoning, stating that she was skeptical much of it was "rooted in Article III standing doctrine" and contending that the majority misapplied various precedents.

Justice Alito filed a solo dissent. He argued that "settled law . . . leads ineluctably to the conclusion that Texas has standing" because of burdens including "the cost of criminal supervision of aliens who should have been held in DHS custody." On redressability, Alito argued among other things that executive officials would probably abide by a ruling vacating the guidelines even if they retained prosecutorial discretion and that the question whether vacatur was appropriate under the APA was not squarely presented. Alito then attacked the Court's refusal to recognize state standing as inconsistent with various precedents, unsupported by the cases

on which the majority relied, and inconsistent with a proper understanding of executive authority.

GRANTED CERTIORARI

***Acheson Hotels, LLC v. Laufer*, No. 22-429 (Decision below: 50 F.4th 259 (1st Cir. 2022))**

Deborah Laufer sued Acheson Hotels for allegedly violating the Americans with Disabilities Act (ADA) by failing to include sufficient accessibility information on the website of the Coast Village Inn and Cottages. Laufer is disabled—with limited mobility and vision impairment—but did not intend to visit the inn. Instead, as the First Circuit explained, "Laufer is a self-proclaimed ADA 'tester' and advocate for disabled persons and has filed hundreds of other ADA-related suits in federal courts from coast to coast."

The district court dismissed the case on standing grounds, reasoning that Laufer had not suffered a cognizable injury. The First Circuit reversed, concluding that the Supreme Court recognized standing for testers in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). The First Circuit further declared that any language undermining such standing in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), was dictum—or in the alternative, that "Laufer's feelings of frustration, humiliation, and second-class citizenry" constituted "adverse effects" capable of providing standing under *TransUnion*.

The Supreme Court granted cert to decide whether a tester who does not intend to visit the business in question has standing to pursue an ADA action—a question over which several circuits have split.

***Department of Agriculture Rural Development Rural Housing Service v. Kirtz*, No. 22-846 (Decision below: 46 F.4th 159 (3d Cir. 2022))**

The plaintiff borrowed money from the U.S. Department of Agriculture (USDA). Claiming that he had repaid the loan in its entirety but that USDA nevertheless told a credit-reporting agency it was past due, the plaintiff sued under the Fair Credit Reporting Act (FCRA). The district court held that USDA was protected by sovereign immunity. The Third Circuit reversed, holding that the FCRA waives such immunity.

Underscoring its continued interest in congressional withdrawals of sovereign immunity, the Court granted cert to consider whether the FCRA's civil-liability provisions "unequivocally and unambiguously waive the sovereign immunity of the United States."

ADDITIONAL INFORMATION

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