Modern American Remedies:
Cases and Materials
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2025 Supplement

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PREFACE

This Supplement includes decisions through July 10, 2025. As in the main volume, quotations appearing in this Supplement may remove internal quotation marks and citations without notice for ease of reading. Always check the original source before quoting material reprinted here. Citations to statutes are as they existed in spring 2025.

Students, just as no one expects you to memorize all the information in the main volume, no one expects you to memorize all the recent decisions. But reviewing recent developments helps give you a sense of the field and its trajectory. The continuing flow of remedies litigation, especially in the Supreme Court of the United States, illustrates the continuing importance of these issues and the remarkable variety and novelty with which they appear.

We are grateful to Mariah Hall at Texas for research assistance.

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CHAPTER TWO

PAYING FOR HARM: COMPENSATORY DAMAGES

E. Limits on Damages

2. Avoidable Consequences, Offsetting Benefits, and Collateral Sources

Page 83. At the end of note 6, add:

6. The seat-belt cases. . . .

Georgia passed a wide ranging tort reform bill in 2025. Among other things, the bill repealed the state's ban on seat-belt evidence and expressly provided that such evidence is admissible for any purpose. But failure to use a seat belt cannot be a basis for cancelling insurance coverage or raising insurance rates. Ga. Code §40-8-76.1.

Page 90. At the end of note 5, add:

5. Discounted medical bills. . . .

Georgia has also addressed discounted medical bills. It provided that "Special damages for medical and healthcare expenses shall be limited to the reasonable value of medically necessary care, treatment, or services," and that both the amounts billed and the amounts actually paid pursuant to an insurance contract or otherwise shall be admissible evidence on the reasonable value. The legislation does not say what the factfinder is supposed to do with this evidence. Ga. Code §51-12-1.1. This sounds like a reasonable compromise, but it kicks the policy issue to each jury. It can mean that some plaintiffs recover the full amount of the inflated hospital bill and others recover only the much smaller amount paid under the insurance contract.

3. The Scope of Liability

Page 99. After note 10, add:

11. A RICO puzzle. The Racketeer Influenced and Corrupt Organizations Act creates a cause of action for "any person injured in his business or property" by actions that might, at least in theory, be prosecuted as crimes. 18 U.S.C. §1964(c). What if business or property losses are caused by a personal injury? See Medical Marijuana, Inc. v. Horn, 145 S. Ct. 931 (2025). Plaintiff took a pain reliever sold by defendant. Defendant represented that its product contained no THC, the psychoactive compound in marijuana. But plaintiff soon failed a drug test administered by his employer and lost his job. He sued under RICO, alleging that loss of employment was an injury to his business or property.

Some circuits had held that any claim arising out of an injury to the person was categorically barred. The Court disagreed, in an opinion by Justice Barrett. "[T]he 'business or property' requirement operates with respect to the *kinds* of harm for which the plaintiff can recover, not the *cause* of the harm for which he seeks relief." Id. at 939.

Justice Kavanaugh for three dissenters said that nearly all personal injuries have financial consequences, so that many personal injury claims could now be alleged as RICO claims. Justice Barrett said that would not happen. Plaintiff must first establish RICO's criminal prerequisites. Beyond that, RICO has a tight scope-of-liability limit: the RICO violation must directly cause the

harm, and "foreseeability does not cut it." Id. at 945. And the Court had not decided whether loss of employment is an injury to business or property.

G. Damages Where Harm Cannot Be Valued in a Market

1. Personal Injuries, Pain and Suffering, and Death

Page 161. After note 9, add:

9.1. Legislation. New tort reform legislation in Georgia prohibits counsel from mentioning any amount for "noneconomic" damages until her closing argument to the jury. And then "such argument shall be rationally related to the evidence of noneconomic damages and shall not make reference to objects or values having no rational connection to the facts proved by the evidence." Ga. Code §9-10-184. This last sentence is apparently aimed at arguments such as those disapproved in Gregory v. Chohan, 670 S.W.3d 546 (Tex. 2023), where plaintiff's lawyer suggested numbers based on the high cost of fighter jets and rare works of art, and also suggested two cents for every mile the defendant trucking company had driven.

3. The Controversy over Tort Law

Page 199. At the end of note 3, add:

3. Damage caps. . . .

Colorado has also substantially increased its damage caps for claims accruing in 2025 and later. The cap on "noneconomic" damages in most cases was increased from $250,000 to $1,500,000. Colo. Rev. Stat. §13-21-102.5(3)(A)(I). The cap on "noneconomic" damages in suits against medical providers is lower, but gradually increases to $875,000 in 2029. Id. §13-64-302(c)(I)(F). The cap on "noneconomic" damages in most wrongful death cases is raised to $2,125,000; here too, the cap is lower for health care providers. Id. §13-21-203. All these caps are to be adjusted for inflation going forward.

Page 206. After note 8, add:

9. Constitutionality. The Supreme Court has imposed constitutional limits on very large awards of punitive damages. See section 3.A.2. Some defendants have begun to argue that similar constitutional limits should apply to compensatory damages for pain and suffering and the like. ExxonMobil is reportedly making this argument in Gill v. ExxonMobil, now pending in the Pennsylvania Superior Court. See Casey Alan Coyle, *Mo Money Mo Problems: As Noneconomic Damages Awards Continue to Rise, So Do Concerns Over Their Constitutionality*, Legal Intelligencer (June 12, 2025). The jury awarded, and the trial court upheld, a $725 million verdict in a case of cancer allegedly caused by defendant's benzene. Gill v. ExxonMobil Corp., https://perma.cc/6S45-QV5K (Pa. Ct. Com. Pl. 2024).

For discussion of the alleged excessiveness of the damage award, see id. at 349-356. Plaintiff had lost income, and he must have had medical expenses, but he did not claim damages based on these. The entire award was for "noneconomic" damages. The Coyle article reports that ExxonMobil argued in the trial court both that there should be due process limits on compensatory damages and that this award was punitive damages in disguise. The trial court said that the damages were entirely compensatory, and it did not discuss the claim that constitutional limits should apply to compensatory damages.

CHAPTER THREE

PUNITIVE REMEDIES

A. Punitive Damages

1. Common Law and Statutes

Page 231. After note 5, add:

5.1. An extreme ratio, pending. NSO Group produces and sells Pegasus, generally described as a spyware program. It is marketed openly to governments, but is also sold or used in the private sector. A jury found that NSO used its software to hack into the WhatsApp accounts of 1400 journalists, human rights activists, and government officials. It awarded $444,719 in compensatory damages and $167,254,000 in punitive damages—a ratio of just over 376:1. NSO's motion for a new trial, and WhatsApp's motion for a permanent injunction against further hacking, are pending.

The case is described in Eli Tan & Sheera Frenkel, *Meta Awarded $167 Million in Damages from Israeli Cybersecurity Firm*, N.Y. Times (May 6, 2025). There are no opinions related to the size of the verdict, but the verdict form and other case documents are available on Pacer. WhatsApp Inc. v. NSO Group Technologies Ltd., No. 19-cv-07123 in the Northern District of California.

CHAPTER FOUR

PREVENTING HARM: THE MEASURE OF INJUNCTIVE RELIEF

A. The Scope of Injunctions

1. Preventing Wrongful Acts

Page 271. After note 8, add:

9. The Supreme Court weighs in. The Court finally addressed the issue in the next principal case.

Trump v. CASA, Inc.

606 U.S. ___, 2025 WL 1773631 (U.S. June 27, 2025)

Justice BARRETT delivered the opinion of the Court.

The United States has filed three emergency applications challenging the scope of a federal court's authority to enjoin Government officials from enforcing an executive order. Traditionally, courts issued injunctions prohibiting executive officials from enforcing a challenged law or policy only against the plaintiffs in the lawsuit. The injunctions before us today reflect a more recent development: district courts asserting the power to prohibit enforcement of a law or policy against *anyone*. These injunctions—known as "universal injunctions"—likely exceed the equitable authority that Congress has granted to federal courts.[1] We therefore grant the Government's applications to partially stay the injunctions entered below.

I

The applications before us concern three overlapping, universal preliminary injunctions entered by three different District Courts. See 763 F. Supp. 3d 723 (D. Md. 2025), appeal pending, No. 25–1153 (4th Cir.); 765 F. Supp. 3d 1142 (W.D. Wash. 2025), appeal pending, No. 25–807 (9th Cir.); Doe v. Trump, 766 F. Supp. 3d 266 (D. Mass. 2025), appeal pending, No. 25–1170 (1st Cir.). The plaintiffs—individuals, organizations, and States—sought to enjoin the implementation and enforcement of President Trump's Executive Order No. 14160. See Protecting the Meaning and Value of American Citizenship, 90 Fed. Reg. 8449 (2025). The Executive Order identifies circumstances in which a person born in the United States is not "subject to the jurisdiction thereof" and is thus not recognized as an American citizen. Specifically, it sets forth the "policy of the United States" to no longer issue or accept documentation of citizenship in two scenarios: "(1) when [a] person's mother was unlawfully present in the United States . . . or (2) when [a] person's mother's presence in the United States was lawful but temporary," [if, in either case] "the person's

[1] Such injunctions are sometimes called "nationwide injunctions," reflecting their use by a single district court to bar the enforcement of a law anywhere in the Nation. But the term "universal" better captures how these injunctions work. Even a traditional, parties-only injunction can apply beyond the jurisdiction of the issuing court. Steele v. Bulova Watch Co., 344 U.S. 280, 289 (1952) (. . . a district court "may command persons properly before it to cease or perform acts outside its territorial jurisdiction"). The difference between a traditional injunction and a universal injunction is not so much *where* it applies, but *whom* it protects: A universal injunction prohibits the Government from enforcing the law against *anyone*, anywhere.

father was not a United States citizen or lawful permanent resident at the time of said person's birth." *Id.* . . .

The plaintiffs filed suit, alleging that the Executive Order violates the Fourteenth Amendment's Citizenship Clause, §1, as well as §201 of the Nationality Act of 1940, 8 U.S.C. §1401. In each case, the District Court concluded that the Executive Order is likely unlawful and entered a universal preliminary injunction barring various executive officials from applying the policy to *anyone* in the country. And in each case, the Court of Appeals denied the Government's request to stay the sweeping relief. See 2025 WL 654902 (4th Cir. Feb. 28, 2025); 2025 WL 553485 (9th Cir. Feb. 19, 2025); 131 F. 4th 27 (1st Cir. 2025).

The Government has now filed three nearly identical applications seeking to partially stay the universal preliminary injunctions and limit them to the parties. The applications do not raise—and thus we do not address—the question whether the Executive Order violates the Citizenship Clause or Nationality Act.

[Preliminary injunctions are injunctions issued before final judgment, based on a preliminary hearing and tentative findings. A stay is also a tentative ruling; it would defer enforcement of these preliminary injunctions pending appeal. So the opinion begins by saying that the injunctions "likely" exceed the trial courts' authority. But that appears to be a formality; the rest of the opinion is written in definitive terms. This ruling is quite unlikely to change after further briefing. Stays and preliminary injunctions are considered in section 5.B.]

III

A

The Government is likely to succeed on the merits of its argument regarding the scope of relief. A universal injunction can be justified only as an exercise of equitable authority, yet Congress has granted federal courts no such power.[4]

The Judiciary Act of 1789 endowed federal courts with jurisdiction over "all suits . . . in equity," §11, 1 Stat. 78, and still today, this statute "is what authorizes the federal courts to issue equitable remedies," Samuel L. Bray & Emily Sherwin, *Remedies* 442 (4th ed. 2024). Though flexible, this equitable authority is not freewheeling. . . . [T]he statutory grant encompasses only those sorts of equitable remedies "traditionally accorded by courts of equity" at our country's inception. Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 319 (1999) [briefly summarized in the main volume at 858]. We must therefore ask whether universal injunctions are sufficiently "analogous" to the relief issued "by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act." *Id.* at 318-319.

The answer is no: Neither the universal injunction nor any analogous form of relief was available in the High Court of Chancery in England at the time of the founding. . . .

[S]uits in equity were brought by and against individual parties. Indeed, the "general rule in Equity [was] that all persons materially interested [in the suit] [were] to be made parties to it." Joseph Story, *Commentaries on Equity Pleadings* §72 at 74 (2d ed. 1840). Injunctions were no exception; there were "sometimes suits to restrain the actions of *particular* officers against *particular* plaintiffs." Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*,

[4] Our decision rests solely on the statutory authority that federal courts possess under the Judiciary Act of 1789. We express no view on the Government's argument that Article III forecloses universal relief.

131 Harv. L. Rev. 417, 425 (2017) (emphasis added). . . . The Chancellor's remedies were also typically party specific. . . . Suffice it to say, then, under longstanding equity practice in England, there was no remedy "remotely like a national injunction." *Id.* at 425.

Nor did founding-era courts of equity in the United States chart a different course. If anything, the approach traditionally taken by federal courts cuts *against* the existence of such a sweeping remedy. Consider Scott v. Donald, 165 U.S. 107 (1897), where the plaintiff successfully challenged the constitutionality of a law on which state officials had relied to confiscate alcohol that the plaintiff kept for personal use. Although the plaintiff sought an injunction barring enforcement of the law against both himself and anyone else "whose rights [were] infringed and threatened" by it, this Court permitted only a narrower decree between "the parties named as plaintiff and defendants in the bill." *Id.* at 115-117.

In the ensuing decades, we consistently rebuffed requests for relief that extended beyond the parties. See, *e.g.*, Perkins v. Lukens Steel Co., 310 U.S. 113, 123 (1940) ("The benefits of [the court's] injunction" improperly extended "to bidders throughout the Nation who were not parties to any proceeding, who were not before the court[,] and who had sought no relief"); cf. Frothingham v. Mellon, 262 U.S. 447, 487-489 (1923) (concluding that the Court lacked authority to issue "preventive relief " that would apply to people who "suffe[r] in some indefinite way in common with people generally"). As Justice Nelson put it while riding circuit, "[t]here is scarcely a suit at law, or in equity, . . . in which a general statute is interpreted, that does not involve a question in which other parties are interested." Cutting v. Gilbert, 6 F. Cas. 1079, 1080 (C.C.S.D.N.Y. 1865) (No. 3519). But to allow all persons subject to the statute to be treated as parties to a lawsuit "would confound the established order of judicial proceedings." *Id.*

Our early refusals to grant relief to nonparties are consistent with the party-specific principles that permeate our understanding of equity. "[N]either declaratory nor injunctive relief," we have said, "can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs." Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) [reprinted in the main volume at 587].

In fact, universal injunctions were not a feature of federal-court litigation until sometime in the 20th century. The D. C. Circuit issued what some regard as the first universal injunction in 1963. See Wirtz v. Baldor Electric Co., 337 F.2d 518, 535 (D.C. Cir. 1963) (enjoining the Secretary of Labor "with respect to the entire [electric motors and generators] industry," not just the named plaintiffs to the lawsuit). Yet such injunctions remained rare until the turn of the 21st century, when their use gradually accelerated. . . .

The bottom line? The universal injunction was conspicuously nonexistent for most of our Nation's history. Its absence from 18th- and 19th-century equity practice settles the question of judicial authority. That the absence continued into the 20th century renders any claim of historical pedigree still more implausible. . . .

Faced with this timeline, the principal dissent accuses us of "misunderstand[ing] the nature of equity" as being "fr[ozen] in amber . . . at the time of the Judiciary Act." *Post* at *37 (Sotomayor J., dissenting). Not so. We said it before, and say it again: "[E]quity is flexible." *Grupo Mexicano*, 527 U.S. at 322. At the same time, its "flexibility is confined within the broad boundaries of traditional equitable relief." *Id.* A modern device need not have an exact historical match, but under *Grupo Mexicano*, it must have a founding-era antecedent. And neither the universal injunction nor a sufficiently comparable predecessor was available from a court of equity at the time of our country's inception. Because the universal injunction lacks a historical pedigree, it falls outside

the bounds of a federal court's equitable authority under the Judiciary Act.[10]

B . . .

1

In an effort to satisfy *Grupo Mexicano*'s historical test, respondents claim that universal injunctive relief *does* have a founding-era forebear: the decree obtained on a "bill of peace," which was a form of group litigation permitted in English courts. This bill allowed the Chancellor to consolidate multiple suits that involved a "common claim the plaintiff could have against multiple defendants" or "some kind of common claim that multiple plaintiffs could have against a single defendant." Bray, *Multiple Chancellors*, 131 Harv. L. Rev. at 426. . . .

The analogy does not work. True, "bills of peace allowed [courts of equity] to adjudicate the rights of members of dispersed groups without formally joining them to a lawsuit through the usual procedures." Arizona v. Biden, 40 F.4th 375, 397 (6th Cir. 2022) (Sutton, C. J., concurring). Even so, their use was confined to limited circumstances. Unlike universal injunctions, . . . a bill of peace involved a "group [that] was small and cohesive," and the suit did not "resolve a question of legal interpretation for the entire realm." Bray, *Multiple Chancellors* at 426. And unlike universal injunctions, which bind only the parties to the suit, decrees obtained on a bill of peace "would bind all members of the group, whether they were present in the action or not." 7A Charles Alan Wright, *Federal Practice and Procedure* §1751 at 10.

The bill of peace lives in modern form, but not as the universal injunction. It evolved into the modern class action, which is governed in federal court by Rule 23 of the Federal Rules of Civil Procedure. . . . Rule 23 . . . would still be recognizable to an English Chancellor. Rule 23 requires numerosity (such that joinder is impracticable), common questions of law or fact, typicality, and representative parties who adequately protect the interests of the class. The requirements for a bill of peace were virtually identical. None of these requirements is a prerequisite for a universal injunction. . . .

[U]niversal injunctions circumvent Rule 23's procedural protections and allow "courts to create *de facto* class actions at will." Smith v. Bayer Corp., 564 U.S. 299, 315 (2011). Why bother with a Rule 23 class action when the quick fix of a universal injunction is on the table? . . .

2

Respondents contend that universal injunctions—or at least *these* universal injunctions—are consistent with the principle that a court of equity may fashion a remedy that awards complete relief. We agree that the complete-relief principle has deep roots in equity. But to the extent respondents argue that it justifies the award of relief to nonparties, they are mistaken.[11]

"Complete relief " is not synonymous with "universal relief." It is a narrower concept: The

[10] Nothing we say today resolves the distinct question whether the Administrative Procedure Act authorizes federal courts to vacate federal agency action.

[11] Justice Jackson . . . thinks the "premise" that universal injunctions provide relief to nonparties is "suspect" because, in her view, "[n]onparties may *benefit* from an injunction, but only the plaintiff gets *relief*." *Post*, at *47, n.2 (dissenting). The availability of contempt proceedings suggests otherwise. . . . "When an order grants relief for a nonparty," as is the case with universal injunctions, "the procedure for enforcing the order is the same as for a party." Fed. Rule Civ. Proc. 71. So a nonparty covered by a universal injunction is likely to reap both the practical benefit and the formal relief of the injunction.

equitable tradition has long embraced the rule that courts generally "may administer complete relief *between the parties*." Kinney-Coastal Oil Co. v. Kieffer, 277 U.S. 488, 507 (1928) (emphasis added). While party-specific injunctions sometimes "advantag[e] nonparties," Trump v. Hawaii, 585 U.S. 667, 717 (Thomas, J., concurring), they do so only incidentally.

[The Court offered the example of one neighbor successfully suing another to enjoin a nuisance]. That order will necessarily benefit the defendant's surrounding neighbors too; . . . But while the court's injunction might have the *practical effect* of benefiting nonparties, "that benefit [is] merely incidental." *Trump*, 585 U.S. at 717 (Thomas, J., concurring). As a matter of law, the injunction's protection extends only to the suing plaintiff—as evidenced by the fact that only the plaintiff can enforce the judgment against the defendant responsible for the nuisance. If the nuisance persists, and another neighbor wants to shut it down, she must file her own suit.[13] . . .

[T]he question is not whether an injunction offers complete relief to *everyone* potentially affected by an allegedly unlawful act; it is whether an injunction will offer complete relief *to the plaintiffs before the court*. Here, prohibiting enforcement of the Executive Order against the child of an individual pregnant plaintiff will give that plaintiff complete relief: Her child will not be denied citizenship. Extending the injunction to cover all other similarly situated individuals would not render *her* relief any more complete.

The complete-relief inquiry is more complicated for the state respondents, because the relevant injunction does not purport to directly benefit nonparties. . . .

As the States see it, their harms—financial injuries and the administrative burdens flowing from citizen-dependent benefits programs—cannot be remedied without a blanket ban on the enforcement of the Executive Order. Children often move across state lines or are born outside their parents' State of residence. Given the cross-border flow, the States say, a "patchwork injunction" would prove unworkable, because it would require them to track and verify the immigration status of the parents of every child, along with the birth State of every child for whom they provide certain federally funded benefits.

The Government . . . retorts that even if the injunction is designed to benefit only the States, it is "more burdensome than necessary to redress" their asserted harms. Califano v. Yamasaki, 442 U.S. 682, 702 (1979). After all, to say that a court *can* award complete relief is not to say that it *should* do so. Complete relief is not a guarantee—it is the maximum a court can provide. . . .

Leaning on these principles, the Government contends that narrower relief is appropriate. For instance, the District Court could forbid the Government to apply the Executive Order within the respondent States, including to children born elsewhere but living in those States. Or, the Government says, the District Court could direct the Government to "treat covered children as eligible for purposes of federally funded welfare benefits." . . .

We decline to take up these arguments in the first instance. The lower courts should determine whether a narrower injunction is appropriate; we therefore leave it to them to consider these and any related arguments.

3

[The Court briefly summarized the policy arguments for and against universal injunctions,

[13] The new plaintiff might be able to assert nonmutual offensive issue preclusion. But nonmutual offensive issue preclusion is unavailable against the United States. That universal injunctions end-run this rule is one of the Government's objections to them.

largely tracking the arguments summarized in the main volume.] [T]he policy pros and cons are beside the point. Under our well-established precedent, the equitable relief available in the federal courts is that "traditionally accorded by courts of equity" at the time of our founding. *Grupo Mexicano*, 527 U.S. at 319. Nothing like a universal injunction was available at the founding, or for that matter, for more than a century thereafter. Thus, under the Judiciary Act, federal courts lack authority to issue them.

C . . .

Justice Jackson appears to believe that the reasoning behind *any* court order demands "universal adherence," at least where the Executive is concerned. *Post*, at *44 (dissenting). . . . Once a single district court deems executive conduct unlawful, it has stated what the law requires. And the Executive must conform to that view, ceasing its enforcement of the law against anyone, anywhere.

We will not dwell on Justice Jackson's argument, which is at odds with more than two centuries' worth of precedent, not to mention the Constitution itself. We observe only this: Justice Jackson decries an imperial Executive while embracing an imperial Judiciary.

No one disputes that the Executive has a duty to follow the law. But the Judiciary does not have unbridled authority to enforce this obligation—in fact, sometimes the law prohibits the Judiciary from doing so. See, *e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (concluding that James Madison had violated the law but holding that the Court lacked jurisdiction to issue a writ of mandamus ordering him to follow it). . . .

IV

Finally, the Government must show a likelihood that it will suffer irreparable harm absent a stay. When a federal court enters a universal injunction against the Government, it "improper[ly] intru[des]" on "a coordinate branch of the Government" and prevents the Government from enforcing its policies against nonparties. Immigration & Naturalization Service v. Legalization Assistance Project, 510 U.S. 1301, 1306 (1993) (O'Connor, J., in chambers). That is enough to justify interim relief.

[Justice Sotomayor denied that the government suffered any harm,] because the Executive Order is unconstitutional. Thus, "the Executive Branch has no right to enforce [it] against anyone." *Post*, at *31. . . .

The dissent is wrong to say . . . that a stay applicant cannot demonstrate irreparable harm from a threshold error without also showing that, at the end of the day, it will prevail on the underlying merits. That is not how the *Nken* factors work. See Nken v. Holder, 556 U.S. 418, 434 (2009) [summarized in the main volume at 434]. For instance, when we are asked to stay an execution on the grounds of a serious legal question, we ask whether the capital defendant is likely to prevail on the merits of the issue before us, not whether he is likely to prevail on the merits of the underlying suit. . . . So too here.

The question before us is whether the Government is likely to suffer irreparable harm from the District Courts' entry of injunctions that likely exceed the authority conferred by the Judiciary Act. The answer to that question is yes. See also Maryland v. King, 567 U.S. 1301, 1303 (2012) (Roberts, C. J., in chambers) ("'[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury'" (alteration in

original)). [Maryland v. King is summarized in the main volume at 376.] And the balance of equities does not counsel against awarding the Government interim relief: Partial stays will cause no harm to respondents because they will remain protected by the preliminary injunctions to the extent necessary and appropriate to afford them complete relief.

* * *

. . . [F]ederal courts do not exercise general oversight of the Executive Branch; they resolve cases and controversies consistent with the authority Congress has given them. When a court concludes that the Executive Branch has acted unlawfully, the answer is not for the court to exceed its power, too.

The Government's applications to partially stay the preliminary injunctions are granted, but only to the extent that the injunctions are broader than necessary to provide complete relief to each plaintiff with standing to sue. The lower courts shall move expeditiously to ensure that, with respect to each plaintiff, the injunctions comport with this rule and otherwise comply with principles of equity. . . .

It is so ordered.

NOTES ON UNIVERSAL INJUNCTIONS AND BIRTHRIGHT CITIZENSHIP

1. The concurrences. The opinion of the Court was 26 pages; there were 21 pages of concurring opinions and 66 pages of dissents. Justice Thomas, joined by Justice Gorsuch, sought to further limit the option of providing complete relief to the parties. Justice Alito, joined by Justice Thomas, emphasized his view that the requirements of Rule 23 must be rigorously complied with.

Justice Kavanaugh said, as he has before, that whether a major new statute or regulation remains in effect pending litigation is itself an important issue, and that nationwide uniformity on that interim issue can be important. But uniformity should not come from universal injunctions. Rather, the Supreme Court should decide such questions on motions seeking stays of injunctions issued by the lower courts, or seeking injunctions pending appeal when the lower courts denied relief. And therefore, the Supreme Court should not defer to lower courts on these issues. It should decide for itself whether the challenged law or regulation should remain in effect, or be temporarily enjoined, pending final resolution of the merits. This suggestion would require significant changes in current legal doctrine on stays and injunctions pending appeal, but perhaps not so much change in actual practice.

2. The dissents. Justice Sotomayor, dissenting for the three liberals, found ample historical analogs to universal injunctions, and universal injunctions long before 1963. She relied heavily on the work of Professor Sohoni; note that the majority relied on Professor Bray. For citations to these articles, see notes 2 and 8 in the main volume.

Justice Sotomayor did not think that universal injunctions should be routine. She thought that in this case, a universal injunction was necessary to provide complete relief to the states.

She did not just think that the Executive Order is unconstitutional; she thought that it was flagrantly and obviously unconstitutional, and that this flagrant unconstitutionality argued in favor of universal relief. She feared that newborn citizens might be deported before their parents could file a lawsuit and before they were included in a class action.

Justice Jackson filed a much more expansive dissent. It is not clear that she meant all that the majority attributed to her, but she might. Her dissent could plausibly be taken to mean that

governments (and private parties too) have an obligation to comply with all court decisions that say what the law is, without regard to who the parties are and whether or not the court issues a universal injunction. She argued that the "Court's decision to permit the Executive to violate the Constitution with respect to anyone who has not yet sued is an existential threat to the rule of law." 2025 WL 1773631 at *44.

3. The first response. On July 10, a federal district court provisionally certified a class of all persons born in the United States and purportedly deprived of birthright citizenship by the President's Executive Order. "Barbara" v. Trump, 2025 WL 1902218 (D.N.H. July 10, 2025). And the Court preliminarily enjoined enforcement of the Executive Order against this class. "Barbara" v. Trump, 2025 WL 1901936 (D.N.H. July 10, 2025). The court stayed its own order for seven days to let the government appeal.

4. Institutional Reform Litigation (Structural Injunctions)

Page 324. After note 6, add:

7. State officials finally held in contempt. The Supreme Court's opinion and these notes have focused on the orders to reduce the prison population. But of course defendants were ordered to do many other things in the court's effort to solve the problem.

In a 1999 order, somewhat tightened in 2002, defendants were ordered to reduce the vacancy rate in the relevant categories of mental health providers to 10 percent. In 2017, when that had still not happened, the court set a one-year deadline for compliance. In 2023, when it had still not happened, the court finally held defendants in contempt. It threatened civil contempt fines equal to the salaries of the vacant positions. In 2024, it imposed fines based on double the salaries of the vacant positions. The accumulated fines totaled $110 million. The court proposed to use the money to improve mental health care for the prisoners.

The court of appeals mostly affirmed. Coleman v. Newsom, 131 F.4th 948 (9th Cir. 2025). It rejected the state's arguments that it had substantially complied and that total compliance was impossible. But it remanded for further explanation of how the fines were calculated.

CHAPTER FIVE

CHOOSING REMEDIES

B. Preliminary or Permanent Relief

1. The Substantive Standards for Preliminary Relief

Page 435. At the end of note 7, add:

7. Administrative stays. . . .

Administrative stays are spreading to trial courts. See, e.g., Dellinger v. Bessent, 2025 WL 561425 (D.C. Cir. Feb. 12, 2025). The President fired the plaintiff, an official with statutory protection against discharge without cause. The trial court issued what it called an administrative stay, ordering the defendant government officials to maintain plaintiff in office for three days pending decision on a motion for a temporary restraining order. TROs are taken up at page 446 in the main volume; they are orders with a shorter life, and issued with less procedure, than a preliminary injunction. Preliminary injunctions are immediately appealable; TROs generally are not. The D.C. Circuit dismissed the government's appeal in *Dellinger* for lack of jurisdiction; it said the stay was not equivalent to an appealable preliminary injunction. This appeal took two days; Judge Katsas, concurring, emphasized that the administrative stay would expire by its own terms the day after the decision in the court of appeals.

It is easy to see why a brief stay, without consideration of the merits, irreparable injury, or the balance of hardships, appeals to busy judges. The obvious problem is that these orders appear to act like a temporary restraining order or injunction pending appeal, but without consideration of any of the issues prerequisite to such an order. Presumably, but not necessarily, judges who issue such orders are making an unexplained decision that somewhat tracks those prerequisites—deciding that to briefly preserve the status quo is better than the available alternatives.

Page 435. At the end of note 9, add:

9. Where does this leave us? . . .

In Trump v. Wilcox, 145 S. Ct. 1364 (2025), the Court repeated its statement from Trump v. International Refugee Assistance Project that the purpose of interim relief is to balance the equities.

Page 438. After note 15, add:

16. Preliminary orders to pay money. Courts do sometimes grant preliminary injunctions or temporary restraining orders directing defendants to pay money due to plaintiffs. These orders do not award compensation for some past injury, but order the payment of specific money actually due—or more precisely, found on a preliminary hearing to probably be due. Plaintiffs may suffer irreparable injury from a delay in payment if they have no alternative source of funds. But the greater the risk of destitution or insolvency to plaintiff, the greater the risk that defendant can never recover the money if the preliminary order turns out to be mistaken.

This issue is lurking, often unattended to, in all the litigation about the Trump Administration's refusals to pay out money appropriated by Congress and granted to private recipients or to state and local governments. Four Justices raised the issue in dissent in Department

of State v. AIDS Vaccine Advocacy Coalition, 145 S. Ct. 753 (2025). The district court ordered the government to pay out some $2 billion in foreign aid grants for work already done, and to do so by midnight of the next day. The Supreme Court denied a stay. Justice Alito, dissenting for four, argued that the government likely had a sovereign immunity defense (see section 5.C.1), and that the money would likely never be recovered because it would be quickly spent or disbursed to third parties. How should the court assess the balance of hardships when the plaintiff needs the money, perhaps desperately, the defendant is better able to afford the loss, but money paid out under a mistaken order will likely never be recovered?

A month later, the Court went the other way on a variant of this issue. The district court had ordered the government not to terminate certain education grants, to pay all past due money related to these grants, and to pay further obligations as they accrued. The Court stayed the enforcement of this order. Department of Education v. California, 145 S. Ct. 966 (2025). The Court said that the government had a substantial chance of success on appeal, not because termination of the grants was likely legal, but because the plaintiffs had likely sued in the wrong court under the wrong statute. (See this Supplement to page 511.) This rationale would have been equally applicable in the *AIDS Vaccine* case.

Of more immediate relevance, the Court said that the government would likely not recover the money if it were once paid out. It did not cite *AIDS Vaccine*, but it noted what may have been a crucial difference: the grant recipients in the new case had represented that they had sufficient resources to continue their programs without the government's money until the litigation was resolved.

Justice Kagan dissenting, said that this last claim was untrue, and that plaintiffs had consistently said that they had already curtailed teacher training programs because of the loss of grant money. Whatever the facts were, the difference between a plaintiff who can handle a delay in payment and a plaintiff who cannot is surely relevant to irreparable injury and the balance of hardships. Justices Jackson and Sotomayor also dissented, and the Chief Justice said without explanation that he would deny the stay.

Page 444. At the end of note 3.b, add:

b. The judicial solution. . . .

President Trump has directed attorneys representing the United States to insist on a bond in every case and to argue that bond is mandatory. Donald J. Trump, Memorandum for the Heads of Executive Departments and Agencies, *Ensuring the Enforcement of Federal Rule of Civil Procedure 65(c)*, https://perma.cc/89DL-JYSM (Mar. 11, 2025). It is far too early to know whether anything will come of this.

C. Prospective or Retrospective Relief

1. Suits Against Officers in Their Official Capacities (and the Law of Sovereign Immunity)

Page 466. At the end of note 2, add:

2. Evading the core compromise. . . .

Professor Young has offered a solution to the Texas stratagem. If potential plaintiffs forego the exercise of their asserted constitutional rights for fear of devastating liability, that is injury in fact under existing law. See the discussion of the *Young* dilemma at pages 570-574 and 581-583

of the main volume. (The Young of the *Young* dilemma was an attorney general of Minnesota, with no connection to Professor Young.) And, he argued, a proper defendant in a suit to avoid such injury need only have authority to defend the state law that causes the injury. Such a defendant need not have authority to enforce that law. Ernest A. Young, *Uncertain Enforcement and Standing to Sue*, https://papers.ssrn.com/abstract_id=5126064.

Page 469. At the end of note 8.a, add:

a. Bankruptcy. . . .

The Bankruptcy Code does contain an express override of sovereign immunity in 11 U.S.C. §106(a). In *Katz*, the Court said that this section was just an exercise of Congress's bankruptcy power and did not have to be construed under the more stringent rules for provisions abrogating sovereign immunity; the states had waived their immunity when they ratified the Constitution.

But §106(a) does have to be construed in ordinary terms. It overrides immunity for both the states and the federal government with respect to claims under 59 listed sections of the Bankruptcy Code. One of those sections is 11 U.S.C. §544, which lets a bankruptcy trustee recover any money paid out by the bankrupt debtor if that money could be recovered under state law by an unsecured creditor of the debtor.

United States v. Miller, 145 S. Ct. 839 (2025), is an interesting example, although a bit complicated to explain. The controlling shareholders of an insolvent corporation used $145,000 of corporate funds to pay back taxes owed by the shareholders. This was a fraudulent transfer of the corporate funds, because the corporation received nothing in exchange for its money. Any unsecured creditor can sue under state fraudulent transfer laws to recover money fraudulent transferred. But such a creditor suing outside of a bankruptcy proceeding could not recover against the United States, because the suit would be barred by sovereign immunity. Because §544 required the trustee to rely on the rights of an actual creditor who could recover outside bankruptcy, and because no such creditor existed, the trustee had no claim and the override of sovereign immunity within the bankruptcy proceeding was no help.

The bankruptcy trustee can also recover fraudulent transfers under 11 U.S.C. § 548, without having to identify such an actual creditor. But that section has two-year statute of limitations that had run before the trustee filed his claim. The statute of limitations on the state claim was longer, but the state claim was encumbered by the actual creditor requirement.

Page 476. After note 18, add:

19. Who or what is the state? Sovereign immunity generally extends to agencies and instrumentalities of a state government (or the federal government), but there is litigation about the boundaries of that rule. The Supreme Court has agreed to decide whether the New Jersey Transit Corporation, which operates trains and buses in New Jersey, eastern Pennsylvania, and New York City, is an instrumentality of the state for purposes of the state's immunity from suit in sister states (see note 13). The New York Court of Appeals said no. Colt v. New Jersey Transit Corp., 2024 WL 4874365 (N.Y. Nov. 25, 2024), cert. granted, 2025 WL 1829162 (U.S. July 3, 2025). The Pennsylvania Supreme Court said yes. Galette v. New Jersey Transit Corp., 332 A.3d 776 (Pa. 2025), cert. granted, 2025 WL 1829160 (U.S. July 3, 2025). Each case was a personal injury claim arising in the state where it was decided.

The New York court emphasized that the state has no liability for the Transit Corp.'s liabilities. It also noted that the Transit Corp. generally operates free of direct state supervision,

although the governor appoints its board and can veto the actions of its board. It doubted that running trains and buses is a core state function.

The Pennsylvania court applied a six-factor test derived from an earlier decision holding that the Southeastern Pennsylvania Transit Authority is *not* an arm of the state with sovereign immunity. But it emphasized that a New Jersey statute characterized the Transit Corp. as a state instrumentality, and it thought it owed deference to that labeling. It also emphasized the governor's powers, however rarely he actually vetoed anything. And it thought that providing transportation to its citizens was a core state function.

The Third Circuit had decided that the Transit Corp. was a state instrumentality for purposes of Eleventh Amendment immunity in federal court. Karns v. Shanahan, 879 F.3d 504 (3d Cir. 2018). It seems like there would be a lot more accidents in New Jersey than in neighboring states, so that this issue should have been litigated there. But maybe not. Remarkably, none of these three courts cited any New Jersey decisions.

2. Suits Against Officers in Their Personal Capacities (and the Law of Qualified Immunity)

Page 486. At the end of note 10, add:

10. Interlocutory appeals. . . .

Contractors performing work for the government are not liable on claims that the work, properly performed under the terms of the contract, violated the rights of some person harmed by the work. If the government could not be sued because of sovereign immunity, the contractor cannot be sued either. The seminal case is Yearsley v. W.A. Ross Construction Co., 309 U.S. 18 (1940). There is some dispute whether this is properly characterized as an immunity or a defense on the merits. The Court has agreed to decide whether a decision rejecting this defense is immediately appealable under the collateral order doctrine. Menocal v. GEO Group, Inc., 2024 WL 4544184 (10th Cir. Oct. 22, 2024), cert. granted, 2025 WL 1549767 (U.S. June 2, 2025).

CHAPTER SIX

REMEDIES AND SEPARATION OF POWERS

A. More on Governmental Immunities

1. Consented Suits Against the Government

Page 507. At the end of note 2, add:

2. The Federal Tort Claims Act . . .

The Supreme Court has agreed to decide whether the exception for loss of the mail excludes a claim that postal workers, out of personal spite or racial animus, *intentionally* refused to deliver a person's mail. The Fifth Circuit held that this claim is not barred by the exclusion of claims for "loss, miscarriage, or negligent transmission." Konan v. United States Postal Service, 96 F.4th 799 (5th Cir. 2024), cert. granted, 145 S. Ct. 1919 (2025).

Justice Thomas again called for overruling *Feres* in Carter v. United States, 145 S. Ct. 519 (2025).

Page 508. At the end of note 3, add:

3. The intentional-tort exception. . . .

In Martin v. United States, 145 S. Ct. 1689 (2025), the Court held that the law enforcement proviso overrides only the intentional-tort exception to which it is attached, and not all the other exceptions in the Tort Claims Act. It remanded to the Eleventh Circuit for consideration of the government's claim that raiding the wrong house without checking the address falls within the discretionary function exception.

Page 511. After note 7, add:

7.1. Choosing the right statute. As far as we know, all the litigation challenging the Trump Administration's decisions cutting off federal funds has been filed under the Administrative Procedure Act, treating the funds cut off as an agency decision subject to judicial review. The lower courts have proceeded on this theory. But defendants are arguing that many of these defendants are seeking to recover money due on a contract, and that their remedy, if any, is a suit under the Tucker Act in the Court of Claims. In Department of Education v. California, 145 S. Ct. 966, 968 (2025), the Court said that the government was "likely to succeed" on this argument.

B. Creating Causes of Action

Page 534. At the end of note 7, add:

7. Creeping ever closer to repudiation? . . .

In Goldey v. Fields, 2025 WL 1787625 (U.S. June 30, 2025), the Court summarily reversed (i.e., on the cert papers, without merits briefing or oral argument) a Fourth Circuit decision allowing a *Bivens* claim for alleged physical abuse of a prisoner. The Court said without explanation that the "case arises in a new context." Id. at *2. In Carlson v. Green, summarized in note 1.a, the Court had recognized a *Bivens* claim for a prisoner who allegedly died from lack of medical care. So beatings are sufficiently different from withholding medical care to create a new context.

The Court also said that "Congress has actively legislated in the area of prisoner litigation but has not enacted a statutory cause of action for money damages," citing cases that had cited the Prison Litigation Reform Act, 18 U.S.C. §3626. Id. This argument has more force; a *Bivens* claim would bypass the tight limitations on prisoner litigation in the PLRA. The decision was unanimous.

Page 539. After note 5, add:

5.1. Clarification? Under the Medicaid Act, the federal government provides funds to states to support medical care for persons with low incomes. The Act requires states accepting federal funds to "provide that (A) any individual eligible for medical assistance (including drugs) may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required." 42 U.S.C. §1396a(a)(23). In Medina v. Planned Parenthood South Atlantic, 2025 WL 1758505 (U.S. June 26, 2025), the Court held that this language does not create an individual right that can be enforced with a lawsuit under § 1983. The Court's principal argument appeared to be that this provision does not use any form of the word "right."

The Court contrasted the language in *Talevski*:

> *Talevski* addressed Federal Nursing Home Reform Act provisions requiring facilities to "protect and promote" residents' "*right* to be free from" restraints and provisions titled "[t]ransfer and discharge *rights*" in a subsection called "[r]equirements relating to residents' *rights*." § 1396r(c) (emphasis added).
>
> The any-qualified-provider provision looks nothing like these. . . . This language addresses state duties and may benefit providers and patients, but lacks FNHRA's clear "rights-creating language," *Talevski*, 599 U.S. at 186.

The Court did not say that Congress must use the word "right," but that may be the only safe course for those drafting bills. The Court said that §1983 protects constitutional and statutory "rights," not statutory "interests" or "benefits." It said three times that statutes creating enforceable individual rights are "rare." Id. at *5-7.

Justice Jackson, dissenting for the three liberals, charged that "the project of stymying one of the country's great civil rights laws continues." Id. at *21. Justice Thomas, concurring, argued that the word "rights" in §1983 has a much narrower meaning than the same word in other contexts, and that the Court should revisit all of its modern cases recognizing §1983 claims.

Page 539. At the end of note 6, add:

6. "Appropriate relief." . . .

The Supreme Court has agreed to interpret the identical language in the closely related Religious Land Use and Institutionalized Persons Act, 42 U.S.C. 2000cc-2(a). Landor v. Louisiana Department of Corrections, 82 F.4th 337 (5th Cir. 2023), cert. granted, 2025 WL 1727386 (U.S. June 23, 2025).

The first statute, the Religious Freedom Restoration Act (RFRA), protects religious liberty as against the federal government. The second statute, RLUIPA, protects prisoners in state and local jails and prisons and protects religious organizations against state and local land use regulation. The courts of appeals have distinguished the two statutes, partly on the ground that the prison provisions of RLUIPA are Spending Clause legislation but RFRA is not, and partly on the basis of Sossaman v. Texas, 563 U.S. 277 (2011), briefly summarized at page 474 of the main

volume. *Sossaman* held that RLUIPA does not override sovereign immunity, but that has essentially nothing to do with whether it authorizes damages against individual officers. Officers are not the sovereign, and even if RLUIPA authorizes damages, defendants would still have a defense of qualified immunity, examined in section 5.C.2.

Qualified immunity is likely unavailable in *Landor*. Landor, a Rastafarian, handed intake officers at the prison a copy of a Fifth Circuit decision upholding the right of Rastafarian prisoners to keep their long hair. The guard threw the opinion in the trash, and after checking with the warden, forcibly shaved Landor's head. It is hard to imagine better facts than these for overriding qualified immunity.

6.1. Rescission. The Supreme Court has agreed to decide whether §47b of the Investment Company Act, 15 U.S.C. § 80a-46(b), creates an implied cause of action. Saba Capital Master Fund, Ltd. v. Blackrock ESG Capital Allocation Trust, 2024 WL 3174971 (June 26, 2024), cert. granted as FS Credit Corp. v. Saba Capital Master Fund, 2025 WL 1787708 (U.S. June 30, 2025).

The Act regulates mutual funds. Section 47(b) requires quotation:

> (1) A contract that is made, or whose performance involves, a violation of this subchapter . . . is unenforceable by either party . . . .
>
> (2) To the extent that a contract described in paragraph (1) has been performed, a court may not deny rescission at the instance of any party . . . .

In the ellipses, each paragraph states a defense that need not concern us here.

Focus on paragraph (2). Rescission of a contract undoes the contract and reverses the transaction; each party must return to the other whatever it received under the contract. Rescission is examined in section 8.B.3.b. How could a court ever have an opportunity to "deny rescission at the instance of any party" if no party has a right to sue for rescission? Yet the Third, Fourth, and Ninth Circuits found no right to sue. None of these decisions explains, or even quotes, the "may not deny rescission" language or the "instance of any party" language in the statute. The Second Circuit held that this language creates a cause of action.

C. The Right to Jury Trial

Page 556. At the end of note 2, add:

2. Mixed cases of law and equity. . . .

The Court summarized *Beacon Theatres* and Dairy Queen v. Wood (note 3) in some detail in Perttu v. Richards, 145 S. Ct. 1793 (2025). It reaffirmed that "*Beacon Theatres* should be read 'expansively.'" Id. at 1802.

The actual issue in *Perttu* was somewhat different. The Prison Litigation Reform Act, 42 U.S.C. §1997e(a), requires that prisoners exhaust prison grievance procedures before filing a lawsuit. The courts of appeals have held that exhaustion is a threshold issue, like jurisdiction and venue, that judges can decide on motion and without a jury. This is not obviously correct; the Supreme Court has characterized failure to exhaust as an affirmative defense. But no one challenged the lower courts' rule in *Perttu*.

Instead, the prisoner argued that in his case, the exhaustion issue was entwined with the merits of his claim. He alleged that defendant, a prison guard, had sexually abused him and other prisoners, and that when he filed grievances, defendant had destroyed the paperwork and threatened to kill him if he refiled. He filed a claim based on the alleged sexual assaults and a

second claim based on his First Amendment right to file grievances. The key factual issue on this second claim—whether defendant had destroyed his grievance papers—was also the key factual issue on whether plaintiff had exhausted prison remedies to the extent possible. A finding by a judge on that issue with respect to exhaustion could result in dismissal of the case, depriving plaintiff of a jury trial on the merits of the First Amendment claim. The Court therefore held that plaintiff was entitled to jury trial on the exhaustion issue. This decision is not about law and equity, but the principle is the same as in *Beacon Theatres*—the risk that a judge's finding on an issue in one context might preclude jury trial of that issue in a related context.

Justice Barrett dissented for four, rejecting the idea that it makes any difference whether issues are entwined. But the Court cited precedents for that idea in a variety of contexts.

CHAPTER SEVEN

PREVENTING HARM WITHOUT COERCION: DECLARATORY REMEDIES

A. Declaratory Judgments

2. The Special Case of Interference with State Enforcement Proceedings

Page 583. After note 5.c., add:

6. Heck v. Humphreys? In Heck v. Humphreys, 512 U.S. 477 (1994), the Court held that a plaintiff cannot sue for damages arising out of his criminal conviction unless that conviction has been overturned on appeal, on habeas corpus, or by executive clemency. The case is further described in the main volume at pages 114 and 516-517.

The Supreme Court has agreed to decide whether this rule applies to suits for prospective relief to prevent further enforcement of the allegedly unconstitutional law on which the conviction was based. Olivier v. City of Brandon, 2023 WL 5500223 (5th Cir. Aug. 25, 2023), cert. granted, 2025 WL 1829163 (U.S. July 3, 2025). Petitioner pleaded no contest to a charge of violating an ordinance restricting demonstrations around the city amphitheater, and he paid a small fine. He then sued to enjoin future enforcement of the restrictions. He alleged damages in the district court, which was a serious mistake in light of *Heck*. But in the court of appeals and the Supreme Court, he did not seek damages or a refund of his fine or an order vacating his conviction. Even so, the Fifth Circuit read *Heck* to bar any relief that "would necessarily imply the invalidity of a prior conviction." Id. at *3.

CHAPTER NINE

ANCILLARY REMEDIES: ENFORCING THE JUDGMENT

A. Enforcing Coercive Orders: The Contempt Power

2. How Much Risk of Abuse to Overcome How Much Defiance?

a. Perpetual Coercion

Page 768. At the end of note 5, add:

5. Too stubborn to be coerced. . . .

Early in 2025, the court found that Thompson could not be coerced and ended his imprisonment for civil contempt. But he had also been sentenced to two years in prison for criminal contempt, and that sentence had been suspended during the incarceration for civil contempt. So he did not get out of prison; he immediately began serving his criminal sentence. United States v. Thompson, 2025 WL 353911 (S.D. Ohio Jan. 31, 2025).

Thompson was in prison for civil contempt from December 15, 2015 to January 31, 2025. His civil contempt fine of $1000 per day had accumulated to $3,335,000.

6. Drafting Decrees

Page 811. After note 5.d, add:

e. "Removing" or "removal." This one is more complicated, and it highlights the difficulties of dealing with evasive or defiant defendants. On March 15, 2025, a Saturday, federal officials were attempting to deport two plane loads of immigrants before a court could stop them. Much of the day was consumed with communications among the court, the plaintiffs' lawyers, and the government's lawyers, with the court trying to learn what was happening and with the government lawyers failing or refusing to answer many of the court's questions.

The court convened a hearing at 5:00 p.m. and asked whether any removals were planned in the next 24 or 48 hours. The government lawyer said that he did not know but would try to find out. So at 5:22, the court adjourned the hearing to 6:00. The two planes took off from Harlingen, Texas, on the Mexican border, at 5:25 and 5:45. When the hearing resumed at 6:00, the government lawyer said that he had no information to report.

Shortly into the resumed hearing, the court orally ordered that the government was enjoined from conducting the "removal" of any noncitizens pursuant to a presidential proclamation invoking the Alien Enemies Act, 50 U.S.C. §21. At about 6:45, the court further ordered the government lawyers, still orally:

> [Y]ou shall inform your clients of [the Order] immediately, and that any plane containing [class members] that is going to take off or is in the air needs to be returned to the United States, but those people need to be returned to the United States. However that's accomplished, whether turning around a plane or not [dis]embarking anyone on the plane . . . , I leave to you. But this is something that you need to make sure is complied with immediately.

J.G.G. v. Trump, 2025 WL 1119481, at *14 (D.D.C. Apr. 16, 2025) (alterations by the court).

The hearing soon adjourned, and at 7:25 the court issued a written temporary restraining order: "As discussed in today's hearing, the Court ORDERS that . . . [t]he Government is ENJOINED from removing members of [the] class (not otherwise subject to removal) pursuant to the Proclamation for 14 days or until further Order of the Court." *Id.* at *11 (alterations by the court). The planes landed in Honduras at 7:37 and 8:10, remained on the ground for several hours, and then continued to El Salvador. Shortly after midnight, most of the passengers were transferred to Salvadoran custody.

At a later hearing on whether government officials were in criminal contempt, the government argued that "removal" occurred when the planes left U.S. air space, thus removing the class members from the United States, and that this happened before any of the court's orders issued. The court responded that "removal" meant removal from U.S. custody, and that this happened after midnight in El Salvador, in open defiance of the court's orders. The court noted that its written order specifically referenced its earlier and more specific oral order to turn the planes around if they were already in the air.

The court also held that the oral order was independently enforceable, and that violation of the oral order was contempt of court. See the conflicting cases on that issue summarized at page 775 of the main volume. It also emphasized that in determining whether an order is sufficiently clear and specific to support a contempt finding, "courts 'apply an objective standard that takes into account' not just 'the language of the order' but also 'the objective circumstances surrounding the issuance of the order.'" Id. at *10, quoting United States v. Young, 107 F.3d 903, 907 (D.C. Cir. 1997).

The court found probable cause to believe that defendants were in contempt of court. It offered them an opportunity to purge their contempt, presumably by returning the two plane loads of plaintiffs to the United States. And it said that if the defendants did not do so, it would refer the case for criminal prosecution. The odds that the Trump-appointed U.S. Attorney would prosecute this case appear to be zero. The court's traditional authority to appoint a special prosecutor (page 760 of the main volume) is now disputed. See United States v. Donziger, 143 S. Ct. 868 (2023) (Gorsuch and Kavanaugh, JJ., dissenting from denial of certiorari). The government's appeal from the finding of probable cause is pending. J.G.G. v. Trump, No. 25-5124 in the D.C. Circuit.

Was "removal" sufficiently clear? Or genuinely ambiguous? Did the written order improperly incorporate the earlier oral order? See the next set of notes, at pages 814-817 of the main volume. Was the court just sloppy in not spelling out exactly what it meant in the written order? Or was some imprecision the nearly inevitable result of the time pressure created by the government's efforts to act before the court could stop it? Defendants thought they had found a loophole, but they could not have been in any doubt about what the court intended. Should that matter?

5.1. ***Apple.*** The Trump Administration is not the only evasive litigant. Apple, the computer company, is subject to an antitrust injunction with facts too complex to briefly explain here. The district court found that Apple had abandoned the precise anticompetitive practices that had been enjoined and had shifted to slightly different practices that were for all practical purposes the same. It held Apple and its Vice President for Finance in criminal contempt and referred the case to the U.S. Attorney for possible prosecution. Epic Games, Inc. v. Apple Inc., 2025 WL 1260190 (N.D. Cal. Apr. 30, 2025). Apple's appeal is pending. Epic Games, Inc. v. Apple Inc., No. 25-2935 in the Ninth Circuit.

Page 814. After note 12, add:

12.1. Alternative legal theories. Sometimes the court decides the legality of defendant's conduct under one legal theory, but does not consider other theories. This has been a recurring issue in litigation over President Trump's decisions to cut off funds appropriated by Congress and granted to state or local governments or private actors. In a typical case, the Administration would order funds withheld, a court would hold that order illegal and enjoin its implementation, and the Administration would then invoke some other basis for withholding the funds. This may look like evasion or defiance, and it may be if there is no substance to the alternative basis for withholding funds. But that alternative basis had not been at issue in the initial litigation, and the court had not adjudicated its legality.

This is partly a drafting problem; the injunction needs to cover all the bases. But it is also a substantive problem. The court cannot enjoin all possible bases for withholding funds unless it adjudicates all possible bases. It is hard for plaintiffs to anticipate alternative bases for the challenged action, and there may be ripeness issues about a challenge to any alternative bases until the defendants invoke one of them. The issue is briefly reviewed in Charlie Savage, *Trump Team Finds Loophole to Defy Spirit of Court Orders Blocking Spending Freezes*, N.Y. Times (Feb. 19, 2025). An example is New York v. Trump, 2025 WL 480770 (D.R.I. Feb. 12, 2025). The issue is not well explained, but the court says that while it had enjoined withholding funds pursuant to a particular order of the Office of Management and Budget, "the TRO permits the Defendants to limit access to funds based on *actual authority* from applicable statutes, regulations, and terms." Id. at *1.

Compare National Council of Nonprofits v. Office of Management and Budget, 2025 WL 597959 (D.D.C. Feb. 25, 2025), involving the same OMB order. The court "**ORDERED** that Defendants are enjoined from implementing, giving effect to, or reinstating under a different name the unilateral, non-individualized directives in OMB Memorandum M-25-13 with respect to the disbursement of Federal funds under all open awards." Id. at *19. Does "reinstating under a different name" solve the problem? Or is that too vague to be enforceable by contempt? Quite apart from that, defendants continued to withhold many funds under what plaintiffs attacked as an unduly narrow interpretation of "open awards" of funds. See National Council of Nonprofits v. Office of Management and Budget, 2025 WL 829677 (D.D.C. Mar. 14, 2025). The court declined to clarify its order for the odd reason that plaintiffs had waited too long to question how defendants were interpreting it. The delay was only a few weeks, and the court did not suggest that defendants had been prejudiced.

B. Collecting Money Judgments

1. Execution, Garnishment, and the Like

Page 833. After the third paragraph of note 11, add:

11. Judgment proofing. . . .

The court dismissed J&J's third bankruptcy filing. In re Red River Talc LLC, 2025 WL 1029302 (Bankr. S.D. Tex. Mar. 31, 2025). Red River Talc was the name of the latest entity J&J created to absorb its talc liability. J&J said it would not appeal, but would just defend the talc claims on the merits. The court noted that the number of claims was up to 90,000, that most

plaintiffs who had gone to trial had lost, but that there had been some huge judgments against J&J. For a $1.6 billion judgment in favor of 20 plaintiffs, see page 237 of the main volume.

CHAPTER ELEVEN

REMEDIAL DEFENSES

E. Statutes of Limitations

2. The Discovery Rule

Page 973. At the end of note 11, add:

11. "Jurisdictional" time limits. . . .

When a noncitizen seeking judicial review of a deportation order seeks judicial review, the general rule is that the "petition for review must be filed not later than 30 days after the date of the final order of removal." 8 U.S.C. §1252(b)(1). In Riley v. Bondi, 2025 WL 1758502 (U.S. June 26, 2025), the Court unanimously held that this time limit is not jurisdictional. The government did not contest the point; the Court appointed an amicus to defend the Fourth Circuit's contrary decision.

Justice Alito's opinion for the Court again emphasized that treating a rule as jurisdictional can disrupt the judicial process and that Congress must "clearly state" its intention to make a rule jurisdictional, although it need not use "magic words." Id. at *8-9. The Court said that for the past 20 years, "our cases have almost uniformly found that the provisions at issue failed to meet this very demanding test." Id. at *9. It said that the statutory language quoted in the preceding paragraph states what the petitioner must do, not what the court may or must do. It treated this language as significant on the ground that jurisdictional provisions are directed to courts.

In yet another variation, the Court has agreed to decide whether the 30-day time limit for removing a case from state to federal court is subject to equitable tolling. If a plaintiff files in state court a case that could have been filed in federal court, defendant can remove the case to federal court by filing a notice in the federal court. Subject to some exceptions, defendant has 30 days to do so. 28 U.S.C. §1446(b)(1). The Sixth Circuit held that this deadline is not jurisdictional, so that plaintiff can waive or forfeit it, but that it is mandatory and not subject to equitable tolling. Nessel v. Enbridge Energy LP, 104 F.4th 958 (6th Cir. 2024), cert. granted, 2025 WL 1787715 (U.S. June 30, 2025).