



A A L S

**FEDERAL COURTS  
SECTION NEWSLETTER**

**February 14, 2023**

**ANNOUNCEMENTS**

**2023 ANNUAL MEETING PROGRAM**

Beginning in 1925, Felix Frankfurter and James Landis surveyed and analyzed the business of the federal judicial system in a series of articles in the *Harvard Law Review*, which would then be compiled into the 1928 book, *The Business of the Supreme Court: A Study in the Federal Judicial System*. A core assumption animated that work: the federal courts serve a vital function to resolve important issues of federal law. It would take the field another quarter century to begin to take shape when Henry Hart and Herbert Wechsler published their influential and paradigmatic casebook in 1953

At the January 2023 Annual Meeting, a panel titled “Dispelling the Myth—the Business of the Federal Judicial System, Today” traced the lineage and development of the “canon” of Federal Courts, with an eye toward what has been left out as much as what has been included. Maggie Gardner (Cornell), Elizabeth Hidalgo Reese (Stanford), and James Pfander (Northwestern), with Diego Zambrano (Stanford, Section Chair), moderating, discussed the state of the field and the course, exploring how to teach and study the business of the federal courts as they are, today.

**2022 BEST ARTICLE AWARD**

At the 2023 Annual Meeting, Ben Johnson (Penn State) won the 2022 Best Article Award for *The Origins of Supreme Court Question Selection*,

122 *Columbia Law Review* 793 (2022). This award recognizes outstanding Federal Courts scholarship by an untenured faculty member. Congratulations, Ben!

**SECTION OFFICERS**

At the 2023 Annual Meeting, Merritt McAlister (Florida) was elected Chair of the Section, and Marin Levy (Duke) was elected Chair-Elect. Katherine Mims Crocker (William & Mary) and Celestine McConville (Chapman) were reelected Co-Secretaries. We all look forward to working together to serve the Section!

**NEW SCHOLARSHIP**

**Z. Payvand Ahdout, *Enforcement Lawmaking and Judicial Review*, 135 *Harvard Law Review* 937 (2022)**

Through developments that are managerial and doctrinal, substantive and procedural, high-profile and seemingly mundane, federal courts have subjected an important set of executive actions, “enforcement lawmaking”—the exercise of enforcement discretion in a manner that goes beyond simple policy and that shares attributes of law—to judicial oversight. Together, these developments reveal a potential shift in the structure of separation of powers. Courts have leveraged their inherent case-management powers to force transparency on the Executive and to hold it to account. This Article maps the effects of these “managerial checks,” which render the simple existence of judicial review powerful,

particularly when viewed together with the extension of justiciability and remediation doctrines. Courts have authorized judicial review earlier and to greater effect by redefining when executive action is ripe for judicial review. They have created new avenues for multiparty public litigation through developments in standing doctrine. And they have deployed the nationwide injunction to counterbalance increasingly muscular forms of executive action. This Article argues that these developments along the entire life cycle of suits challenging enforcement lawmaking should be viewed together and in separation-of-powers terms. The nuts and bolts of litigating these suits has led to an emerging expansion of judicial power. Courts have flexibly and responsively assimilated new assertions of executive power in ways that have restructured federal court doctrine and practice and emboldened federal courts.

**Rachel Bayefsky, *Administrative Stays: Power and Procedure*, 97 *Notre Dame Law Review* 1941 (2022)**

Federal courts are often asked to issue various forms of expedited relief, including stays pending appeal. This Article explores a little examined device that federal courts employ to freeze legal proceedings until they are able to rule on a party's request for a stay pending appeal: the "administrative" or "temporary" stay. A decision whether to impose an administrative stay can have significant effects in the real world, as illustrated by recent high-profile litigation on topics including immigration and abortion. Yet federal courts have not endorsed a uniform standard for determining whether an administrative stay is warranted or clarified the basis for their power to issue such a stay. This Article draws attention to the administrative stay device and proposes standards to guide federal courts in determining when such a stay is appropriate. In so doing, the Article probes the bounds of federal courts' equitable authority and the interests underlying their decisions about whether to grant interim relief in response to claims of impending harm.

**Rachel Bayefsky, *Order Without Formalism*, 90 *George Washington Law Review* 1458 (2022)**

The quest for order and structure is a powerful force underlying influential jurisprudential theories such as originalism and textualism. This Article suggests that Justice Ginsburg's jurisprudence represented an alternative vision of order in federal judicial practice—one guided by commitment to judi-

cial virtues like concern for the methodical administration of justice, sensitivity to context, and epistemic humility. In short, Justice Ginsburg's jurisprudence highlights the possibility of order without formalism. Justice Ginsburg's attachment to that vision emerges from her opinions on topics including jurisdiction, procedure, and stare decisis. The Article draws out implications of Justice Ginsburg's approach for current controversies, such as the role of precedent and the meaning of judicial restraint.

**Zachary D. Clopton, *Catch and Kill Jurisdiction*, 121 *Michigan Law Review* 171 (2022)**

In catch and kill jurisdiction, a federal court assumes jurisdiction over a case that could be litigated in state court and then declines to hear the merits through a nonmerits dismissal. Catch and kill jurisdiction undermines the enforcement of substantive rights. And, importantly, because catch and kill jurisdiction relies on jurisdictional and procedural law, it is often able to achieve ends that would be politically unpalatable by other means.

Descriptively, this Article defines catch and kill jurisdiction and identifies areas where it can be found today, including in transnational and complex cases. Normatively, this Article argues that catch and kill jurisdiction is problematic when it relies on seeming neutrality, obscurity, and delegation to achieve deregulatory ends that might not be possible through substantive lawmaking. These concerns are exacerbated because federal judges—not legislators—are the lawmakers in catch and kill. Federalism values also are at stake when catch and kill defeats claims arising under state law. Prescriptively, this Article suggests that wholesale strategies to defeat catch and kill are unlikely to succeed, but some retail options are available.

**Katherine Mims Crocker, *Qualified Immunity, Sovereign Immunity, and Systemic Reform*, 71 *Duke Law Journal* 1701 (2022)**

Qualified immunity has become a central target of the movement for police reform and racial justice. And rightly so. In critical respects, though, qualified immunity has become too much a focus of the conversation about constitutional-enforcement reform. This article argues that the legal community should reconsider other aspects of the constitutional-tort system too—especially sovereign immunity, which interacts with qualified immunity in complex doctrinal and functional ways. The article contends that Congress should remove qualified im-

munity and allow entity liability at all levels of government for Fourth Amendment excessive-force claims while paving the way for further-reaching changes. Increasing accountability here should help provide equal justice under law while showing that peeling away unwarranted defenses will not wreak havoc on individual or government finances, the judicial system, or substantive rights.

**Scott Dodson, *The Making of the Supreme Court Rules*, 90 *George Washington Law Review* 866 (2022)**

In contrast to lower-court rulemaking, the literature on the Supreme Court Rules, and the rulemaking process behind them, is practically nonexistent. Part of the reason is that the rulemaking process for the Supreme Court Rules is a black box. This article, relying on interviews with current and former government officials, opens that black box to reveal the history of the rulemaking process for the Supreme Court Rules from the 1980s to the present. That process, as contrasted with the open and participatory rulemaking process for the lower-court rules, is secretive and insular. At times, the Court issues an order amending its rules without warning, without rationale, and without disclosure of who provided input. If individuals or groups are exerting outsized influence on the rules, it is likely that no one would know. The article analyzes the justifications of such an approach and finds none persuasive. The article then turns to modest proposals for reform that will benefit the rulemaking process at marginal cost to the Court.

**Donald L. Doernberg, *Betraying the Constitution*, 74 *Baylor Law Review* 323 (2022)**

The Court often tells us that it does not sit to judge the wisdom of statutes, only their constitutionality. Curiously, the Court does routinely judge the wisdom of enforcing constitutional rights. Distinguish between two situations: (1) The constitutional principle upon which plaintiffs rely does not forbid the conduct in which government officials engaged, and (2) the government officials' conduct did violate the Constitution, but the Court deems it unwise to recognize constitutional supremacy and allow relief to the constitutional victim.

We know the second situation as the realm of qualified immunity, and we should recognize that doctrine for what it is: the Court deciding that giving the Constitution its due in some situations is unwise. Executive immunity is the Court's own common-law doctrine. It did not exist in English common

law, which emphatically rejected executive immunity only ten years before the Revolution.

The Court has at times insisted that English executive immunity did exist, implying that the Founders knew full well that the Bill of Rights would be largely unenforceable. Thus, it implicitly accuses the Founders of duplicity, and it does so without the *imprimatur* of history. The Court's common law overturns supremacy.

**Arthur D. Hellman, *Liberalism Triumphant? Ideology and the En Banc Process in the Ninth Circuit Court of Appeals*, 31 *William & Mary Bill of Rights Journal* 1 (2022)**

For more than four decades, the Ninth Circuit Court of Appeals has been widely regarded as “a reliably liberal appeals court” that predictably issues “rulings favorable to liberal causes.” But knowledgeable commentators have disputed the characterization, calling it a “myth.”

This article is the first to test the characterization empirically. It does so by focusing on the only judicial activity that involves the participation of all of the court's active judges: the vote on whether to rehear en banc a case already decided by a three-judge panel. It draws on a unique database that includes case information not readily available in any public source.

The study examines the results of en banc balloting by the full court over the 23-year period from 1998 through 2020. It concludes that the Ninth Circuit *is* a liberal court, but its liberalism is more nuanced and selective than the conventional depictions suggest. In en banc balloting, the liberal position prevails more often than not—but the conservative side is not shut out. Moreover, looking separately at the different issues that generated en banc calls reveals a wide variation in the *extent* to which the court used the en banc process to produce liberal outcomes.

**Richard L. Heppner Jr., *Appealing Compelled Disclosures in Discovery that Threaten First Amendment Rights*, 70 *Kansas Law Review* 101 (2022)**

*Americans for Prosperity Foundation v. Bonta*, 594 U.S. \_\_\_\_ (2021), held unconstitutional a California anti-fraud policy compelling charities to disclose their major donors' names. *Bonta* expanded the protections of *NAACP v. Alabama*, 357 U.S. 449 (1958), where the Court held that a discovery order compelling the NAACP to disclose its members'

names violated the First Amendment because of their justifiable fear of retaliation.

*Bonta*'s three majority opinions disagree about the standard of scrutiny for First Amendment associational challenges to compelled disclosures. They don't clearly explain how to weigh the type of disclosure, the interest in it, the kind of threat, and the risk of (and protections against) further disclosures. And they don't say how this confused analysis applies to compelled disclosures in civil discovery, the original context of *NAACP v. Alabama*.

This article observes that these questions remain unanswered in part because the most common context for them to arise, civil discovery, is the least likely to give rise to an appeal. It predicts that, after *Bonta*, more litigants will argue that discovery orders violate their associational rights. And it argues courts should clarify the doctrine by using the collateral order doctrine to permit immediate appeals of such orders.

**Helen Hershkoff & Stephen Loffredo, *Standing for Democracy: Is Democracy a Procedural Right in Vacuo? A Democratic Perspective on Procedural Violations as a Basis for Article III Standing*, 70 Buffalo Law Review 52 (2022)**

This Article argues that the Supreme Court's treatment of procedural rights for determining standing—the key that opens the door to federal court—is an overlooked factor in contributing to democratic erosion. According to these cases, the alleged violation of a congressionally conferred procedural right that does not safeguard some separate, non-procedural, concrete interest of the plaintiff—a procedural right “in vacuo” as dubbed by the Court—does not constitute Article III injury so the right holder is barred from federal court. Conceding that standing requires a showing of a concrete injury, the Article argues that a congressionally conferred right to participate in the processes of self-governance is valuable in and of itself, and its infringement should be treated as Article III injury even if it does not cause immediate financial loss or injury to some other non-procedural interest. The Court's devaluation of these procedural rights in its standing doctrine not only has diminished opportunities for democratic practice, but also has destabilized political institutions that support democratic values. Overall, the Article seeks to reorient standing doctrine in ways that support participatory norms and intrinsic process values that serve as guardrails of democracy.

**Jeffrey A. Parness, *FRCP Sanctions for Advocating Bad Discovery Papers?*, 21 Illinois State Bar Association Federal Civil Practice Section Newsletter (Sept. 2022)**

**Jeffrey A. Parness, *Presuit Lawyer Information Duties Relevant to Civil Litigation*, 71 Defense Law Journal 109 (Lexis Nexis Nov. 2022) (reprinted from Marquette Law Review)**

**Michael E. Solimine & James L. Walker, *The Strange Career of the Three-Judge District Court: Federalism and Civil Rights, 1954-1976*, 72 Case Western Reserve Law Review 909 (2022)**

The three-judge district court, and its direct appeal to the Supreme Court, has had a colorful career in the history of the federal court system. Congress created the court in reaction to the canonical decision of *Ex parte Young*, which permitted federal court suits against state officials in constitutional challenges to state laws. First established as a presumed break on judicial activism, plaintiffs in the Civil Rights era saw the court as advancing their agenda. The number of such cases in the district courts, and on appeal to the Supreme Court, swelled in the 1960s and 1970s. The court came to be seen as burdensome and unnecessary, and Congress severely restricted the jurisdiction of the court in 1976, limiting it to reapportionment cases. This article empirically examines this period by studying 885 three-judge district court decisions from 1954 (the start of the Warren Court) to 1976 (when the court was nearly abolished). The study addresses the number and results of cases litigated in those courts, as well the dispositions of direct appeals to the Supreme Court. It also considers how these cases affected jurisprudential developments in several areas of civil rights litigation, including reapportionment and judicial abstention.

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Section members who'd like information about a Federal Courts article, essay, or book they published in 2023 included in the newsletter should email the citation and a summary of *no more than 200 words* to Katherine Mims Crocker ([kmcrocker@wm.edu](mailto:kmcrocker@wm.edu)) and Celestine McConville ([mcconvil@chapman.edu](mailto:mcconvil@chapman.edu)) by January 1, 2024.

## IN THE SUPREME COURT

Here are descriptions of argued cases and cases in which the Court has granted certiorari that appear to present Federal Courts issues. (The Court has not yet decided any such cases during the October 2022

Term.) Material new in this issue of the newsletter appears in [blue type](#). There are [hyperlinks](#) to lower-court decisions and argument transcripts.

#### ARGUED CASES

***Axon Enterprise, Inc. v Federal Trade Commission*, No. 21-86 (Decision below: [986 F.3d 1173](#) (9th Cir. 2021)) ([Argument transcript](#))**

The Federal Trade Commission (FTC) filed an administrative complaint against a corporation related to its acquisition of a competitor. The corporation thereafter filed suit in federal court challenging the constitutionality of the FTC’s enforcement proceedings.

The district court dismissed for lack of jurisdiction, and the Ninth Circuit affirmed. The question presented is “[w]hether Congress impliedly stripped federal district courts of jurisdiction over constitutional challenges to the Federal Trade Commission’s structure, procedures, and existence by granting the courts of appeals jurisdiction to ‘affirm, enforce, modify, or set aside’ the Commission’s cease-and-desist orders” under 15 U.S.C. § 45(c)–(d).

***Financial Oversight & Management Board for Puerto Rico v. Centro de Periodismo Investigativo, Inc.*, No. 22-96 (Decision below: [35 F.4th 1](#) (1st Cir. 2022)) ([Argument transcript](#))**

This case addresses whether Congress abrogated Eleventh Amendment immunity in the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA). Among other things, PROMESA created the Financial Oversight and Management Board for Puerto Rico (Board)—an entity within the Puerto Rican government—and granted jurisdiction in federal court for “any action against the Oversight Board, and any action otherwise arising out of” PROMESA. 48 U.S.C. § 2126(a).

Invoking PROMESA’s jurisdictional grant, Plaintiff media organization sued the Board, arguing that the Board failed to provide requested documents in violation of the Puerto Rico constitution. The district court rejected the Board’s claim of sovereign immunity for the territorial claim, as did the First Circuit, which ruled, 2–1, that PROMESA’s grant of general jurisdiction abrogated the Board’s sovereign immunity for both federal and territorial claims, even though the statute failed to expressly mention sovereign immunity or abrogation. The First Circuit relied not only on statutory language authorizing “any action ...

arising out of [PROMESA],” but also on a provision the court described as “clearly contemplat[ing] . . . declaratory and injunctive relief . . . against the Board, as well as orders related to alleged constitutional violations.” It also leaned on three exceptions to the jurisdictional grant, reasoning that their existence “imply[ed]” that PROMESA “establish[ed] general jurisdiction over all other matters not specifically excepted.” The court agreed that PROMESA “may not be as precise” as other abrogation provisions but noted that “[t]he Supreme Court has ‘never required that Congress use magic words’ to make its intent to abrogate clear.”

The question presented is whether PROMESA’s “general grant of jurisdiction to the federal courts over claims against the Board and claims otherwise arising under PROMESA abrogate[s] the Board’s sovereign immunity with respect to all federal and territorial claims.”

***Haaland v. Brackeen*, No. 21-376 (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 establish impermissible preferences in violation of the Fifth Amendment’s equal-protection principles.

Among other questions, the cert petition in this case—which is consolidated with several others—asks the Supreme Court to decide “[w]hether the individual plaintiffs have Article III standing to challenge ICWA’s placement preferences for ‘other Indian families’” in 25 U.S.C. § 1915(a)(3) “and for ‘Indian foster home[s]’” in § 1915(b)(iii). The federal-government petitioners argue that any relevant injury is (a) overly speculative and therefore not fairly traceable to the challenged provisions and (b) unlikely to be redressed by the requested relief because the state courts that would enforce the provisions would not be bound by the federal declaratory judgment.

***Securities & Exchange Commission v. Cochran*, No. 21-1239 (Decision below: [20 F.4th 194](#) (5th Cir. 2021)) ([Argument transcript](#))**

The subject of a Securities and Exchange Commission (SEC) enforcement action filed suit in federal court raising a separation-of-powers challenge to the proceedings. The district court dismissed for lack of jurisdiction, ruling that 15 U.S.C. § 78y, which gives federal courts of appeals jurisdiction to review SEC final orders, implicitly removed district-court jurisdiction over the challenge. A Fifth Circuit panel affirmed. On rehearing en banc, a deeply divided Fifth Circuit reversed, creating a lopsided circuit split.

The question presented is “[w]hether a federal district court has jurisdiction to hear a suit in which the respondent in an ongoing [SEC] administrative proceeding seeks to enjoin that proceeding, based on an alleged constitutional defect in the statutory provisions that govern the removal of the administrative law judge who will conduct the proceeding.”

***Cruz v. Arizona*, No. 21-846 (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), 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*, which he claimed was retroactive on collateral review. 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 ruled against the inmate because *Lynch* “did not declare any change in the law representing a clear break from the past.” Having denied relief under Rule 32.1(g), the court declined to address the retroactivity question.

The question framed by the Court is “[w]hether the Arizona Supreme Court’s holding that Arizona Rule of Criminal Procedure 32.1(g) precluded postconviction relief is an adequate and independent state-law ground for the judgment.”

***Health & Hospital Corp. v. Talevski*, No. 21-806 (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.

The defendants ask the Court to reconsider whether Spending Clause legislation can ever form a foundation for § 1983 actions and, if necessary, whether the particular FNHRA provisions can be enforced in that manner.

***Jones v. Hendrix*, No. 21-857 (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 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 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 “safety valve” 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 safety valve 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.

This case presents the question whether a federal inmate may seek habeas relief under § 2241 based on a Supreme Court decision holding that conduct does not violate a criminal statute where circuit precedent previously foreclosed such an argument.

***United States v. Texas*, No. 22-58 (Decision below: [40 F.4th 205](#) (5th Cir. 2022)) ([Argument transcript](#))**

At the request of Texas and Louisiana, a federal district court issued a nationwide vacatur of 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 Supreme Court denied the United States’ stay application, treated it as a petition for certiorari before judgment, and granted it, limited to three Court-formulated questions.

Relevant here are the questions “[w]hether the state plaintiffs have Article III standing to challenge the [guidance]” and “[w]hether 8 U.S.C. § 1252(f)(1) prevents the entry of an order to ‘hold unlawful and set aside’ the [guidance] under 5 U.S.C. § 706(2).” Section 1252(f)(1) states that “no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [8 U.S.C. §§ 1221–1232],” which is a part of the Immigration and Nationality Act.

#### GRANTED CERTIORARI

***Biden v. Nebraska*, No. 22-506 (Decision below: [52 F.4th 1044](#) (8th Cir. 2022));**

***Department of Education v. Brown*, No. 22-535 (Decision below: [2022 WL 16858525](#) (N.D. Tex. 2022))**

In August 2022, the Biden Administration announced a program that would cancel up to \$20,000 in student-loan debt for qualifying borrowers. Numerous parties filed suit seeking to block the program, including six states in one action and two individual borrowers in another.

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 universal

injunction pending appeal. The Solicitor General of the United States asked the Supreme Court to vacate the injunction or, in the alternative, to grant cert before judgment.

In *Department of Education v. Brown*, the district court granted summary judgment in favor of the individual borrowers and vacated the program on a nationwide basis. The Fifth Circuit denied the Administration’s request for a stay pending appeal. The Solicitor General then sought a stay from the Supreme Court, with an alternative suggestion that the Court could grant cert before judgment.

The Court granted cert before judgment in both cases. The Solicitor General’s consolidated opening brief presents the questions (1) whether each set of plaintiffs have Article III standing and (2) whether the program exceeds the Administration’s statutory authority, is arbitrary and capricious, or was adopted in a procedurally improper manner.

#### ADDITIONAL INFORMATION

##### CONTRIBUTORS

Katherine Mims Crocker (William & Mary) and Celestine McConville (Chapman) prepared this newsletter. If you have an idea for the newsletter, please let one of them know. And if you’d like to assist with producing the newsletter, please contact one of the following Section officers:

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