A A L S

FEDERAL COURTS SECTION NEWSLETTER

July 29, 2022

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.

This panel, titled "Dispelling the Myth—the Business of the Federal Judicial System, Today," will trace that lineage and the development of the "canon" of federal courts. It will do so critically, with an eye toward what has been left out as much as what has been included. For example, federal law related to Indian tribes has never been treated as canon, even though some key cases like *Ward v. Love County* and *Seminole Tribe* are central to many who teach the class. And then there's also how the federal courts really operate—beyond the Supreme Court. Magistrate and bankruptcy judges play key roles, and at the district court level, many federal courts are preoccupied with multi-district litigation involving almost exclusively diversity cases. Much of the work of the federal appellate courts today barely resembles their work in the days of Frankfurter and Landis—or even the 1953 Hart and Wechsler era courts. Today, these courts' output is nonprecedential, "copy-paste" precedent. All the while, of course, the Supreme Court has issued any number of decisions that have undermined—or at least have threatened to undermine—some of the core animating assumptions of the field. For example, enforcement mechanisms for constitutional rights from *Ex parte Young* to the *Bivens* remedy have been reshaped.

This panel will consider the state of the field and the course nearly a century since Frankfurter and Landis wrote their influential work, as we explore how to teach and study the business of the federal courts as they are, today. We look forward to hearing from Maggie Gardner (Cornell), Elizabeth Hidalgo Reese (Stanford), James Pfander (Northwestern), and Fred Smith (Emory) as panelists.

Call for Nominations

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 2023 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, 2022 (date of actual publication determines eligibility). Eligible authors are those who, at the close of nominations (i.e., as of September 15, 2022), 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 Prof. Diego Zambrano at Stanford Law School (dzambran@law.stanford.edu).

Without exception, all nominations must be received by 11:59 p.m. (EDT) on *September 15, 2022*. Nominations will be reviewed by a prize committee comprised of Profs. Merritt McAlister (University of Florida Levin College of Law), Richard Re (University of Virginia), Mila Sohoni (University of San Diego School of Law), Steve Vladeck (University of Texas), and Diego Zambrano (Stanford) with the result announced at the Federal Courts section program at the 2023 AALS Annual Meeting.

New Newsletter Feature

We're pleased to announce that on a trial basis beginning with the next issue of the newsletter, we plan to highlight Federal Courts scholarship by Section members. All entries will be based on self-submissions. If you'd like a Federal Courts article, essay, or book you published in 2022 included, please email the citation information and a summary *of no more than 200 words* to Katherine Mims Crocker (kmcrocker@wm.edu) and Celestine McConville (mcconvil@chapman.edu) by January 1, 2023.

IN THE SUPREME COURT

Here are brief summaries of relevant cases the Court decided in the October 2021 Term, followed by descriptions of cases that appear to present Federal Courts issues in which the Court has granted certiorari. 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

***Arizona v. City & County of San Francisco*, 142 S. Ct. 1926 (2022) (Decision below: 992 F.3d 742 (9th Cir. 2021)) (Argument transcript)**

The Court granted certiorari to consider 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 it.

In a per curiam opinion, the Court dismissed the writ of certiorari as improvidently granted. Chief Justice Roberts, joined by Justices Thomas, Alito, and Gorsuch, concurred, explaining that the present administration's repeal of the challenged regulation in response to a final judgment in a different case raised numerous issues that "could stand in the way of our reaching the question presented on which we granted certiorari, or at the very least, complicate our resolution of that question."

***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.

***Egbert v. Boule*, 142 S. Ct. 1793 (2022) (Decision below: 998 F.3d 370 (9th Cir. 2021)) (Argument transcript)**

Robert Boule owned property that straddled the U.S.–Canadian border and included the so-called Smuggler's Inn. Without a warrant, a U.S. Border Patrol agent named Erik Egbert entered Boule's property to investigate a Turkish guest, and a dispute

ensued. Boule alleged that Egbert shoved him and that Egbert subsequently initiated regulatory processes against him. Boule sued Egbert for excessive force under the Fourth Amendment and unlawful retaliation under the First Amendment. The district court granted summary judgment in favor of Egbert, and the Ninth Circuit reversed.

The Supreme Court reversed, 7–2, in an opinion by Justice Thomas holding that Boule had no damages cause of action under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). The Court held that even though *Bivens* itself involved Fourth Amendment claims, the "risk of undermining border security" and the fact that the Border Patrol offered a grievance process meant that the judiciary should not "extend[]" the regime to the context at bar. The Court then noted that it had never authoritatively applied *Bivens* to the First Amendment and declined to do so here. The majority explained that "[t]here are many reasons to think that Congress, not the courts, is better suited to authorize such a damages remedy," including that "fear of personal monetary liability and harassing litigation" could "unduly inhibit officials in the discharge of their duties." At bottom, the Court made its continued hostility to *Bivens* claims clear but declined formally to "reconsider *Bivens* itself."

Justice Gorsuch concurred in the judgment, stating that he "struggle[d] to see how this set of facts differs meaningfully from those in *Bivens* itself," that the judiciary should always defer to the legislature when it comes to creating new causes of action, and that the Court should overrule *Bivens* rather than holding out "false hope" to "future litigants."

Justice Sotomayor, joined by Justices Breyer and Kagan, concurred in the judgment in part and dissented in part. These Justices agreed with the majority that Boule's First Amendment claim could not proceed because it raised "line-drawing concerns" that Congress should resolve, but they argued that the majority's reasons for rejecting the Fourth Amendment claim failed under existing precedent. The opinion closed by counseling that while the decision made obtaining relief more difficult, "the lower courts should not read it to render *Bivens* a dead letter."

***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.

***Brown v. Davenport*, 142 S. Ct. 1510 (2022) (Decision below: 964 F.3d 448 (6th Cir. 2020)) (Argument transcript)**

A 6–3 opinion by Justice Gorsuch reversed a decision of the Sixth Circuit granting habeas relief solely under the harmless-error standard articulated in *Brecht v. Abrahamson*, 507 U.S. 619 (1993). The majority ruled that federal habeas courts may not grant relief unless the petitioner hurdles all relevant provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA) and all relevant Court-made equitable rules. Accordingly, where harmless error is an issue, petitioner must satisfy AEDPA (28 U.S.C. § 2254(d) in this case) and the Court's rule in *Brecht*.

Justice Kagan dissented, joined by Justices Breyer and Sotomayor, reasoning that in two prior cases the Court determined that *Brecht* "subsumes" § 2254(d), making reliance on *Brecht* alone appropriate.

***Cameron v. EMW Women's Surgical Center, P.S.C.*, 142 S. Ct. 1002 (2022) (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 claim-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.

***Nance v. Ward*, 142 S. Ct. 2214 (2022) (Decision below: 981 F.3d 1201 (11th Cir. 2020)) (Argument transcript)**

Michael Nance was sentenced to death for murder under Georgia law. The only method of execution that Georgia allowed was lethal injection, but Nance claimed that this procedure would subject him to a "substantial risk of severe pain" and would therefore be cruel and unusual in violation of the Eighth Amendment. Pursuant to precedent requiring death-row inmates challenging their methods of execution to propose alternative procedures, Nance requested that his execution be carried out by firing squad. Nance brought this claim under 42 U.S.C. § 1983. The district court dismissed the suit under the applicable statute of limitations. The Eleventh Circuit vacated that ruling and relied on an alternative ground for dismissal: that Nance should have raised his claim under habeas corpus rather than under § 1983 and that the "reconstrued" habeas petition amounted to an improper second or successive filing under 28 U.S.C. § 2244(b).

The Supreme Court reversed, 5–4, in an opinion written by Justice Kagan and joined by Chief Justice Roberts and Justices Breyer, Sotomayor, and Kavanaugh. According to *Heck v. Humphrey*, 512 U. S. 477 (1994), any constitutional claim that would "necessarily imply the invalidity of [a state prisoner's] conviction or sentence" must proceed in habeas rather than under § 1983. The Court reasoned that Nance's legal theory would not render his death sentence invalid, thus permitting his case to continue under § 1983. The Court explained that even if Nance prevailed, Georgia could still carry out his death sentence by changing its statutory law to allow execution by firing squad (like four other states). "To be sure," the majority acknowledged, "amending a statute may require some more time and effort than changing an agency protocol" like those involved in prior cases. But, the Court continued, "incidental delay" of this kind "is not relevant" to whether habeas or § 1983 provides the proper vehicle for a constitutional claim, and Georgia offered "no reason to think that the amendment process would be a substantial impediment" anyway. The Court remanded the case for further consideration of the timeliness issue and any other outstanding questions.

Justice Barrett dissented for herself and Justices Thomas, Alito, and Gorsuch. She argued that "the consequence of the relief that a prisoner seeks" should "depend[] on state law as it currently stands," such that challenging a state's only statutorily authorized method of execution should qualify as trying to invalidate a capital sentence. "[T]he unavailability of federal habeas relief does not justify recourse to § 1983," she contended, for "[t]he habeas statutes funnel such challenges to the state courts."

***Patel v. Garland*, 142 S. Ct. 1614 (2022) (Decision below: 971 F.3d 1258 (11th Cir. 2020)) (Argument transcript)**

In a 5–4 decision by Justice Barrett, the Court ruled that 8 U.S.C. § 1252(a)(2)(B) deprives federal

courts of jurisdiction to review factual determinations made in discretionary-relief proceedings under the Immigration and Nationality Act.

Justice Gorsuch dissented, joined by Justices Breyer, Sotomayor, and Kagan, interpreting § 1252(a)(2)(B) to preclude jurisdiction over discretionary-relief decisions but not over factual determinations, such as eligibility for relief, that precede such decisions. The majority's rule, he argued, renders "courts . . . powerless to correct bureaucratic mistakes . . . no matter how grave they may be" and "promises that countless future immigrants will be left with no avenue to correct even more egregious agency errors."

***Shinn v. Ramirez*, 142 S .Ct. 1718 (2022) (Decisions below: 937 F.3d 1230 (9th Cir. 2019); 943 F.3d 1211 (9th Cir. 2019)) (Argument transcript)**

In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Court ruled that ineffective assistance of state postconviction counsel would excuse the procedural default of a "substantial" ineffective-assistance-of-trial-counsel claim if the claim must have been raised in an "initial review" state postconviction proceeding. Just ten years later, *Shinn v. Ramirez* erects an enormous barrier to accessing *Martinez*'s pathway to relief.

In a 6–3 ruling by Justice Thomas, the majority held that, with narrow exceptions, 28 U.S.C. § 2254(e)(2) prohibits a federal habeas court from considering new evidence supporting the underlying merits of a defaulted-but-excused trial-ineffectiveness claim (faulting petitioners for their state postconviction counsel's failure to develop the state-court record). Hobbling petitioners even further, the Court ruled that federal habeas courts may not hold hearings to develop evidence supporting cause and prejudice to excuse the default unless the evidence would meet the strictures of § 2254(e)(2). Petitioners, in effect, must rely on the state-court record both to excuse the default and to prove the merits of the trial-ineffectiveness claim.

In a strongly worded dissent joined by Justices Breyer and Kagan, Justice Sotomayor argued that the majority's ruling "all but overrules" *Martinez*, which "repeatedly recognized" the need to develop evidence outside the state-court record to support a claim of trial ineffectiveness. Justice Sotomayor characterized the majority opinion as "perverse," questioning the logic of "excus[ing] a habeas petitioner's counsel's failure to raise a claim altogether because of ineffective assistance in postconviction proceedings . . . but to fault the same petitioner for that postconviction counsel's failure to develop evidence in support of the trial-ineffectiveness claim."

***Vega v. Tekoh*, 142 S. Ct. 2095 (2022) (Decision below: 985 F.3d 713 (9th Cir. 2021)) (Argument transcript)**

A Los Angeles County Sheriff 's Deputy, Carlos Vega, interrogated a certified nursing assistant, Terence Tekoh, about a patient's allegation that Tekoh sexually assaulted her. Vega did not give Tekoh the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966). Tekoh provided a written statement "apologizing for inappropriately touching the patient's genitals," and the statement was admitted against him at a criminal trial. Tekoh was acquitted and then sued Vega under 42 U.S.C. § 1983, alleging that the use of the un-*Mirandized* statement violated the Fifth Amendment privilege against self-incrimination. The district court refused to provide a jury instruction compatible with this claim, holding that *Miranda* provided prophylactic protection for the privilege rather than defining its actual scope. The Ninth Circuit reversed.

The Supreme Court reversed, 6–3, and remanded the case. Justice Alito's majority opinion proffered precedent for the point that *Miranda* warnings are prophylactic only and do not provide substantive Fifth Amendment protection. The Court's decision in *Dickerson v. United States*, 530 U.S. 428 (2000), did not change this conclusion, the majority reasoned. For while *Dickerson* held that *Miranda* was "constitutionally based" (such that Congress could not effectively overrule it), *Miranda* was still prophylactic instead of substantive. Accordingly, the Court held that "a violation of *Miranda* does not necessarily constitute . . . 'the deprivation of [a] right . . . secured by the Constitution'" under § 1983. The Court then held that a *Miranda* claim is not actionable as "the deprivation of [a] right . . . secured by the . . . laws" under § 1983 either. For even if a "judicially created prophylactic rule" could undergird a § 1983 suit, the Court said, "the benefits" of applying *Miranda* in this way "would be slight," while "the costs would be substantial."

Justice Kagan dissented, joined by Justices Breyer and Sotomayor. They argued that *Dickerson* makes clear that "*Miranda*'s protections are a 'right[]' that is 'secured by the Constitution' within the meaning of § 1983." Even assuming that this right is prophylactic, the dissent continued, whether it "safeguards a yet deeper constitutional commitment makes no difference to § 1983."

***Torres v. Texas Department of Public Safety*, 142 S. Ct. 2455 (2022) (Decision below: 583 S.W.3d 221 (Tex. App. 2018)) (Argument transcript)**

Le Roy Torres worked as a state trooper for the Texas Department of Public Safety. A longtime member of the Army Reserves, in 2007 he was deployed to Iraq. He was exposed to toxic burn pits there and developed constrictive bronchitis, which caused trouble breathing. When Torres returned to the United States, the Texas Department of Public Safety refused to place him in a different job that he could perform with this condition. Torres sued Texas in state court under the federal Uniformed Services Employment and Reemployment Rights Act (USERRA), which allows private state-court actions against state employers who refuse to accommodate returning veterans' service-related disabilities. Texas sought dismissal on the basis of state sovereign immunity. The trial court denied the motion; the intermediate appellate court reversed; and the Supreme Court of Texas denied review.

The Supreme Court reversed, 5–4, in an opinion written by Justice Breyer and joined by Chief Justice Roberts and Justices Sotomayor, Kagan, and Kavanaugh. Following the "plan-of-the-Convention" cases holding that states surrendered their sovereign immunity in certain situations dictated by constitutional structure, the majority reasoned that Congress may authorize suits against states when acting under the Article I powers "[t]o raise and support Armies" and "[t]o provide and maintain a Navy." Applying a test derived from *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244 (2021), which addressed delegated eminent-domain authority, the Court asked "whether the federal power is 'complete in itself.'" The Court answered in the affirmative, holding that "'when the States entered the federal system, they renounced their right' to interfere with national policy in this area."

Justice Kagan concurred. She wrote that while she had described the plan-of-the-Convention reasoning in *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), which concerned Article I's Bankruptcy Clause, as "a good-for-one-clause-only holding," *Allen v. Cooper*, 140 S. Ct. 994, 1003 (2020), "*PennEast* proved me wrong." And she explained that while she joined a dissent in *PennEast* itself, "[m]uch more than eminent domain, war powers lie at the heart of the Convention's plan." She therefore joined the majority in recognizing a waiver of state sovereign immunity here.

Justice Thomas advanced a variety of arguments in dissent, joined by Justices Alito, Gorsuch, and Barrett. Thomas argued that the majority should have given more serious consideration to the possibility that USERRA's text contemplates suits against consenting states only. He also argued that constitutional state sovereign immunity in state courts is absolute, such that claimants can rely on plan-of-the-Convention waiver in federal courts only. And he argued that the Court's test for plan-of-the-Convention waiver was too loose, such that any Article I power could qualify in contravention of precedent including *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

***Shoop v. Twyford*, 142 S. Ct. 2037 (2022) (Decision below 11 F.4th 518 (6th Cir. 2021)) (Argument transcript)**

The district court issued an All Writs Act order to transport petitioner to a hospital for medical tests that he alleged would support his claim for habeas relief. The Sixth Circuit affirmed the order.

The Supreme Court reversed, 5–4, in an opinion by Chief Justice Roberts. After holding that the Court of Appeals had jurisdiction because the transportation order fell within the collateral-order exception to the final-judgment rule, the majority ruled that federal courts cannot use the All Writs Act to develop evidentiary support for a habeas claim unless the Antiterrorism and Effective Death Penalty Act would allow consideration of such evidence. An All Writs Act order that "enables a prisoner to fish for unusable evidence" is not "'necessary or appropriate in aid of' a federal habeas court's jurisdiction," 28 U.S.C. § 1651(a), the Court said.

Justice Breyer, joined by Justices Sotomayor and Kagan, dissented, arguing that the Court of Appeals lacked jurisdiction because the transportation order did not fall within the collateral-order doctrine. Justice Gorsuch dissented, explaining that the Court "did not take this case to extend" the collateral-order doctrine and that he "would have dismissed th[e] case as improvidently granted when the jurisdictional complication became apparent."

***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.

GRANTED CERTIORARI

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

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).

***Haaland v. Brackeen*, No. 21-376 (Decision below: 994 F.3d 249 (5th Cir. 2021))**

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 commandeer 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))**

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))**

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))**

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))**

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 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: 2022 WL 2466786 (5th Cir. 2022))**

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.

ADDITIONAL INFORMATION

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