A A L S

FEDERAL COURTS SECTION NEWSLETTER

March 31, 2022

2022 Annual Meeting Program

At the January 2022 Annual Meeting, we turned our scholarly gazes toward the states. The federal courts, as always, get all of the attention. By some measures, our federal courts are highly professional, well funded, celebrated, and increasingly polarized. But as all of us know but often ignore—most litigation takes place outside of the federal system. More than ninety percent of claims in the United States are in state courts and overwhelmingly comprise landlord-tenant, debt collection, and small contract claims. The rules of procedure in our state courts are increasingly distinct from their federal analogs in areas like standing, multidistrict litigation, pleading, and discovery. Sometimes these differences generate friction. For example, federal judges presiding over multidistrict litigation are increasingly issuing injunctions to stop state discovery in parallel cases. At other times, the state-federal overlap generates cooperation. Witness, for instance, the growing number of cases where state and federal judges jointly manage complex litigation. Even more, the states play a role in the federal judicial system as litigators, competitors, and sites of political contestation. Pedagogically, some faculty have incorporated the states by renaming Federal Courts classes, "Federal and State Courts in the Federal System."

Elizabeth Chamblee Burch (Georgia), Judith Resnik (Yale), Colleen F. Shanahan (Columbia), and Jessica Steinberg (George Washington), with Diego Zambrano (Stanford, Section Chair) moderating, discussed the new "turn toward the states" and its relationship to current trends in the federal system. The discussion considered the role of multidistrict litigation in both state and federal courts, jurisdictional overlap between the two systems (and its effect on the common law), how the states increasingly dissent from federal judicial trends, differences in docket composition between the two court systems, procedural divergence, and the incorporation of the states in Federal Courts classes.

Our Section also joined the Remedies Section to co-sponsor a panel addressing nominal damages. Sadie Blanchard (Notre Dame), Maureen Carroll (Michigan), and Michael L. Wells (Georgia), with James E. Pfander (Northwestern) moderating, discussed the nature of nominal damages and its intersection with Article III standing rules.

In the Supreme Court

Here are brief summaries of cases the Court has decided in the October 2021 Term so far, followed by descriptions of argued cases and cases awaiting review that appear to present Federal Courts issues. Material new in this issue of the newsletter appears in blue type. There are hyperlinks to Supreme Court opinions, lower-court decisions, and argument transcripts.

Decided in the October 2021 Term

***City of Tahlequah v. Bond*, 142 S. Ct. 9 (2021) (Decision below: 981 F.3d 808 (10th Cir. 2020))**

A woman's ex-husband allegedly came to her home in an intoxicated state and refused to leave. Police officers arrived, and the man moved from a doorway into the garage, where he grabbed a hammer and held it above his head, to which two of the officers responded by shooting and killing him. The man's estate sued for excessive force, and the district court granted the defendants summary judgment, holding the officers' conduct reasonable and subject to qualified immunity in any event. The Tenth Circuit reversed, holding that a jury could find that the officers' maneuvers created the circumstances necessitating deadly force, which under circuit precedent could amount to a constitutional violation. The Tenth Circuit also rejected qualified immunity, relying on circuit precedent.

The Supreme Court summarily reversed in a per curiam decision. The Court declined to "decide whether the officers violated the Fourth Amendment in the first place, or whether recklessly creating a situation that requires deadly force can itself violate the Fourth Amendment" but held that "[o]n this record, the officers plainly did not violate any clearly established law." The Court stated that precedential specificity is especially important in the Fourth Amendment context, reasoning that the facts of previous cases were too far removed from the matter at bar to support liability.

***Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4 (2021) (Decision below: 979 F.3d 645 (9th Cir. 2020))**

Several police officers responded to a call alleging that a mother and her two daughters had barricaded themselves in a room because the mother's boyfriend "was trying to hurt them and had a chainsaw." Aware that the man had a knife in his front left pants pocket, one officer put his knee on the left side of the man's back for up to several seconds while arresting him. The man filed suit for excessive force, and the district court granted the officer summary judgment. The Ninth Circuit reversed, holding that the officer was not entitled to qualified immunity on the basis of circuit precedent.

The Supreme Court summarily reversed in a per curiam decision. As in *Bond*, the Court stated that precedential specificity is especially important for Fourth Amendment claims. The Court then held that the prior decision on which the Ninth Circuit relied was "materially distinguishable" and therefore did not establish the law with sufficient clarity to overcome the officer's assertion of qualified immunity.

***United States v. Texas*, 142 S. Ct. 522 (2021) (Decision below: 2021 WL 4786458 (5th Cir. 2021)) (Argument transcript)**

***Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021) (Decision below: 13 F.4th 434 (5th Cir. 2021)) (Argument transcript)**

A Texas law (S.B. 8) prohibits abortion after detection of a fetal heartbeat. For the purpose of avoiding pre-enforcement review in federal court, S.B. 8 generally removes direct enforcement authority from state executive officials and delegates it to private parties. In separate suits challenging the legality of S.B. 8, the United States sued Texas, and abortion providers sued a variety of parties.

In *Whole Woman's Health*, the district court denied the defendants' motions to dismiss. The defendants pursued interlocutory appeals, and the plaintiffs asked the Fifth Circuit to enjoin the law's enforcement pending disposition of the appeals. The Fifth Circuit declined to issue an injunction and instead stayed the district-court proceedings. The plaintiffs then sought injunctive relief from the Supreme Court, which declined to intervene. Finally, the plaintiffs sought certiorari before judgment on the appeal of the denial of the defendants' motions to dismiss, which the Court granted.

The Court—in an opinion by Justice Gorsuch joined by Justices Thomas, Alito, Kavanaugh, and Barrett—ruled that the plaintiffs could not sue either a state-court judge or a state-court clerk, reasoning among other things that the principles associated with *Ex Parte Young*, 209 U.S. 123 (1908), did not provide an exception to sovereign immunity in this context and that these defendants were not adverse to the petitioners for purposes of Article III's case-or-controversy requirement. The same majority also refused to allow the plaintiffs to sue the Texas attorney general, reasoning that he had no authority to enforce S.B. 8 that a court could enjoin. And the Court unanimously held that the plaintiffs lacked standing to sue the private defendant, an anti-

abortion activist, because he swore that he did not intend to try to enforce S.B. 8 against them.

Eight Justices—all except Thomas—permitted the case to proceed against state medical-licensing officials, reasoning that the plaintiffs had "identified provisions of state law that appear to impose a duty on [these] defendants to bring disciplinary actions against [the plaintiffs] if they violate S.B. 8." The Court remanded for further proceedings.

Justice Thomas concurred in part and dissented in part, arguing that the plaintiffs "may not maintain suit against any of the governmental respondents" under *Young* and that they lacked standing. Thomas disagreed with the majority that S.B. 8 permits enforcement by medical-licensing officials. Chief Justice Roberts concurred in the judgment in part and dissented in part, joined by Justices Breyer, Sotomayor, and Kagan. Roberts argued that in addition to the medical-licensing officials, the attorney general and the state-court clerk possessed enforcement authority and were therefore proper defendants. Justice Sotomayor also concurred in the judgment in part and dissented in part, joined by Justices Breyer and Kagan. Sotomayor argued that "[b]y foreclosing suit against state-court officials and the state attorney general, the Court effectively invites other States to refine S.B. 8's model for nullifying federal rights" and "thus betrays not only the citizens of Texas, but also our constitutional system of government."

On remand, the Fifth Circuit certified to the Supreme Court of Texas the question whether state medical-licensing officials have authority to enforce S.B. 8. The Supreme Court of Texas said they do not.

In *United States v. Texas*, several individuals who intended to file S.B. 8 enforcement actions intervened as defendants. After finding that the United States had standing to sue, the district court granted a preliminary injunction against the law's enforcement, which the Fifth Circuit stayed on appeal. The Supreme Court treated the United States' stay application "as a petition for a writ of certiorari before judgment . . . limited to the following question: May the United States bring suit in federal court and obtain injunctive or declaratory relief against the State, state court judges, state court clerks, other state officials, or all private parties to prohibit S.B. 8 from being enforced."

The same day that it decided *Whole Woman's Health*, the Court dismissed the petition in *United States v. Texas* as improvidently granted and denied the application to vacate the Fifth Circuit's stay. As a result of the DIG, it remains an open question whether the United States has authority to sue a state to stop enforcement of a law alleged to intrude on a federal right where the state law seeks to foreclose federal pre-enforcement review. The issue might resurface now that the Supreme Court of Texas has ruled that medical-licensing officials lack authority to enforce S.B. 8.

***Cameron v. EMW Women's Surgical Center, P.S.C.*, 142 S. Ct. 1002 (2002) (Decision below: 831 F. App'x 748 (6th Cir. 2020)) (Argument transcript)**

This case arises from a challenge to a restrictive Kentucky abortion law. Respondents sued the state attorney general, the state secretary for Health and Family Services, and two other state officials. Respondents dismissed the attorney general without prejudice. In a joint stipulation of dismissal, the attorney general agreed that his office would be bound by the judgment but reserved the right to raise claims on appeal. The secretary defended the law until the Sixth Circuit invalidated it. He then declined to seek rehearing en banc or certiorari. The newly elected state attorney general moved to intervene to continue the defense, and the Sixth Circuit denied the motion.

The Supreme Court reversed, 8–1. Justice Alito, joined by Chief Justice Roberts and Justices Thomas, Gorsuch, Kavanaugh, and Barrett, rejected, as either a jurisdictional or claims-processing rule, Respondents' claim that the attorney general must file a timely notice of appeal to invoke the appellate court's jurisdiction, explaining that "no provision of law" supports the claim and pointing to the attorney general's specific reservation of rights on appeal.

On the merits, the majority ruled that the Sixth Circuit abused its discretion in denying intervention because it "failed to account for the strength of the Kentucky attorney general's interest in taking up the defense of [the law] when the secretary for Health and Family Services elected to acquiesce" and erred in finding the motion untimely and prejudicial.

Justice Thomas concurred, asserting that Respondents' jurisdictional argument also failed because only *parties* may file a notice of appeal. Justice Kagan, joined by Justice Breyer, concurred in the judgment, emphasizing the seriousness of Respondents' jurisdictional claim and rejecting Justice

Alito's alternate characterization of the claim as a claim-processing rule. Justice Sotomayor dissented, arguing that the Sixth Circuit exercised appropriate discretion in denying intervention given the attorney general's prior position that he lacked authority to enforce the abortion law.

Argued Cases

***Arizona v. City & County of San Francisco*, No. 20-1775 (Decision below: 992 F.3d 742 (9th Cir. 2021)) (Argument transcript)**

This case raises the question whether interested states can intervene under Federal Rule of Civil Procedure 24 as defendants in a suit challenging a federal immigration regulation promulgated by the prior administration after the present administration decides not to defend the regulation.

***Brown v. Davenport*, No. 20-826 (Decision below: 964 F.3d 448 (6th Cir. 2020)) (Argument transcript)**

Brecht v. Abrahamson, 507 U.S. 619 (1993), ruled that a federal court may not grant habeas relief unless the "error had substantial and injurious effect or influence in determining the jury's verdict," a standard different than the one applied on direct review under *Chapman v. California*, 386 U.S. 18 (1967). In 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) imposed numerous limits on federal habeas relief, one of which (28 U.S.C. § 2554(d)(1)) requires federal-court deference to reasonable state-court applications of "clearly established Federal law." *Davis v. Ayala*, 576 U.S. 257 (2015), held that "the *Brecht* test subsumes the limitations imposed by AEDPA."

The question presented is whether "a federal habeas court [may] grant relief based *solely* on its conclusion that the *Brecht* test is satisfied, as the Sixth Circuit held, or must the court also find that the state court's *Chapman* application was unreasonable under § 2254(d)(1), as the Second, Third, Seventh, Ninth, and Tenth Circuits have held."

***Egbert v. Boule*, No. 21-147 (Decision below: 998 F.3d 370 (9th Cir. 2021)) (Argument transcript)**

This case asks whether a damages cause of action exists under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), for First Amendment retaliation and Fourth Amendment claims against a Customs and Border Patrol agent for conduct connected to a dispute over immigration-related investigative activities occurring near the U.S.–Canadian border.

***Shinn v. Ramirez*, No. 20-1009 (Decisions below: 937 F.3d 1230 (9th Cir. 2019) and 943 F.3d 1211 (9th Cir. 2019)) (Argument transcript)**

In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Court held that ineffective assistance of state post-conviction counsel constituted cause to excuse the procedural default of a "substantial" ineffective-assistance-of-trial-counsel claim, if such a claim must have been raised in an "initial review" state postconviction proceeding. The question in *Shinn v. Ramirez* is whether evidence developed on federal habeas in connection with a successful showing of cause to excuse the procedural default of an ineffective-assistance-of-trial-counsel claim can be used to evaluate the underlying merits of that claim, even though 28 U.S.C. § 2254(e)(2) prohibits consideration of evidence a petitioner failed to develop in state court. Specifically, petitioner asks whether "the equitable rule . . . announced in *Martinez v. Ryan* render[s] 28 U.S.C. § 2254(e)(2) inapplicable to a federal court's merits review of a claim for habeas relief." The Court left this question open in *Ayestas v. Davis*, 138 S. Ct. 1080 (2018).

***Torres v. Tex. Dep't of Pub. Safety*, No. 20-603 (Decision below: 583 S.W.3d 221 (Tex. App. 2018)) (Argument transcript)**

Congress's use of its Article I power to abrogate state sovereign immunity is under the spotlight once again. The Court granted certiorari to consider whether Congress may authorize damages suits against state employers in state court using its Article I power to regulate the military.

Submissions

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:

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