A A L S

FEDERAL COURTS SECTION NEWSLETTER

September 2024

ANNOUNCEMENTS

2024 Annual Meeting Program

In 2018, Chief Justice Roberts famously posited that there are no "Obama judges or Trump judges." This expression of judicial independence from politics represented a conventional picture of impersonal judging under the law. Yet legal culture has become unusually polarized in recent years, as reflected in predictable voting lineups at the Supreme Court, allegedly partisan behavior by some federal circuit courts of appeals, and aggressive forum and judge shopping by litigants. Judicial retirements, too, are becoming increasingly politicized in light of the vast legal and practical consequences attending a justice's death in office. And even the tone and tenor of judicial opinions seems to be in flux, as judges sometimes seem to jockey for attention and ideological credibility by issuing genre-busting opinions with sensational rhetoric.

These developments have prompted a series of policy proposals, ranging from structural changes in the appointment or replacement of Supreme Court justices to greater unpredictability in district court panel assignments. Behind the scenes, some judges have tried to restore old norms of collegiality or else create new practices capable of meeting new challenges. Court decisions, too, offer fodder for reform, as judges seek ways of preserving their authority and independence in a time of partisan strife over the judiciary.

With panelists including Judge William Fletcher, Marin Levy, and Richard Re, this panel aims to place recent events in historical context and to explore paths forward. Is the present moment really so anomalous? Are effective steps being taken to preserve the ideal that federal judges transcend the president or political party that appointed them? Or will legal culture eventually have to accept that there really are Obama, Trump, and Biden judges, after all?

Call for Nominations

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 2025 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, 2024 (date of actual publication determines eligibility). Eligible authors are those who, at the close of nominations (i.e., as of October 1, 2024), 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 Marin Levy at Duke University School of Law (levy@law.duke.edu).

Without exception, all nominations must be received by 11:59 p.m. (EDT) on *October 1, 2024*. Nominations will be reviewed by a prize committee comprised of Professors Payvand Ahdout (University of Virginia School of Law), Kellen Funk (Columbia Law School), Tom Lee (Fordham School of Law), Marin K. Levy (Duke University School of Law), and Richard Re (University of Virginia School of Law), with the result announced at the Federal Courts Section program at the 2025 AALS Annual Meeting.

NEW SCHOLARSHIP

We appreciate the excellent response to this feature 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 2024 included in the first 2025 issue of the newsletter, email the citation and a summary of no more than 200 words to Katherine Mims Crocker (kmcrocker@law.tamu.edu) and Celestine Richards McConville (mcconvil@chapman.edu) by January 15, 2025.

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

***Acheson Hotels, LLC v. Laufer*, 601 U.S. 1 (2023) (Decision below: 50 F.4th 259 (1st Cir. 2022)) (Argument transcript)**

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 was "a self-proclaimed ADA 'tester'" who "advocate[d] for disabled persons" and "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 had split. Before argument, however, Acheson dismissed the underlying complaint and filed a suggestion of mootness. She averred that she did not intend to file any additional ADA tester suits, as one of her attorneys had been sanctioned for unethical conduct related to some of her cases.

The Supreme Court, in an opinion by Justice Barrett, held the case moot, leaving the standing issue undecided. Justices Thomas and Jackson each filed a concurrence in the judgment. Thomas argued that the Court should have held that Acheson lacked standing. Jackson wrote separately to express concerns about the Court's vacatur practices for moot cases under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

***Department of Agriculture Rural Development Rural Housing Service v. Kirtz*, 601 U.S. 42 (2024) (Decision below: 46 F.4th 159 (3d Cir. 2022)) (Argument transcript)**

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. The Supreme Court unanimously affirmed. The Court explained that it has found clear waivers when (1) "'a statute says in so many words that it is stripping immunity from a sovereign entity,'" and (2) "'a statute creates a cause of action' and explicitly 'authorizes suit against a government on that claim.'" The FCRA fell into the latter category. The Court rejected the government's

argument that when Congress creates a cause of action and authorizes suit, it must also include a separate waiver provision to clearly waive sovereign immunity.

***Federal Bureau of Investigation v. Fikre*, 601 U.S. 234 (2024) (Decision below: 35 F.4th 762 (9th Cir. 2022)) (Argument transcript)**

After the Federal Bureau of Investigation (FBI) placed him on the "No Fly List," the plaintiff sued, arguing that placement on the list without notice or explanation violated due process. The plaintiff also alleged that the government placed him on the list because of his affiliation with a specific mosque and maintained him on the list when he refused to act as an informant. The district court dismissed the claims as moot after the FBI removed the plaintiff from the list and submitted a sworn declaration stating that the plaintiff "no longer satisfied the criteria for placement on the No Fly List" and would "not be placed on the No Fly List in the future based on the currently available information." The Ninth Circuit reversed. In conflict with the Fourth and Sixth Circuits, it held that the government's declaration did not "satisfy the heavy burden" of showing that the government would not return the plaintiff to the list "for the same reason it placed him there originally."

The Supreme Court affirmed, holding that the FBI failed to meet the "'formidable burden'" of proving that it would not resume the challenged conduct. While the FBI's sworn declaration could mean that the plaintiff's past actions were insufficient to justify relisting, the declaration did not preclude the government's relisting if the plaintiff "d[id] the same or similar things in the future." Moreover, the government's speculation that the plaintiff might have resumed religious affiliation or conduct in the lengthy time since delisting was insufficient to demonstrate mootness. To meet its burden, Court said, the government must prove "that it cannot reasonably be expected to resume *its* challenged conduct." The government's "speculation about . . . plaintiff's actions [cannot] make up for a lack of assurance about its own."

Justice Alito, joined by Justice Kavanaugh, concurred, writing separately to emphasize that the Court's decision does not require disclosure of classified information to demonstrate mootness.

***Food & Drug Administration v. Alliance for Hippocratic Medicine*, 602 U.S. 367 (2024) (Decision below: 78 F.4th 210 (5th Cir. 2023)) (Argument transcript);**

***Danco Laboratories, LLC v. Alliance for Hippocratic Medicine*, 602 U.S. 367 (2024) (Decision below: 78 F.4th 210 (5th Cir. 2023)) (Argument transcript)**

Several organizations with members who are doctors with conscience objections to abortion, as well as individual doctors with such objections, sued the Food and Drug Administration (FDA), challenging FDA's actions related to approving mifepristone, a drug used to terminate early pregnancies. The plaintiffs challenged four FDA actions, two of which were relevant here: its relaxed conditions of use in 2016 and its 2021 decision not to enforce a requirement for in-person prescribing and dispensing. Danco Laboratories (Danco), the maker of Mifeprex, the brand name for mifepristone, intervened.

The district court found standing and granted preliminary relief. The Fifth Circuit upheld the district court's order, finding that the plaintiffs had "proven up each link in the chain of causation—that a percentage of women who take mifepristone will suffer serious medical complications; that hundreds of the [plaintiff organizations'] members are physicians who treat patients in those circumstances; that many of the [plaintiff doctors] have in fact treated such patients; and that providing such treatment causes the [d]octors to violate their rights of conscience, sustain mental and emotional distress, divert time and resources away from their ordinary practice, and incur additional liability and insurance costs." On the merits, the Fifth Circuit found FDA's 2016 and 2021 actions arbitrary and capricious and upheld the district court's award of preliminary relief.

The Supreme Court unanimously reversed on standing grounds. The Court emphasized that "unregulated parties"—parties who "challenge[] the government's 'unlawful regulation (or lack of regulation) of *someone else*'"—often struggle to show standing, and such was the case here. Mere opposition to the government's conduct, whether based on "legal, moral, ideological, [or] policy concerns," however strong, is insufficient to support standing. The Court also held that the plaintiffs failed to establish "conscience injuries." Federal law (and the law of many states) protects doctors who have con-

science objections, and the plaintiffs failed to "identif[y] any instances where a doctor was required, notwithstanding conscience objections, to perform an abortion or to provide other abortion-related treatment that violated the doctor's conscience."

The Court also rejected "doctor standing"—injury in the form of increased workload caused by the government's "loosening of general public safety requirements"—reasoning that "there would be no principled way to cabin such a sweeping doctrinal change to doctors or other healthcare providers." In a footnote, the Court rejected the plaintiffs' attempt to "vindicate their patients' injuries" because third-party standing requires that plaintiffs *themselves* suffer injury before raising the rights of others.

Finally, the Court held that the plaintiff medical organizations' voluntary expenditure of funds in response to the FDA's regulations was not cognizable, for "an organization . . . cannot spend its way into standing simply by expending money to gather information and advocate against the defendant's action."

Justice Thomas concurred, writing separately to explain his constitutional concerns with both third-party and associational standing.

***Murthy v. Missouri*, 2024 WL 3165801 (Decision below: 80 F.4th 641 (5th Cir. 2023)) (Argument transcript)**

The plaintiffs—three doctors, a healthcare activist, the owner of the Gateway Pundit website, and the states of Missouri and Louisiana—asserted First Amendment claims based on the Biden Administration allegedly "jawboning" social-media platforms into "censoring" posts about controversial topics like the COVID-19 pandemic, election fraud, and Hunter Biden's laptop. The district court granted a preliminary injunction restricting interactions between social-media companies and multiple federal-government defendants. The Fifth Circuit affirmed in part but limited the injunction to the defendants associated with the White House, the Surgeon General's Office, the Centers for Disease Control and prevention, the FBI, and (on a motion for rehearing) the Cybersecurity and Infrastructure Security Agency.

Having previously stayed the preliminary injunction, the Supreme Court reversed the Fifth Circuit in a 6–3 decision holding that the plaintiffs lacked standing. Justice Barrett's majority opinion explained that the plaintiffs faced an uphill battle because while their alleged injuries "depend[ed] on the *platforms'* actions," they "s[ought] to enjoin *Government agencies and officials* from pressuring or encouraging the platforms to suppress protected speech in the future." The Court concluded, first, that most of the plaintiffs had not offered sufficient evidence that the specific instances of content moderation of which they complained were traceable to the government defendants. The Court ruled, second, that all the plaintiffs—including the healthcare activist, whom the majority was willing to assume "eked out a showing of traceability for her past injuries"—failed to establish redressability. For "without proof of an ongoing pressure campaign, it is entirely speculative that the platforms' future moderation decisions will be attributable, even in part, to the defendants," such that enjoining federal parties would not provide the plaintiffs forward-looking relief.

Finally, the Court rejected the plaintiffs' "'right to listen' theory" as "startingly broad" and reliant on an alleged injury that was neither concrete nor particularized. And for the state plaintiffs, the Court rejected this theory for the additional reason that it represented "a thinly veiled attempt to circumvent the limits on *parens patriae* standing" in state cases against federal defendants.

Justice Alito filed a dissent in which Justices Thomas and Gorsuch joined. The dissent began by arguing that "[i]f the lower courts' assessment of the voluminous record is correct, this is one of the most important free speech cases to reach this Court in years." Criticizing the majority for allegedly applying inappropriately high standards, Alito contended that the healthcare activist had standing and that she was "likely to prevail on her claim that the White House coerced Facebook into censoring her speech."

***Securities & Exchange Commission v. Jarkesy*, 2024 WL 3187811 (Decision below: 34 F.4th 446 (5th Cir. 2022)) (Argument transcript)**

The Securities and Exchange Commission (SEC) initiated in-house (agency) enforcement proceedings against the defendants for alleged securities fraud. After proceedings before an Administrative Law Judge, the SEC issued a final order imposing civil penalties. The defendants appealed to the Fifth Circuit, arguing that the SEC proceedings violated their Seventh Amendment right to a jury trial

in federal court. The Fifth Circuit agreed and vacated the SEC's final order.

The Supreme Court affirmed, 6–3, using the two-part test from *Granfinanciera, S.A. v. Nordbert*, 492 U.S. 33 (1989). The Court first ruled that SEC securities-fraud actions are "[s]uits at common law" under the Seventh Amendment because the civil penalties authorized by federal law are "designed to punish or deter the wrongdoer" rather than to "'restore the status quo'" and because the statutory cause of action bears a "close relationship . . . [to] common law fraud." The Court then held that Congress could not circumvent the Seventh Amendment by authorizing agency adjudication because the public-rights exception to Article III did not apply. Echoing its Seventh Amendment reasoning, the Court concluded that federal securities-fraud actions are "matter[s] of private rather public right[s]" because they involve "civil penalties, a punitive remedy that we have recognized 'could only be enforced in courts of law.'"

Justice Gorsuch, joined by Justice Thomas, concurred, writing separately to explain that Article III and the Due Process Clause "reinforce the correctness of the Court's course." Justice Sotomayor, joined by Justices Kagan and Jackson, dissented, arguing that SEC enforcement actions that seek civil penalties fall comfortably within the public-rights exception: "This Court has held, without exception, that Congress has broad latitude to create statutory obligations that entitle the Government to civil penalties, and then to assign their enforcement outside the regular courts of law where there are no juries."

GRANTED CERTIORARI

***Glossip v. Oklahoma*, No. 22-7466 (Decision below: 529 P.3d 218 (Okla. 2023))**

Petitioner's fifth application for state postconviction relief from his capital conviction and sentence raised claims alleging failure to disclose exculpatory material in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and failure to correct false testimony of a key witness in violation of *Napue v. Illinois*, 360 U.S. 264 (1959). In its response to the application, Oklahoma conceded the *Napue* error and asked the court to vacate the conviction and sentence and remand for a new trial. Petitioner and the State also filed a joint motion to stay the execution. The Oklahoma Supreme Court denied both the application for postconviction relief and the stay motion. With respect to the former, the court rejected the *Napue* claim on the merits and as procedurally defaulted under the Oklahoma Post-Conviction Procedure Act (OPCPA). It rejected some of the *Brady* claims on the merits and others both on the merits and as procedurally defaulted under the OPCPA.

The questions presented ask (1) whether the government violated *Brady* by failing to disclose a key witness's prior mental-health treatment; (2) whether a court must consider all suppressed evidence when evaluating "materiality" under *Brady*; and (3) whether the Due Process Clause "requires reversal, where a capital conviction is so infected with errors that the State no longer seeks to defend it." The Court also directed the parties to address whether the state supreme court's "holding that the [OPCPA] precluded post-conviction relief is an adequate and independent state-law ground for the judgment."

ADDITIONAL INFORMATION

CONTRIBUTORS

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