The Court That Does Not Let Standing Stand in Its Way

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ABSTRACT

Article III of the Constitution limits the power of the federal courts to adjudicating cases and controversies. Embedded in that concept are the separate and sometimes overlapping doctrines of standing, ripeness, political question, mootness, and the overall responsibility of the courts to assure both that they are deciding legal issues only where there are real parties with an actual dispute between them and that a court is the proper institution to resolve it. That proposition is not in dispute, but, as Biden v. Nebraska *demonstrates, its application to particular cases is very much a source of disagreement.*

Traditionally, the Supreme Court has been quite strict on standing, in my view more so than is necessary or appropriate in some cases. But under the Roberts Court, these barriers have come down, at least in those cases where the conservative majority wishes to reach the merits. That change has not been across the board, and its selectivity is one of its problems. From the perspective of this observer, under the Roberts Court, the requirements of Article III are relaxed when the majority is eager to decide a case that enables the conservative majority to do what it did in Nebraska*: issue a decision that is consistent with its policy preferences.*

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INTRODUCTION

> [The rules on standing] may sound technical, but they enforce "fundamental limits on federal judicial power." They keep courts acting like courts. Or stated the other way around, they prevent courts from acting like this Court does today. The plaintiffs in this case are six States that have no personal stake in the Secretary's loan forgiveness plan. They are classic ideological plaintiffs: They think the plan a very bad idea, but they are no worse off because the Secretary differs. In giving those States a forum—in adjudicating their complaint—the Court forgets its proper role. The Court acts

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> as though it is an arbiter of political and policy disputes, rather than of cases and controversies.[1]

Article III of the Constitution limits the power of the federal courts to adjudicating cases and controversies.[2] Embedded in that concept are the separate and sometimes overlapping doctrines of standing, ripeness, political question, mootness, and the overall responsibility of the courts to assure both that they are deciding legal issues only where there are real parties with an actual dispute between them and that a court is the proper institution to resolve it.[3] That proposition is not in dispute, but, as *Biden v. Nebraska* demonstrates, its application to particular cases is very much a source of disagreement.

The main battleground comes under the standing prong, but the lines between the prongs are not clear, and the label is less important than whether the Court is self-policing itself in deciding whether to reach the merits of a particular case. Traditionally, as I show in Part I, the Supreme Court has been quite strict on standing, in my view more so than is necessary or appropriate in some cases. But under the Roberts Court, these barriers have come down, at least in those cases where the conservative majority wishes to reach the merits. As I argue in Part II, that change has not been across the board, and its selectivity is one of its problems. From the perspective of this observer, under the Roberts Court, the requirements of Article III are relaxed when the majority is eager to decide a case that enables the conservative majority to do what it did in *Nebraska*: issue a decision that is consistent with its policy preferences. Although most of the cases I discuss were decided on standing grounds, this Essay will include other cases in which the label was different, but the fundamental question remained whether the particular case was appropriate for a judicial decision consistent with the limits of Article III. In order to keep this Essay within manageable length, my discussion of the cases will focus on the relevant facts and the conclusion, rather than debating the rationale for finding that Article III was satisfied. Put another way, this Essay will not seek to analyze the applicable doctrine, but to show how it has been manipulated to achieve certain policy results.

One other preliminary note: this Essay does not purport to be a complete survey of all standing and related Article III cases under the Roberts Court, let alone all those that were decided before it. I seek here only to identify what I consider to be an unhealthy and perhaps ideologically driven trend,

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1 Biden v. Nebraska, 143 S. Ct. 2355, 2385 (2023) (Kagan, J., dissenting) (quoting Allen v. Wright, 468 U. S. 737, 750 (1984)).

2 U.S. CONST. art. III, § 2, cl. 1.

3 *See* 2 KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 18 (6th ed. 2019).

and I leave to another day, and perhaps to other scholars, the opportunity to provide a fuller treatment of the topic.

I. THE TRADITIONAL VIEW: FOUR EXAMPLES

For most litigants, the Supreme Court has traditionally been very tough on standing.[4] In many cases, it is not as though the wrong plaintiff had sued. Even with important and controversial legal issues, or perhaps because of the presence of those issues, the Court has been perfectly content to issue standing decisions under which no one will ever be able to have the claim at issue decided by the federal courts. The cases that follow illustrate the manner in which the Court has, until recently, applied the law of standing.

Article I, § 9, clause 7 of the Constitution requires that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."[5] For many years, the budget of the Central Intelligence Agency ("CIA") has been a secret, although various members of Congress have access to it. In *United States v. Richardson*,[6] a citizen-taxpayer filed suit asking that the courts require the CIA's budget be made public, and the Court dismissed the suit for lack of standing on the ground that the plaintiff could show no special injury beyond that of every other citizen and taxpayer.[7] The result was clear, and it did not seem to bother the Court that no one could sue to enforce this part of the Constitution.

In *Allen v. Wright*,[8] the case cited by Justice Kagan in her dissenting opinion in *Nebraska*, the same result held: neither these plaintiffs nor anyone else had standing to sue the Internal Revenue Service ("IRS") for failing to enforce a law that denied tax exempt status to private schools that deny admission to Black students.[9] The students did not sue the schools seeking admission, but made the IRS the defendant on the theory that, if the IRS enforced the law, the schools would lose their favored tax status, parents would not be able to deduct "contributions" to the school, and the higher cost would cause many white parents to send their children to public school, thereby achieving the integrated schools that the Black families sought.[10] The Court concluded that the result that the parents sought was too speculative to

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4 *See* Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1768–75 (1999).

5 U.S. CONST. art. I, § 9, cl. 7.

6 418 U.S. 166 (1974).

7 *Id.* at 167, 174–80.

8 468 U.S. 737 (1984).

9 *Id.* at 739–40.

10 *Id.* at 743–46.

support their standing,[11] even though the targeted private school intervened to protect the status quo and the fundamental principles underlying the granting of tax deductions—as incentives to take certain action—support the plaintiffs' standing rationale.[12] According to the majority, this dispute was a matter for the political branches, even though the plaintiffs claimed that the law Congress had already passed gave them the relief they sought.[13]

In *Lujan v. Defenders of Wildlife*,[14] the plaintiffs challenged a rule issued by the Interior Department under the Endangered Species Act which would have made the Act applicable outside the United States only on the high seas.[15] The Court refused to reach the merits because even though the individuals had previously visited the locations and viewed the endangered species there, that "is simply not enough. Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."[16] Accordingly, the Court dismissed for lack of standing.[17]

Finally, in *Clapper v. Amnesty International USA*,[18] the plaintiffs, who were U.S. citizens, sought a court order stopping the Director of National Intelligence from listening to their conversations in violation of a number of constitutional provisions.[19] The plaintiffs included lawyers who talked regularly with their non-U.S. clients who were among the groups of people targeted by the government.[20] They further asserted their belief that those communications had been overheard by the government and will be overheard in the future.[21] Because plaintiffs had no proof that their calls were being overheard and would be overheard in the future, the Court concluded that their claims were too "speculative" and hence that they lacked standing.[22]

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11 *Id.* at 753–61.

12 *Id.* at 737; *see id.* at 788 (Stevens, J., dissenting).

13 *Id.* at 761.

14 504 U.S. 555 (1992).

15 *Id.* at 557–58.

16 *Id.* at 564.

17 *Id.*

18 568 U.S. 398 (2013).

19 *Id.* at 406–07.

20 *Id.*

21 *Id.*

22 *Id.* at 410–14.

Three points are important to note. First, except for *Lujan*, it is clear that no one had better standing than these plaintiffs, which meant that the legality of the action of the government would be unchallengeable forever. Second, if the Article III problem in *Lujan* was only that the plaintiffs had not bought their tickets, the standing decision seemed highly formal, and for that reason, the case was likely to return. Third, the reason that the plaintiffs in *Clapper* could not test the legality of the wiretaps was that the defendant refused to tell them whether their suspicions were justified even though the defendant's records could conclusively answer that factual question.

II. STANDING ON DEMAND

In the Roberts Court, there has been a significant shift that has enabled the Court to reach the merits in a number of cases in which standing and other Article III jurisdictional barriers could have, and in the view of this author, should have required the Court to dismiss the action. But it did not, which made it possible to decide a number of cases on the merits, often coming down on the side of the conservative political position. These standing rulings are particularly striking in light of the traditional manner in which the Court has addressed issues of standing.

In *National Federation of Independent Business v. Sebelius*,[23] the Court was asked to decide the constitutionality of the individual mandate in the Affordable Care Act ("ACA"), which required most individuals who did not have health insurance to pay a penalty—or tax—in an amount considerably less than the cost of the insurance.[24] The law was not scheduled to take effect until 2014 and one of the plaintiffs in the case that reached the Court insisted that he did not have health insurance now and would never purchase it.[25] Plainly, if the Court required the plaintiffs to show an imminent injury, or even something close to a certain future injury as in *Lujan*, the case would have had to be dismissed. In addition, Congress had included exceptions to the payment requirement so that many individuals who would not purchase insurance would not have to pay the tax.[26] Furthermore, an individual who would not otherwise purchase health insurance would not have to pay the tax

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23 567 U.S. 519 (2012).

24 *Id.* at 530–32, 538–39.

25 Florida *ex rel.* Bondi v. U.S. Dep't of Health & Hum. Servs., 780 F. Supp. 2d 1256, 1270–71 (N.D. Fla. 2011).

26 *See Sebelius*, 567 U.S. at 539–40; *Summary of Coverage Provisions in the Patient Protection and Affordable Care Act*, KAISER FAM. FOUND. (July 17, 2012), https://www.kff.org/health-costs/issue-brief/summary-of-coverage-provisions-in-the-patient/ [https://perma.cc/W2GV-X2W6].

if they accepted a job where health insurance was included as a benefit.[27] On the other hand, no one doubted that there would be hundreds of thousands, if not millions, of Americans who would be required to pay the penalty, even if they could not be identified in 2012 when the case was before the Court.

The timing of the case was significant for another reason: 2012 was an election year, and the Republicans were promising to repeal the ACA if they won the presidency and controlled Congress.[28] Indeed, although the Obama Administration initially argued in the lower courts that the plaintiffs' challenge to the individual mandate should be dismissed on standing—i.e., ripeness—grounds, it later withdrew those objections and urged the Court to decide the merits.[29] The Obama Administration hoped for a big victory to tout in the upcoming election, and it did not want to look as if it were running away from defending the ACA.

But as the Court has frequently observed, Article III is not an optional provision, and the Court has an independent obligation to assure its requirements are met.[30] Moreover, the doctrine of constitutional avoidance, under which courts should decline to decide a case on constitutional grounds if there is another way to rule, should also have been a factor in the standing and ripeness analysis. Here, there were major questions as to whether Congress properly exercised its powers under the Commerce Clause and the taxing authority, which in the end sharply divided the Court. There can be no doubt that the Court wanted to reach the merits, but what is most remarkable is that not one of the opinions on the individual mandate suggested that Article III presented even a theoretical obstacle to deciding the constitutional issues regarding the mandate.

Free Enterprise Fund v. Public Company Accounting Oversight Board[31] is a case in which the Court struck down a provision under which Congress prevented members of the Public Company Accounting Oversight Board from being removed except for cause.[32] The plaintiffs had filed a pre-

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27 *See Sebelius*, 567 U.S. at 539–40.

28 *See* Andy Sullivan, *Romney to Campaign as Only Hope Against "Obamacare"*, REUTERS (June 28, 2012, 12:07 PM), https://www.reuters.com/article/us-usa-healthcare-romney/romney-to-campaign-as-only-hope-against-obamacare-idUSBRE85R12M20120628 [https://perma.cc/AN2T-GNL9].

29 *Compare Bondi*, 780 F. Supp. 2d at 1270–73, *and* Florida *ex rel.* Att'y Gen. v. U.S. Dep't of Health & Hum. Servs., 648 F.3d 1235, 1242–44 (11th Cir. 2011), *with Sebelius*, 567 U.S. at 546 (proceeding to the merits of the case without addressing previous standing disputes).

30 *See* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 340 (2006) (raising standing and dismissing for lack of standing when defendants did not raise the issue).

31 561 U.S. 477 (2010).

32 *Id.* at 483–84.

enforcement challenge to the Board's rulemaking authority, which included claims that the Board had not been properly appointed under the Appointments Clause in Article II, § 2, clause 2.[33] The only claim on which they succeeded was that the Board's members could only be removed for cause.[34] The Court did not ask whether members of the public had standing to object to limitations on the power of the President because no one raised it, perhaps because plaintiffs clearly had standing to challenge the propriety of the appointment of the members of the Board. The standing issue would have asked how the plaintiffs were injured by a limit on a power that only the President, not they, could exercise. In any event, the majority wanted to decide the constitutionality of removal restrictions, which is an issue that a number of the Justices on the Roberts Court, especially those aligned with the Federalist Society and the unitary executive theory, have been trying to get the Court to decide.[35] And it was able to take its first step in that direction, setting aside the removal restriction.[36]

Having reached the merits of one removal restriction in *Free Enterprise*, this became a precedent for the next such challenge in *Seila Law v. Consumer Financial Protection Bureau*.[37] *Seila Law* was a routine case in which the Consumer Financial Protection Bureau ("CFPB") went to court to enforce a civil investigative demand issued to a law firm that the agency believed was engaged in unlawful collection activities.[38] The firm raised a number of defenses, all but one of which were rejected and out of the case when it sought Supreme Court review on the issue of whether the bar on removal of the agency's director was unconstitutional.[39] Until that point, the CFPB was represented by its own lawyers, but the law is clear that in the Supreme Court only the Solicitor General may represent a federal agency and hence decide what position to take on the removal question. Consistent with the positions

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33 *Id.* at 487–88.

34 *See id.* at 508–13 (severing the unconstitutional provisions from the remainder of the statute and upholding the Board's appointment structure).

35 *See* Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83, 85 (2021); Emma Brown, *How the Federalist Society Won*, NEW YORKER (July 24, 2022), https://www.newyorker.com/news/annals-of-education/how-the-federalist-society-won [https://perma.cc/8ADE-SZ9A].

36 The Trump Administration asked the Court to decide the constitutionality of the removal limits on administrative law judges in *Lucia v. SEC*, but the Court did not accept the question for review and then refused to decide it when the issue was raised during the merits briefing focused on another issue on which review was granted. 138 S. Ct. 2044, 2050 n.1 (2018).

37 140 S. Ct. 2183 (2020).

38 *Id.* at 2194.

39 *Id.* at 2194–95.

that the Trump Administration had taken in *Lucia*, the government agreed with Seila that the removal-for-cause-only limitation was an unconstitutional restriction on the President's powers to take care that the laws be faithfully executed and urged the Court to grant review and decide that question.[40]

The Court therefore had a problem because there was no party to defend the law, and so it appointed Paul Clement as an amicus to defend the law.[41] In his brief, he argued that the Court should not reach the merits for several reasons, including that Seila lacked standing to challenge the removal restrictions.[42] On the standing issue, the Court cited *Free Enterprise* and a number of other cases in which the constitutionality of the applicable removal restrictions was decided on the merits, although in none of those cases did the Court confront the standing issue.[43] As a result, it now appears that the doors will be wide open for challenges to similar limitations on multimember bodies like the National Labor Relations Board, Federal Trade Commission, and Federal Communications Commission by anyone who is aggrieved by a final order of such an agency. Indeed, with the decision this past term in *Axon Enterprise v. Federal Trade Commission*,[44] which allows structural challenges such as these to be brought before an administrative proceeding is complete,[45] even the filing of an agency complaint against a company will enable it to go to court right away to object to the President's inability to fire the members of the agency.

In the continuing effort to cut back on the effectiveness of the CFPB, the Court will decide next term the constitutionality of the law enabling the agency to receive 100% of its requested funding from the Federal Reserve, with no opportunity for Congress or the President to say "no," unless the agency's organic statute can be amended.[46] The Fifth Circuit ruled that the funding mechanism was unconstitutional,[47] and the government sought and obtained Supreme Court review. Merits aside, the Solicitor General did not even ask the Court to consider whether a private party has standing to object to the manner in which the federal agency that seeks to regulate the way

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40 *Id.* at 2197.

41 *Id.* at 2195.

42 Brief for Court-Appointed *Amicus Curiae* in Support of Judgment Below at 21–27, Seila Law LLC v. CFPB, 140 S. Ct. 2183 (2020).

43 *Seila Law LLC*, 140 S. Ct. at 2196–97.

44 598 U.S. 175 (2023).

45 *Id.* at 180.

46 Cmty. Fin. Sers. Ass'n of Am., Ltd. v. CFPB, 51 F.4th 616 (5th Cir. 2022), *cert. granted sub nom.* CFPB v. Cmty. Fin. Servs. Ass'n of Am., Ltd., 143 S. Ct. 978 (2023) (argument set for Oct. 3, 2023).

47 *Cmty. Fin. Sers. Ass'n of Am., Ltd.*, 51 F.4th at 639–42.

plaintiff is funded, or whether that is a question for Congress, not the courts.[48] And the administrative law judge removal issue will also be back before the Court this year in *Securities Exchange Commission v. Jarkesy*,[49] this time with the law being defended by the Biden Administration on the merits. Again, the Biden Administration is not raising a standing objection, perhaps because of a recognition that standing is no longer a barrier whenever there is a separation of powers issue, or at least one that the Roberts majority wishes to decide.[50]

In *Kennedy v. Bremerton School District*,[51] the only relief that the plaintiff sought was to be reinstated to his former position, but, by the time the Court heard the case, the plaintiff had sold his house in Washington State and moved to Florida to help take care of his father-in-law.[52] In response to the defendant's suggestion of mootness, the plaintiff insisted that he would move back to Washington to accept his job as a part-time high school football coach.[53] In reaching the merits and deciding for the plaintiff, the Court did not even mention the problem even though Article III forbids a court from deciding a claim that is no longer live. There appeared to be at least a factual dispute as to the plaintiff's intentions, but the Court did not send the case back to allow the lower court to conduct further fact finding.[54] Moreover, the merits raised controversial Free Exercise Clause issues, such that the doctrine of constitutional avoidance was a further ground for not reaching the merits, unless the Court wanted to do so.

This term the Court had before it a two pronged challenge to the constitutionality of the Indian Child Welfare Act in *Haaland v. Brackeen*,[55] which, to simplify for these purposes, required courts to give preference in the adoption of Indian children to Indian families, even in cases where the

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48 *See* Petition for a Writ of Certiorari, CFPB v. Cmty. Fin. Servs. Ass'n of Am., Ltd., No. 22-488 (U.S. Nov. 14, 2022).

49 Jarkesy v. SEC, 34 F.4th 446 (5th Cir. 2022), *cert. granted sub nom.* SEC v. Jarkesy, 143 S. Ct. 2688 (2023).

50 *See* Petition for a Writ of Certiorari, SEC v. Jarkesy, No. 22-859 (U.S. Mar. 1, 2023).

51 142 S. Ct. 2407 (2022).

52 Suggestion of Mootness at 1–2, 4–6, Kennedy v. Bremerton School District, 142 S. Ct. 2407 (2022); Response to Respondent's Suggestion of Mootness at 2–4, Kennedy v. Bremerton School District, 142 S. Ct. 2407 (2022).

53 Response to Respondent's Suggestion of Mootness, *supra* note 52, at 1, 4–5.

54 Ultimately, the plaintiff was reinstated, coached for one game, and then resigned to return to Florida. Melissa Quinn, *High School Football Coach at Center of Supreme Court Prayer Case Resigns After First Game Back*, CBS NEWS (Sept. 6, 2023, 6:01 PM), https://www.cbsnews.com/news/supreme-court-prayer-case-football-coach-joe-kennedy-resigns-bremerton-high-school/ [https://perma.cc/9RKS-KEWN].

55 143 S. Ct. 1609 (2023).

child has been living in a non-Indian home and the family wished to adopt the child.[56] The first question was whether Congress had the power to enact this law under Article I, even though adoption laws are the exclusive province of the states.[57] A divided court upheld the statute, but it then declined to decide the second question, which was whether the preferred treatment for Indians was a racial classification that violated the Equal Protection Clause.[58]

The Court's rationale is what is interesting. The majority concluded that the plaintiffs, who were non-Indians, lacked standing to sue on that claim in federal court because the plaintiffs had no Equal Protection claims against the defendants, who were all federal officials.[59] It went on to add that those claims could be raised in state courts where the contested adoption proceedings would be conducted.[60] I believe that the Court was correct in declining to decide the Equal Protection claim, but not because of a lack of standing: the plaintiffs were surely injured if they were denied the right to adopt a child because the outcome was based on unconstitutional racial classifications authorized by federal law. The problem was that the federal officials had no control over the outcome in those cases, which were decided by state courts applying state law in the first instance, subject to the requirements of the governing federal law.

In that respect, it was like the Texas abortion case, *Whole Woman's Health v. Jackson*,[61] in which the Court's majority ruled that the plaintiffs' claims could not be heard in federal court because there was no properly sued defendant who was charged with enforcing the state law and therefore its constitutionality could only be decided in a state court as a defense to an enforcement action there.[62] The only difference between the cases is that the defendants in the Texas case were state officials and those in *Haaland* were federal officers, but for neither claim did the plaintiffs have a federal claim against the only defendants in the federal court. Seen in that light, the problem in *Haaland* was not standing, but failure to present a federal claim against the only defendants in the case. If that is correct, then the same defect should have prevented the Court from reaching the merits of the Article I Indian Child Welfare Act claim because the same federal defendants had no

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56 *Id.* at 1623–25.

57 *Id.* at 1627–31.

58 *Id.* at 1627–31, 1638–40. Plaintiffs also had a non-delegation challenge, which lacked standing for the same reason. *Id.* at 1640–41.

59 *Id.* at 1638–40.

60 *Id.* at 1640 n.10.

61 142 S. Ct. 522 (2021).

62 *Id.* at 531–34, 537.

enforcement authority under it either. Thus, *Haaland* seems like a case in which the majority decided it wished to uphold the authority of Congress to legislate on this subject, but that it was unwilling to face the difficult legal and political Equal Protection issue of whether the classification was improperly based on race. In other words, the Court should have reached the same threshold determination on both issues, and the refusal to decide only the Equal Protection claim was error, regardless of whether it was based on standing or failure to state a claim against these defendants.

In June 2023, the Court found a way to reach the merits in three other cases, each involving a different element of Article III, in order to decide a difficult constitutional question. In *Moore v. Harper*,[63] at issue was the validity of the independent state legislature theory, a doctrine that purported to give state legislatures the final say in cases in which their redistricting for seats in the U.S. House of Representatives was challenged.[64] In *Moore*, the North Carolina Supreme Court had overturned what the legislature had done and ordered new district lines for the 2022 election.[65] That election was over, but the Supreme Court agreed to hear the question of whether the state court had overstepped its federal constitutional boundaries, which would prevent that court from stepping into future disputes and might have affected the 2024 elections.[66]

That was the situation when the case was argued in December, but the election in November 2022 had significantly altered the composition of the North Carolina Supreme Court.[67] That court on the motion of the legislature reconsidered its prior decision in this very case, concluding that the prior judges erred and that the state court lacked the power, as a matter of state law, to overturn the substantive conclusions of the legislature on proper district lines.[68] Some, but not all, of the legislature's opponents, who had prevailed below, argued that the U.S. Supreme Court case was moot, and in any event, everyone agreed that the Supreme Court had an independent Article III duty not to decide a case that has become moot.[69]

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63 143 S. Ct. 2065 (2023).

64 *Id.* at 2074–75.

65 *Id.*

66 *Id.* at 2076–79.

67 The 2022 election swung the composition of the North Carolina Supreme Court from a 4–3 Democratic majority to a 5–2 Republican majority. Andrew Chung, *North Carolina Urges US Supreme Court to Toss Major Elections Case*, REUTERS (Mar. 20, 2023, 8:48 PM), https://www.reuters.com/world/us/north-carolina-urges-us-supreme-court-toss-major-elections-case-2023-03-20/ [https://perma.cc/9RZW-NLGL].

68 *Moore*, 143 S. Ct. at 2074–79.

69 *See* Brief for Non-State Respondents at 70, Moore v. Harper, 143 S. Ct. 2065 (2023); Brief in Opposition of Respondent Common Cause at 4, 33, Moore v. Harper, 143 S. Ct. 2065

To the surprise of many, the majority rejected the mootness argument on the theory that the original state court ruling—that the legislature's plan for 2022 was invalid—was still the law, and it could be overturned only if the Supreme Court adopted the independent legislature theory.[70] On the other side, the legislature had not asked the North Carolina court to overturn that ruling, probably because the 2022 election was over and the legislature would be free to draw new lines for 2024, with or without a favorable ruling on the issue on which the Supreme Court had granted review.

With a live case before it, the Court ruled that the independent state legislature theory, as espoused by the North Carolina legislature, was invalid, but then announced, relying on the three Justice concurrence in *Bush v. Gore*,[71] that the federal courts had the obligation to assure that state courts followed state laws in federal election cases so that the legislature, not the court, made state law.[72] Because no party challenged the 2022 decision, there was no specific case to which that warning could be applied, which enabled the Court to issue an arguable advisory opinion, another prohibition under Article III. Ironically, or perhaps not, had the legislature prevailed on their principal argument, the state legislature's power would be aggrandized, but the actual result produced a power shift from the state to the federal courts, and in particular the U.S. Supreme Court, where a losing party in a state court would seek redress.

The second plaintiff in this group of three cases was the website designer in *303 Creative v. Elenis*[73] who wished to expand into doing websites for weddings. Because she believed strongly that marriage should be reserved for a man and a woman, she stated that she would refuse to design a website for a same-sex couple that celebrated their marriage.[74] She also made clear that she was willing to serve gays and lesbians, but not in a way that her website design would support their marriage.[75] She had never done a website for a wedding, and no same-sex couple had directly approached her to do one, let alone had discussed the details of what such a website would contain.[76] The Colorado Civil Rights Commission took the position that her unwillingness to do wedding websites for same-sex marriages violated its

(2023); Brief in Opposition by State Respondents at 37, Moore v. Harper, 143 S. Ct. 2064 (2023).

70 *Id.* at 2076–79.

71 531 U.S. 98, 111–22 (2000) (Rehnquist, C.J., concurring).

72 *Moore*, 143 S. Ct. at 2089–90.

73 143 S. Ct. 2298 (2023).

74 *Id.* at 2308–09.

75 *Id.* at 2309.

76 *Id.* at 2308.

statute, and in order to avoid being sued or possibly penalized, the designer brought suit in federal court seeking a pre-enforcement court ruling that she had a First Amendment right to refuse to design a website that offended her beliefs, on the ground that to do so would be compelled speech.[77] The state cooperated with her effort to obtain an advance ruling by stipulating to a long set of facts and not raising any Article III objections to her case.[78]

Because her claim was based on the First Amendment, she did not have to wait to be sued by the state to have Article III standing and to avoid a ripeness objection.[79] But the nature of her claim alone does not permit a court to decide the legal issue that she presented unless there are concrete facts on which to base its constitutional ruling. The principal problem in this regard was that the record is unclear as to what exactly any client wanted her to include on their website and whether carrying out the client's wishes would have offended her deeply held beliefs—almost certainly because she was never faced with a concrete request. Would including their names or their photographs be offensive, and would their inclusion be the kind of artistic speech that she claimed was protected under the First Amendment? If a same-sex couple wanted only the most plain vanilla website, with just the basic facts and a link to the hotel and gift registry, would she have refused to do even that? The Court did not know because she never had a real customer who made a real request. In other words, was there a concrete case or controversy of the kind that Article III requires before a court may decide a legal issue, even if both sides ask the court to resolve it?

There is another reason why the Court should not have decided this hypothetical case. Included in the stipulation of the parties were Exhibits A and B that she planned to include on her website.[80] The first was a mock-up of a possible website, which could be seen as unwelcoming to same-sex couples, or simply what the plaintiff chose to use as her sample. Did Colorado threaten to sue her over that sample? We do not know, but unless it did, then there may never be a case raising a First Amendment issue because some couples may not have objected to it. Exhibit B was much more provocative, with its references to God and marriage being between a man and a woman, and seemed to close the door to same-sex couples, even if they wanted a plain vanilla website because of its lower price. Again, the Court does not know what the Colorado Civil Rights Commission and the state

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77 *Id.* at 2308–09.

78 *Id.* at 2309–10.

79 *See id.* at 2308 (citing Susan B. Anthony List v. Driehaus, 573 U.S. 149, 159 (2014)).

80 Joint Appendix at 51–74, 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023), https://www.supremecourt.gov/DocketPDF/21/21-476/226349/20220526141251289_21-476%20Joint%20Appendix.pdf [https://perma.cc/98YN-H8G7].

courts would say about Exhibit B, which perhaps explains why the Court announced its legal conclusions, but the decision gives no indication of what the lower court must order the defendant to do or not do.

The fact that both parties ask the Court to decide a legal issue does not mean that Article III has been satisfied. Nor does it require the Court, which has absolute discretion to deny review in a case like this, or to dismiss the writ as improvidently granted, to issue a constitutional ruling when there are no real facts to cabin its adjudication—that is, unless the Court wants to decide the issue because of its views on the merits.

Before returning to *Biden v. Nebraska*, it is necessary to note that the Court has not wholly abandoned its traditional approach to standing. For example, in *California v. Texas*,[81] the Court was once again asked to invalidate the entire ACA, this time because Congress had repealed the tax that individuals had to pay if they did not have health insurance.[82] The plaintiffs, eighteen states and several individuals, asserted that, because the individual mandate was both the key to the ACA's insurance coverage, and no longer had any effect, the entire ACA was no longer a valid law, and the Court should so rule,[83] even though the law had been fully operative since 2012, benefitting millions of Americans. With Justice Breyer writing for the Court, the case was dismissed for lack of standing, mainly because the plaintiffs could not show any cognizable harm that the repeal of the tax caused them.[84] What is most remarkable is that three Justices dissented on standing in what was plainly an ideological lawsuit seeking to obtain in court what the Trump Administration had asked Congress to do—repeal the entire ACA—but for which it was unable to garner the necessary votes, even when the Republicans had majorities in both houses of Congress.

Once again, this past term, in another suit in which Texas was one of the plaintiffs,[85] the Court dismissed for lack of standing an effort to overturn the Biden Administration policy under which it set priorities for removing noncitizens who were no longer entitled to remain in this country.[86] Justice Kavanaugh concluded that none of the plaintiffs could show any Article III injury from the exercise of administrative discretion to exempt certain

81 141 S. Ct. 2104 (2021).

82 *Id.* at 2112.

83 *Id.*

84 *Id.* at 2113.

85 United States v. Texas, 143 S. Ct. 1964 (2023).

86 *Id.* at 1968.

individuals from deportation when everyone agreed that it was impossible to deport everyone who was in the country unlawfully.[87]

Two other points are worth noting. Three Justices who concurred with the standing decision did so on the basis that the relief that plaintiffs sought was not redressable, but not because they had not been injured.[88] Their argument was that a provision of the Immigration and Nationality Act precluded courts from issuing an order of the kind that plaintiffs sought, and so they could not succeed.[89] Assuming that their reading of the law is correct, that would not be a standing problem, but a reason to reject the claim on the merits. That is because redressability under the law of standing applies when a favorable court ruling would be futile because the defendant has no control over the acts about which the plaintiff is complaining.[90] Here the defendant had the power to invalidate the Biden Administration's policy, as required for standing, but the courts had no power to force the defendant to do so, as required to succeed on the merits. Finally, the fact that another Justice dissented and would have found a cognizable injury demonstrates once again how malleable standing law has become and how it enables the Supreme Court—and encourages the lower courts—to find standing if they want to decide the merits, either for or against the plaintiffs.[91]

The third recent traditional standing case is *TransUnion LLC v. Ramirez*.[92] The defendant, a company that compiles and sells credit ratings for individuals, failed to "ensure the accuracy of their credit files" causing an individual to suffer actual harm when he was misidentified as a possible terrorist.[93] That individual brought a class action under a federal statute that was designed to deal with this very kind of case.[94] After a trial on the merits, the lower courts affirmed damages awards for two groups of individuals beside the named plaintiff.[95] However, the Supreme Court ruled that only the named plaintiff could recover on one claim and that only a portion of the class—about 20%—could recover on the other,[96] even though Congress had provided otherwise. The Court so ruled because Article III allows the courts to award money damages for only certain kinds of injuries and it concluded

87 *Id.* at 1969–72.

88 *Id.* at 1977 (Gorsuch, J., concurring).

89 *Id.* at 1798–80.

90 *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 568–71 (1992).

91 United States v. Texas, 143 S. Ct. at 1989 (Alito, J., dissenting).

92 141 S. Ct. 2190 (2021).

93 *Id.* at 2200–02.

94 *Id.*

95 *Id.* at 2202.

96 *Id.* at 2214.

that the vast majority of class members had not suffered the constitutionally required injury.[97] Merits of that ruling aside—and there may be differences between the two groups that were found to lack standing—the strict adherence to the Court's limits on standing here stands in marked contrast to a number of the Court's other recent standing decisions, including the one delivered by the Chief Justice on the final decision day in 2023 in *Biden v. Nebraska*.

At issue there was whether the President had the legal authority to cancel roughly $430 billion in debts owed to the government under the federal student loan program, in some cases as much as $20,000 for some individuals.[98] The effects of the cancellation would have been to help hundreds of thousands of debtors and to make the federal treasury that much poorer. The claim looked like one in which taxpayers objected to the manner in which the government spent money, whether the claim is based on a statute or the Constitution, and the Court has been clear that taxpayers lack standing to bring such claims, except when the claim is based on the Establishment Clause.[99]

The state of Missouri had an idea to deal with the standing problem, which the majority accepted. Missouri had created an independent nonprofit body to service student loan repayments for a fee.[100] The state claimed that, if the loan cancellation went ahead, the loan servicer would lose fees and suffer a real economic injury.[101] Aside from the question of whether the loan servicer was in the zone of interest of the laws on which the plaintiffs relied—i.e., whether it had a constitutionally cognizable injury—there was another big problem: the loan servicer was not a party to the case, and it had refused to join or even cooperate with the State Attorney General who had filed the lawsuit.[102] Moreover, all of the profits or losses realized by the loan servicer stayed with it and were not passed along to Missouri.[103]

I will not attempt to describe the means by which the Court concluded that none of this adversely affected Missouri's standing and hence the ability of the Court to decide the merits against the Biden Administration. I leave that to Justice Kagan's dissent, noted in the introduction. But this case, more

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97 *Id.* at 2208–14.

98 Biden v. Nebraska, 143 S. Ct. 2355, 2364–65 (2023).

99 *See* Flast v. Cohen, 392 U.S. 83, 105–06 (1968).

100 *Nebraska*, 143 S. Ct. at 2365–66.

101 *Id.*

102 *Id.* at 2386–87 (Kagan, J., dissenting).

103 *Id.*

than any other, demonstrates that the Court will not let standing stand in its way when it wishes to rule for the plaintiffs on the merits.

CONCLUSION

What do we make of these cases? First, is it fair to conclude that the Court has become more flexible in its invocation of strict rules on standing and other Article III case or controversy limitations? Readers can decide for themselves, but this recitation of cases, even recognizing that there are many others, strongly suggests that these doctrines are not being applied in the same manner in every case. Perhaps that is not all bad, especially for those who believe that the Court has been too rigid in at least some cases in the past.

Second, and the more debatable question, is whether the Court is applying the Article III limitations strictly or not, depending on whether it wishes to decide a case and make its views on the merits the established law. Even more debatable is the claim that the decision on whether to decide the case depends on whether the outcome will coincide with the agenda of the political party of the President who appointed the deciding Justices. To my mind, there is a reasonable case to be made for that proposition, but we will probably not know the answer for many decades, if ever, but at least not until all the papers of the current Justices are made public, and perhaps not even then.