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Let the Right Ones In: The Supreme Court's Changing Approach to Justiciability

*Richard L. Heppner Jr.**

In last term's blockbuster case *Dobbs v. Jackson Women's Health Organization*, one of the considerations Justice Alito cited for overturning *Roe* and *Casey* was that they "have led to the distortion of many important but unrelated legal doctrines."¹ Alito asserted that abortion jurisprudence has, among other things, "ignored the Court's third-party standing doctrine."² Whether that is a fair description of the case law is debatable. But it raises the question of whether the newly ascendant conservative majority might likewise distort standing doctrine, and other justiciability doctrines, in order to decide particular, controversial issues.

The power of federal courts to act is circumscribed not only by the limits of subject matter jurisdiction, but also by various justiciability doctrines. Article III of the Constitution vests the "judicial power of the United States" in the Supreme Court and "such inferior courts" as Congress creates.³ That power is limited to deciding "cases" and "controversies."⁴ It does not permit federal courts to provide advisory opinions when there is not a real dispute between the parties. Based on that constitutional limit, and related prudential concerns, the Court has developed a variety of justiciability requirements limiting which cases can be heard in federal courts, including standing, mootness, and ripeness.⁵

The standing requirement focuses on the party advancing the claim (usually the plaintiff), asking whether it has a "personal

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1. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2275 (2022).

2. *Id.* at 2275–76 (2022). The other doctrines he identified are the standard for facial constitutional challenges, *res judicata*, rules of severability, constitutional avoidance, and the First Amendment. *Id.*

3. U.S. CONST. art. III, § 1.

4. *Id.*

5. See 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. § 3529 (3d ed. 2022).

stake” in the litigation.⁶ The mootness and ripeness doctrines focus on the timing of the case: If a case is too late—such that the issues “are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome”—then it is moot.⁷ If a case is too early—such that it depends on “contingent future events that may not occur as anticipated, or indeed may not occur at all”—then it is not ripe.⁸

Because each justiciability doctrine poses a potential barrier to accessing federal court, they can frustrate parties who want to effect change through litigation. Indeed, some have criticized the Court’s justiciability jurisprudence for allowing courts to avoid deciding cases involving controversial issues.⁹ But the justiciability requirements also act as a curb on the courts’ power—preventing judicial activism by stopping courts from reaching such issues.¹⁰ This Article argues that the Supreme Court, on its way to reaching several hot-button issues last term, minimized or ignored some justiciability problems.

As discussed below, in *Federal Election Commission v. Ted Cruz for Senate*, the Court minimized standing concerns in order to strike down a campaign-finance law on First Amendment grounds.¹¹ In two other cases, *Berger v. North Carolina NAACP* and *Cameron v. EMW Women’s Surgical Center*, the Court interpreted the standing-related question of intervention loosely to permit state officials to defend a state voter-identification law and a state-law abortion restriction against constitutional challenges.¹² And in *West Virginia*

6. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021).

7. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982)).

8. *Trump v. New York*, 141 S. Ct. 530, 535 (2020) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)).

9. See Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921–2006*, 62 STAN. L. REV. 591, 597 (2010) (collecting criticisms of the standing doctrine and arguing that progressive Justices devised the standing doctrine to insulate New Deal legislation from constitutional challenges); *id.* at 653 (noting that “The short period of New Deal insulation was followed only by a long period of conservative ‘cooptation’ of standing to retard the rights revolution.”); see, e.g., Michael J. Klarman, *Windsor and Brown: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 145–46 (2013) (arguing that the majority in *Hollingsworth v. Perry*, 570 U.S. 693 (2013) “probably” used standing doctrine to “duck[] the constitutional issue . . . because one or more of the . . . Justices . . . were not yet prepared to impose gay marriage on the states.”).

10. See Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1, 7 (2016) (summarizing arguments for using justiciability doctrines to avoid contentious issues, thereby safeguarding judicial legitimacy and leaving space for democratic dialogue); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346–56 (1936) (Brandeis, J., concurring) (arguing for using justiciability to avoid contentious, constitutional issues).

11. *FEC v. Ted Cruz for Senate*, 142 S. Ct. 1638 (2022).

12. *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191 (2022); *Cameron v. EMW Women’s Surgical Ctr., PSC*, 142 S. Ct. 1002 (2022).

v. EPA, the Court sidestepped questions of mootness to strike down an EPA regulation and announce the “major questions doctrine” as a new tenet of administrative law.¹³

* * *

To establish standing, Article III requires a plaintiff to show three things: (1) an injury in fact (2) that is fairly traceable to the challenged conduct of the defendant and (3) that is likely to be redressed by the requested relief.¹⁴ In recent years, much of the focus has been on the injury requirement, with the Court making it harder to show a sufficiently “concrete and particularized” injury to give rise to standing.¹⁵ In *Clapper v. Amnesty International*, for example, the Court held that attorneys, journalists, and human rights activists challenging the constitutionality of the Foreign Intelligence Surveillance Act had not pled an injury giving rise to standing, even though they alleged that they had incurred significant costs to ensure the confidentiality of their communications, because those costs were not traceable to the Act’s enforcement.¹⁶ In *Spokeo, Inc. v. Robins*, the Court held that a plaintiff had not alleged an injury in fact giving rise to standing, even though he alleged a violation of a federal statute designed to protect him, because he had not alleged a concrete harm from the violation.¹⁷ And, in *TransUnion LLC v. Ramirez*, the Court held that, in a class action alleging a violation of the Fair Credit Reporting Act, only plaintiffs who suffered a concrete harm (above and beyond a violation of the Act’s credit-reporting requirements) had suffered a concrete and particularized injury giving rise to standing.¹⁸

Last term, standing was an issue in *Federal Election Commission v. Ted Cruz for Senate*.¹⁹ There, Senator Ted Cruz deliberately broke a campaign finance regulation to cause himself a monetary loss and create an injury so that he could challenge the constitutionality of a Federal Election Commission (“FEC”) campaign

13. *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

14. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *Cruz*, 142 S. Ct. at 1646.

15. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021); *see also* Michael Genithes, *Concrete Reliance on Stare Decisis in A Post-Dobbs World*, 14 CONLAWNOW 1, 9 (2022); Richard L. Heppner Jr., *Statutory Damages and Standing After Spokeo v. Robins*, 9 CONLAWNOW 125, 125 (2018).

16. *Clapper v. Amnesty Int’l*, 568 U.S. 398 (2013).

17. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 333–34 (2016).

18. *Ramirez*, 141 S. Ct. at 2190.

19. *FEC v. Ted Cruz for Senate*, 142 S. Ct. 1638 (2022).

finance regulation and the provision of the Bipartisan Campaign Reform Act (“BCRA”) authorizing it.²⁰

Under Section 304 of BCRA, political candidates who loan their own money to their political campaigns may use no more than \$250,000 of post-election contributions to pay themselves back.²¹ The purpose behind the limit is simple: Congress wanted to prevent wealthy politicians from collecting money after they had already been elected that would go directly into their own pockets, because such direct post-election contributions raise the likelihood and appearance of improper influence. To implement that limit, the FEC issued regulations providing that: (1) political campaigns may repay candidates up to \$250,000 in loans using contributions made “at any time”; (2) repayments in excess of \$250,000 must be made “within [twenty] days of the election”; and (3) after the twenty-day deadline, any unpaid loans in excess of \$250,000 must be treated as a contribution and not repaid.²² Thus, under the regulations, there is no limit on the amount of money that candidates may lend their campaigns, but they must repay all but \$250,000 of the loans within twenty days of the election, to avoid repaying themselves from post-election contributions.

While running for reelection in 2018, Ted Cruz loaned his own campaign committee \$260,000, and they did not try to pay it back until after the twenty-day deadline had passed.²³ Therefore, they were able to repay only \$250,000, and the remaining \$10,000 was deemed a campaign contribution. Cruz and his Committee sued, alleging that the BCRA provision and the FEC’s implementing regulation violated the First Amendment, because they limited Cruz’s own political speech—that is, how he spends his own money to support his political campaign.²⁴ Ultimately, the Court—Chief Justice Roberts—agreed with Cruz, holding that both BCRA § 304 and the FEC regulation violated the First Amendment.²⁵

To reach that outcome, however, Roberts had to contend with the government’s argument that Cruz had no standing to challenge BCRA and the regulation because he had not suffered an injury traceable to them. The government raised two standing arguments, and Roberts rejected them both.

20. *Id.* at 1646.

21. 52 U.S.C.A. § 30116(j).

22. 11 C.F.R. § 116.11–12 (2022).

23. *Cruz*, 142 S. Ct. at 1646.

24. *Id.*

25. *Id.* at 1656–57.

First, the government argued that Cruz lacked standing because his \$10,000 injury was “self-inflicted.”²⁶ He deliberately chose to lend himself just over the \$250,000 limit, and he deliberately chose not to pay himself back during the twenty-day post-election period.²⁷ The government argued that—just like the plaintiffs in *Clapper*, who had spent money to avoid the government surveillance they wanted to contest (an injury that the Court ruled did not suffice to confer standing)—Cruz had voluntarily suffered the monetary loss when he could have easily avoided it by paying himself back within twenty days.²⁸ But the Court held that Cruz had not just voluntarily incurred a cost, he had voluntarily subjected himself to the regulation, and it was the FEC’s threatened enforcement of the regulation that actually injured him—an injury that gave him standing.²⁹

Second, the government argued that, even if Cruz had standing to challenge the regulation, he did not have standing to challenge the statutory limit in BCRA itself.³⁰ After all, BCRA’s limitations were less severe than the implementing regulation’s limitations. BCRA only prohibited candidates from using *post*-election contributions to repay themselves more than \$250,000, while the regulation prohibited candidates from using *any* contributions to repay themselves more than \$250,000 (if the repayment was more than twenty days after the election). Cruz had stipulated that “none of the \$250,000 loan was repaid from contributions after the election,” and the Court found that to be true.³¹ Thus, it would seem that, even if Cruz had violated the regulation’s twenty-day deadline, he had not violated the underlying statute’s limitation on use of post-election contributions.

At oral argument, Justices Roberts and Kagan both suggested that perhaps Cruz should have challenged the FEC’s regulation for exceeding the scope of the BCRA.³² But this point did not make it into Kagan’s dissent which focused on the substantive merits of the First Amendment challenge.³³ And Roberts ultimately rejected any argument distinguishing between a challenge to the implementing

26. *Id.* at 1646–47.

27. *Id.* at 1647.

28. *Id.*

29. *Id.* at 1647–48.

30. *Id.* at 1648.

31. *Id.* at 1648–49. The Court rejected Cruz’s argument that some of the pre-election contributions should be considered post-election contributions because they exceeded the federal contribution limits and the campaign had “redesignated” the excess amounts as post-election contributions to Cruz’s next campaign. *Id.*

32. Transcript of Oral Argument at 69–70, *Cruz*, 142 S. Ct. at 1638 (No. 21-12).

33. *Cruz*, 142 S. Ct. at 1657 (Kagan, J., dissenting).

regulation and a challenge to BCRA itself.³⁴ He reasoned that the FEC's enforcement of the regulation was "traceable to the operation of" BCRA because the FEC could not act without the statute's authorization and the regulation was promulgated to enforce the statute.³⁵ Moreover, he reasoned, Cruz's constitutional challenge to the statute would, if successful, invalidate the regulation as well, thereby redressing the injury.³⁶ And so, the Court found Cruz had standing, reached the merits of the claim, and held that both the FEC regulation and BCRA § 304 violated the First Amendment.³⁷

* * *

A standing-related issue arose in two other cases last term, *Berger v. North Carolina NAACP* and *Cameron v. EMW Women's Surgical Center*. These cases addressed variations on the following question: when a state law is challenged in court, and some state officials believe that the state executive is not adequately defending it, can they intervene to defend the law? And both cases ruled that they could.

These two cases are not strictly speaking about standing. It is well established that States—despite their sovereign immunity from suit—have an interest in defending, and thus standing to defend, the constitutionality of their own statutes.³⁸ And, when (thanks to state sovereign immunity) plaintiffs sue state officials to enjoin enforcement of state statutes, the States and their attorneys general have standing to, and often do, mount the defense.³⁹ In short, for state officials to have standing to defend a state law, they need only be representing the State's interest in its enforcement.

Instead, these two cases are about intervention. And, as discussed below, for a state official to *intervene* to defend a state law, the requirement is different. The official must have an interest in the law's enforcement *that is not already adequately represented* by the other state officials already defending the case.

In *Berger v. North Carolina NAACP*, the issue arose in the context of the NAACP's challenge to North Carolina's voter-ID law.⁴⁰ The law was enacted by the North Carolina General Assembly over

34. *Id.* at 1649–50 (majority opinion).

35. *Id.*

36. *Id.*

37. *Id.* at 1656.

38. *Maine v. Taylor*, 477 U.S. 131, 137 (1986) (“[A] State clearly has a legitimate interest in the continued enforceability of its own statutes.”).

39. *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191, 2197 (2022) (quoting *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1952 (2019)).

40. *Id.* at 2191.

the Governor's veto.⁴¹ The NAACP sued the Governor and the State Board of Elections (the Board) to challenge the law, and the state Attorney General defended it.⁴² The State Speaker of the House and Senate President Pro Tempore (whom the Court dubbed "legislative leaders") moved in the trial court to intervene because they thought the Governor and the Attorney General (a former state senator who had voted against an earlier version of the law) would not adequately defend it.⁴³ The district court denied the motion to intervene and a motion to reconsider its denial.⁴⁴ It permitted them to file an amicus brief, but not to introduce new evidence,⁴⁵ and eventually granted a preliminary injunction barring enforcement of the voter-ID requirement in the 2020 primary election.⁴⁶

On appeal from that decision, the Fourth Circuit allowed the legislative leaders to intervene and agreed with them, reversing the preliminary injunction.⁴⁷ A separate panel of the Fourth Circuit heard their separate appeal from the denial of their motion to intervene and reversed that as well, holding that they should have been allowed to intervene in the district court.⁴⁸ However, the full Fourth Circuit then reheard the intervention question *en banc* and ruled against the legislative leaders, holding that they could not intervene in the district court proceedings because they had not shown that the state Attorney General did not adequately represent the State's interests there.⁴⁹

Intervention as a matter of right is governed by Federal Rule of Civil Procedure 24(a)(2), which provides that a "court must permit anyone to intervene" who timely "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Thus, for Justice Gorsuch, who wrote the majority opinion, the case was about two issues: did the State legislative leaders have an interest in the

41. *Id.* at 2198 (discussing S. 824, 2017 General Assembly, 2018 Regular Session (N.C. 2017)).

42. *Id.*

43. *Id.*

44. *Id.* at 2199.

45. Order at 3, N.C. State Conf. of the NAACP v. Cooper, 430 F. Supp. 3d 15 (M.D.N.C. 2019) (No. 18-cv-01034), ECF No. 116 ("Amici's brief and all accompanying exhibits (ECF No. 96) are STRICKEN . . . Amici are permitted to submit a new amicus curiae brief within 10 days of the entry of this order which does not introduce or rely upon evidence not already introduced into the record by the named parties.")

46. *Berger*, 142 S. Ct. at 2199.

44. *Id.* at 2200.

45. *Id.*

46. *Id.*

litigation, and was it adequately represented by the Governor and Attorney General?⁵⁰

As to the first question—the legislative leaders’ interest in the litigation—Justice Gorsuch found it was dispositively decided by North Carolina state law, which provided that the Speaker and President Pro Temp “‘as agents of the State, by and through counsel of their choice,’ ‘shall jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution.’”⁵¹ He rejected arguments from the Board and the NAACP that North Carolina law did not actually grant the legislative leaders that interest, so long as the State was still defending the Board.⁵²

As to the second question—whether the legislative leaders’ interests were adequately represented by the Board’s defense—Justice Gorsuch found that the District Court and the Fourth Circuit both erred by applying a presumption that the Governor and Attorney General were adequately representing the legislative leaders’ interests.⁵³ He distinguished this case—where the legislative leaders were statutorily authorized to defend the statute—from other cases where presumptions might apply, such as when private parties seek to intervene to defend legislation.⁵⁴ And he observed that—despite the principle that States should speak in one voice, which normally grounds such presumptions—“this litigation illustrates how divided state governments sometimes warrant participation by multiple state officials in federal court.”⁵⁵ Plus, he accepted the legislative leaders’ assertion that they had a different interest in the litigation because the Board sought only “guidance” about which law to apply to the upcoming election, while they sought to “vigorously” defend the constitutionality of the Voter ID law.⁵⁶

In her solo dissent, Justice Sotomayor accused the majority of creating the opposite presumption, “that a State is inadequately represented in federal court unless whomever state law designates as a State’s representative is allowed to intervene, even where the interests that the intervenors seek to represent are identical to those of an existing party.”⁵⁷ According to Sotomayor, the State’s

50. *Id.* at 2202–03.

51. *Id.* at 2202 (quoting N.C. GEN. STAT. ANN. § 1–72.2(b) (West 2017)).

52. *Id.* at 2203.

53. *Id.* at 2205.

54. *Id.* at 2204–05.

55. *Id.* at 2205.

56. *Id.*

57. *Id.* at 2206 (Sotomayor, J., dissenting).

interests were already adequately represented by the Board and Attorney General.⁵⁸ And the fact that state law gave legislative representatives standing—i.e., an interest in the case—was not sufficient to show that the interest was distinct from that of, and not adequately represented by, the State’s other representatives.⁵⁹ Moreover, she faulted the majority for allowing State law to determine the adequacy of the representation, which she contended is a question of federal law.⁶⁰

Nonetheless, Justice Gorsuch found the legislative leaders had standing and could intervene to represent their interests. The merits of the underlying case—the constitutionality of the voter-ID law—were not before the Supreme Court. But the holding in *Berger* keeps the door open for state legislators to intervene to defend state statutes more vigorously, even when the State executive is already defending the law in court.

A similar issue arose in *Cameron v. EMW Women’s Surgical Center*.⁶¹ There, the law at issue was a Kentucky ban on certain abortion procedures, and the party seeking to intervene was not a legislator, it was the State’s Attorney General.⁶² A clinic and two doctors (EMW) sued the Kentucky Attorney General and the Kentucky Secretary of Health and Family Services to enjoin enforcement of the abortion ban. The Attorney General’s office moved in the district court for dismissal of the claims against him, arguing that the statute did “not confer upon the Attorney General the authority or duty to enforce” and “does not provide the Attorney General with any regulatory responsibility or other authority to take any action” related to the state statute.⁶³ The Attorney General was dismissed from the case, and the case continued against the Secretary.

The district court enjoined enforcement of the law, and the Secretary appealed. While the appeal was pending, the Attorney General (Andrew Beshear) was elected Governor, and Daniel Cameron was elected to be the new Attorney General. New Governor Beshear appointed a new Secretary to carry on the appeal, and new Attorney General Cameron entered an appearance as counsel for

58. *Id.* at 2210.

59. *Id.*

60. *Id.* at 2210–11.

61. *Cameron v. EMW Women’s Surgical Ctr.*, P.S.C., 142 S. Ct. 1002 (2022).

62. *Id.*

63. *Id.* at 1022 (Sotomayor, J., dissenting) (quoting ECF in No. 19–5516 (CA6, June 11, 2020), Doc. 42, pp. 1). The stipulation of dismissal specified that the Attorney General reserved “all rights, claims, and defenses . . . in any appeals arising out of this action[.]” *id.* at 1007 (majority opinion), and on that basis, the Court found that no claims-processing rule barred the Attorney General from intervening on appeal. *Id.* at 1010.

the Secretary on the appeal. The Sixth Circuit affirmed the district court's injunction, and the new Secretary decided not to move for *en banc* review or seek a writ of certiorari in the Supreme Court. At that point, new Attorney General Cameron withdrew as counsel for the Secretary and moved to intervene as a party, despite his office having voluntarily withdrawn as a party before. The Sixth Circuit denied the motion, and he sought certiorari of that denial.⁶⁴

Permissive intervention on appeal is not governed by any specific statute or rule. But courts consider the same "policies underlying" Federal Rule of Civil Procedure 24.⁶⁵ So, as in *Berger*, the main issue was whether one official (Attorney General Cameron) had an interest in the appeal that was distinct from and not represented by the official already in the case (the Secretary). The majority opinion, written by Justice Alito, found that the Attorney General was asserting a "substantial legal interest that sounds in deeper, constitutional considerations," namely the interest of the State in defending the continued enforceability of its own statutes.⁶⁶ Although Justice Sotomayor's dissent argued that the Attorney General's office had abandoned that interest when it withdrew from the case,⁶⁷ Justice Alito found that the Attorney General had disclaimed only his authority to enforce the law, not his authority to defend the State's interests in court.⁶⁸ And, just as Justice Gorsuch found in *Berger*, Justice Alito found that Kentucky state law "empowers multiple officials to defend its sovereign interests in federal court."⁶⁹

The remainder of the opinion found that the Attorney General's motion to intervene was timely (because he moved to intervene quickly after the Secretary decided not to continue)⁷⁰ and did not prejudice EMW (because he was not able to raise any issues that the Secretary could not have raised).⁷¹ And, thus, the Court held that the Attorney General should have been permitted to intervene to represent the State's interest, even though the Secretary representing those interests had chosen to discontinue the litigation.⁷²

64. *Id.* at 1008–09.

65. *Id.* at 1010.

66. *Id.* at 1010–11.

67. *Id.* at 1023 (Sotomayor, J., dissenting).

68. *Id.* at 1012 n.5 (majority opinion).

69. *Id.* at 1011.

70. *Id.* at 1012–13.

71. *Id.* at 1013–14.

72. Justice Thomas wrote a concurring opinion arguing that the Attorney General also should have been permitted to intervene because, having been dismissed from the district court, he was not a party to that court's final judgment, meaning that he was not circumventing the deadline for appealing from that judgment by waiting to intervene later. *Id.* at

The decisions in *Berger* and *Cameron* may signal a shift in the Court's view of who has an interest in defending state laws against constitutional challenges. Both decisions adopt interpretations of state law that distribute the State's interest among multiple offices and officials in the state government, rather than vesting it in a unitary state executive. As Justice Sotomayor argued in her dissents, the Court had not before relied on state law to grant individual state offices or officials independent interests in defending state laws when the state government was already doing so or had chosen not to. Given the divided (and shifting) composition of many state governments, this change will likely enable more vigorous defenses of state laws—even when only a faction within the state government wants to continue mounting a defense. It remains to be seen whether that will always mean—as it did in *Berger* and *Cameron*—more conservative state politicians defending state laws that more liberal state governments have chosen to stop defending.

* * *

The doctrine of mootness was an issue last term in *West Virginia v. EPA*. That case involved challenges to various EPA regulations governing power plants under the Clean Air Act,⁷³ specifically: the Obama-era Clean Power Plan (CPP),⁷⁴ and the Trump-era Affordable Clean Energy (ACE) Rule.⁷⁵ The central holding of the case—that the “major questions doctrine” requires especially clear congressional authorization before administrative agencies undertake “major” regulations—has far-reaching implications for administrative law.⁷⁶ But the tangled procedural history it took to get to the Supreme Court may have implications for standing and mootness doctrines as well.

1014–17 (Thomas, J., concurring). Justice Kagan wrote a concurring opinion arguing that, even assuming the Attorney General could have appealed from the district court's judgment, he was not circumventing the appeals deadline by intervening later because he reasonably expected the Secretary to handle the defense, and he timely intervened when it became clear that the Secretary would not do so. *Id.* at 1017–20 (Kagan, J., concurring).

73. 42 U.S.C. § 7411(d).

74. See Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units 80 Fed. Reg. 64510-01 (Oct. 23, 2015) (to be codified at 40 C.F.R. pts. 60, 70, 71, 98); Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units 80 Fed. Reg. 64662-01 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

75. Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations 84 Fed. Reg. 32520-01 (July 8, 2019) (to be codified at 40 C.F.R. pt. 60).

76. See generally Dana Neacsu, *Applying Bentham's Theory of Fallacies to Chief Justice Robert's Reasoning in West Virginia v. EPA*, 61 DUQ. L. REV. 95 (2023).

In 2015, during the Obama administration, EPA issued the CPP. To reduce carbon dioxide emissions, the CPP set target emissions limits, which were to be enforced by the States.⁷⁷ Those limits effectively required energy companies to, among other things, shift some of their power generating from coal-fired power plants to natural-gas-fired plants and renewable energy sources. This “generation shifting” requirement was challenged in court by States (contesting their enforcement duties) and energy companies (contesting the emissions targets). In 2016, the Supreme Court stepped in to stay implementation of the CPP before it took effect.⁷⁸ Thanks to that stay, it never went into effect.

In 2019, during the Trump administration, EPA repealed the CPP, finding for the first time that generation shifting implicated a “major question” beyond the scope of EPA’s statutory authority under the Clean Air Act.⁷⁹ The Trump-led EPA replaced the CPP with a new regulation that did not require generation shifting: the ACE.⁸⁰ Various states and private parties sued EPA in the D.C. Circuit, challenging the repeal of the CPP and issuance of the ACE.⁸¹ Other states and private parties (who supported the ACE and opposed the stricter regulations of the CPP) intervened on EPA’s side to defend it. The D.C. Circuit held that the generation shifting requirement was permissible under the Clean Air Act, and therefore the repeal of the CPP and its replacement with the ACE rested on a mistaken reading of EPA’s statutory authority.⁸² So, the D.C. Circuit vacated EPA’s repeal of the CPP and issuance of the ACE, and it remanded to EPA for further consideration.⁸³

But then, in 2021, after yet another change in Presidential administrations, the Biden-led EPA asked the D.C. Circuit to stay issuance of its mandate, to ensure that the CPP would not go into immediate effect.⁸⁴ As it turned out, in response to changes in the

77. See Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units 80 Fed. Reg. 64510-01; Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units 80 Fed. Reg. 64662-01.

78. *West Virginia v. EPA*, 577 U.S. 1126 (2016).

79. Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32520-01 (July 8, 2019) (to be codified at 40 C.F.R. pt. 60).

80. *Id.*

81. See *Am. Lung Ass’n v. EPA*, No. 19-1140 (D.C. Cir. Jan. 19, 2021) and consolidated cases.

82. *Am. Lung Ass’n v. EPA*, 985 F.3d 914 (D.C. Cir.), *rev’d and remanded sub nom.* *West Virginia v. EPA*, 213 L. Ed. 2d 896, 142 S. Ct. 2587 (2022).

83. *Id.*

84. Respondents’ Motion for a Partial Stay of Issuance of the Mandate, *Am. Lung Ass’n v. EPA*, No. 19-1140, (D.C. Cir. Feb. 12, 2021), ECF No. 1885168.

energy market, energy producers had already met the CPP's emissions targets through voluntarily engaging in generation shifting.⁸⁵ The CPP's goals had been met, and the Biden-led EPA had no interest in reviving it and was already considering promulgating a new rule. The D.C. Circuit stayed its mandate, but some of the intervening parties—the states and private parties who sought to defend the Trump-era repeal of the CPP and promulgation of the ACE—filed petitions for certiorari, which EPA opposed.⁸⁶

The standing and mootness issues raised by this convoluted procedural history are intertwined. In short, was the case mooted by the D.C. Circuit's staying of the mandate and EPA's own plan to issue a new regulation, or did the intervenors have standing to challenge the now-obsolete CPP in the Supreme Court? On the one hand, the CPP never went into effect and never would, so none of the intervenors were harmed by it. And its emissions targets had been met, so it would have no effect even if it were revived. The case seemed moot—any opinion the Court could give about the constitutionality of the CPP would be purely advisory. On the other hand, there was no guarantee that EPA would not try to issue a new rule that included generation shifting—maybe one with more stringent generation-shifting requirements.

The majority opinion authored by Chief Justice Roberts found that there was no justiciability problem, addressing the standing and mootness questions separately.⁸⁷ First, it held the intervenors had standing because they were regulated by the original CPP, and the D.C. Circuit's judgment reviving the CPP would cause them a concrete injury if it went into effect.⁸⁸ This holding seems to ignore the fact that the CPP's emissions targets had been met, so reviving it would not cause any injury to any of the intervenor energy companies. It may be defensible on the grounds that a revived CPP—if such a thing were possible—would injure the intervenor States, since it would require them to enforce it. In any event, Roberts held that the intervenors had the requisite “injury ‘fairly traceable to the *judgment below*’” that a “favorable ruling . . . would redress,” regardless of whether that judgment would or could ever go into effect.⁸⁹

85. *West Virginia v. EPA*, 142 S. Ct. 2587, 2627–28 (2022) (Kagan, J., dissenting).

86. *See West Virginia v. EPA*, 142 S. Ct. 420 (2021) (granting certiorari).

87. Chief Justice Roberts was joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett. Justice Gorsuch's concurring opinion, which was joined by Justice Alito, opined on the merits issues in the case but did not address justiciability. Justice Kagan's dissent was joined by Justices Breyer and Sotomayor.

88. *West Virginia*, 142 S. Ct. at 2606.

89. *Id.* (quoting *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2362 (2019)).

Roberts then considered whether the case was mooted either by the D.C. Circuit's staying of its mandate or by EPA's abandonment of the CPP and its plan to proceed with new rulemaking.⁹⁰ He quickly held that staying a mandate does not moot a case, as appellate courts regularly stay their mandates pending certiorari review.⁹¹ He did not discuss the fact that usually the *losing* party seeks a stay to prevent the judgment against it going into effect pending further appeal, while here it was the prevailing party, EPA, that had sought the stay because it no longer wanted the judgment in its favor to go into effect. Roberts then held that EPA's plans to proceed with new rulemaking did not moot the case either. He relied on a well-established limit on mootness, the idea that "'voluntary cessation does not moot a case' unless it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'"⁹² And he noted that the "heavy" burden to make that showing fell on the EPA.⁹³ Without mentioning the practical obsolescence of the CPP's generation-shifting requirement (given that the CPP's emissions targets had been met), he held that EPA had not met that heavy burden because it did not disavow its statutory authority to impose different generation-shifting requirements in the future.⁹⁴

As the dissent by Justice Kagan explained, this may be an accurate statement of the Court's "notoriously strict" mootness jurisprudence, but there was "no reason to reach out to decide this case."⁹⁵ The Supreme Court has discretion to decline cases even if they are justiciable.⁹⁶ The CPP's emissions targets had already been met, and any new EPA rule would not evade review, since it would be subject to pre-enforcement judicial review.⁹⁷ The Court's holding is, effectively, an advisory opinion about whether the EPA can use generation shifting in future regulations.⁹⁸

Given all of that, one might wonder why the Court even bothered to hear the case. It seems unlikely that it granted certiorari to rule on the relatively specific (and hypothetical) question of generation shifting under the Clean Air Act. It seems more likely that the

90. *Id.*

91. *Id.* at 2607.

92. *Id.* (quoting *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007)).

93. *Id.*

94. *Id.*

95. *Id.* at 2628 (Kagan, J., dissenting).

96. *Id.*

97. *Id.*

98. *Id.*

majority wanted to hear the case as a vehicle to reach the far broader and more consequential issue of the “major questions doctrine.” That it amounted to an advisory opinion—where the challenged regulation was no longer in effect and none of the parties challenging the regulation were actually injured—was not going to stop the newly emboldened majority from using the case to expand the scope of judicial authority over agency regulations and strike a blow at the administrative state.

* * *

In an interesting turn of events, another mootness issue arose in the *Kennedy v. Bremerton School District* case, although it did not make it into the final opinion.⁹⁹ In that case, the Court held that a school district ran afoul of the First Amendment’s Free Exercise and Free Speech clauses when it disciplined a football coach for praying at the 50-yard line after high-school football games.¹⁰⁰ In the Supreme Court, after certiorari was granted but before full briefing, the school district filed a Suggestion of Mootness, arguing that the case was moot because Coach Kennedy had chosen not to re-apply for his job, had moved across the country (from Washington to Florida), and could no longer be reinstated.¹⁰¹ Coach Kennedy responded by insisting that he wanted to be reinstated and that he would move back to Washington to coach again.¹⁰² After Coach Kennedy won, there was an open question about whether he would actually return to coach again—suggesting maybe the case had been moot after all.¹⁰³ On remand, however, Coach Kennedy sought and obtained an injunction reinstating him, and he will apparently be moving back to Washington to coach again. Nonetheless, that such a justiciability issue could fly under the radar, receiving little or no public acknowledgement from the Justices,

99. *Kennedy v. Bremerton Sch. Dist.*, 42 S. Ct. 2407 (2022).

100. *Id.* at 2415–16. The factual background of the case, including what Coach Kennedy actually did and how the school district reacted, was contested throughout the litigation, including in the Supreme Court itself. *Id.* at 2434 (Sotomayor, J., dissenting); see also Ann L. Schiavone, A “Mere Shadow” of a Conflict: Obscuring the Establishment Clause in *Kennedy v. Bremerton*, 61 DUQ. L. REV. 40 (2023).

101. Suggestion of Mootness, *Kennedy*, 42 S. Ct. 2407 (No. 21-418); see also Amicus Brief of the Freedom from Religion Foundation, et al. as Amici Curiae Supporting Respondent, *Kennedy*, 42 S. Ct. 2407 (No. 21-418).

102. Response to Respondent’s Suggestion of Mootness, *Kennedy*, 42 S. Ct. 2407 (No. 21-418).

103. See Danny Westneat, *The Story of the Praying Bremerton Coach Keeps Getting More Surreal*, SEATTLE TIMES, <https://www.seattletimes.com/seattle-news/the-story-of-the-praying-bremerton-coach-keeps-getting-more-surreal/> (last updated Sept. 17, 2022, 6:51 AM).

illustrates how the circumvention of justiciability barriers can go undetected.

As Justice Alito warned in *Dobbs*, ideological preferences can distort judicial decisions on purportedly non-ideological legal doctrines like justiciability.¹⁰⁴ Ironically, while Alito was lamenting the effects of past abortion decisions, the Court last term seemed willing to bend the justiciability doctrines—or at least to overlook potential justiciability issues—to hear cases on substantive issues that the new conservative majority wanted to reach. The new Court majority may be more open to deciding issues that a more evenly split Court might have avoided. This openness may distort the justiciability doctrines—and affect who can bring which issues to federal court—in the future.

104. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2275 (2022).