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Federal Court Access Issues in the U.S. Supreme Court’s 2003–2004 Term

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[Editor’s note: The authors are members of the Federal Court Access Group, monitoring U.S. Supreme Court developments on access to federal court by people in poverty.]

In one sense the U.S. Supreme Court’s 2003–2004 term generated the essence in cases raising questions about access to the federal courts. Due process requires a U.S. citizen held as an enemy combatant to be given the opportunity to challenge the factual basis for that detention, and U.S. courts have habeas corpus jurisdiction over foreign nationals held at the Guantánamo Bay Naval Base in Cuba, the Supreme Court held.1 In short, these individuals must have access to the federal court system to question the reasons for their confinement.

While the enemy combatant cases do not raise issues generally relevant to the work of legal aid advocates and will not be discussed further here, the Court nevertheless discussed numerous questions of federal court access—from the traditional to the esoteric—that are more relevant to legal aid practice. Here we explore, from the past term, eleven decisions that offer insight or guidance on federal court access and standards applicable to procedural aspects of federal court practice. These cases address federalism, challenges to agency inaction, judicial deference to administrative interpretation of statutes, the statute of limitations for Section 1981 actions, appellate review of preliminary injunctions, mandamus, and attorney fees from the federal government.

The Latest Federalism Cases

The right of states to be free from suits against them is one of this Supreme Court’s favorite topics. Citing the Eleventh Amendment and a broad concept of “sovereignty,” the Court in past terms aggressively redefined the balance of power between the


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states and the federal government in a series of mostly 5-to-4 decisions that typically favored the states.2 During the 2003–2004 term, however, the Court in three decisions upheld the power of the federal government against states’ claims of sovereign immunity. Added to last year’s ruling in Nevada Department of Human Resources v. Hibbs, these decisions have caused some constitutional scholars to speculate that the Supreme Court has reached the limits of its support for states’ rights.3 These conjectures are likely overly optimistic because, as described below, the decisions were written narrowly, leaving significant leeway for courts to distinguish them in the future.

The most noteworthy federalism case was Tennessee v. Lane, in which, the Court decided state governments may be sued for violating Title II of the Americans with Disabilities Act (ADA) for claims involving the fundamental right of access to the courts.4 Title II of the ADA prohibits discrimination, in public programs or services, against people with disabilities and abrogates state immunity from claims under Title II.

The two Lane plaintiffs, who used wheelchairs, filed suit against the State of Tennessee when they were denied access to the state court system. Lane’s situation was most dramatic: at his first appearance, he crawled up two flights of stairs to get to the courtroom. When he returned for a subsequent hearing, he refused to crawl again or be carried by officers to the courtroom and was subsequently arrested and jailed for failure to appear.5 Tennessee moved to dismiss his subsequent lawsuit on the ground that the suit was barred by the Eleventh Amendment, and the trial court denied the motion. Holding that the ADA claims were not barred because they were based upon due process principles, the Sixth Circuit affirmed the denial.6

Section 5 of the Fourteenth Amendment authorizes Congress “to enforce” the substantive guarantees of that Amendment by enacting “appropriate legislation.”7 Previous Supreme Court decisions described Congress as having “broad power indeed” to enact remedial legislation.8 However, in most of the Court’s recent decisions, it decided that Congress exceeded its authority by enacting legislation that worked a “substantive redefinition” in the governing constitutional law.9 In these earlier cases, the Court established a test for deciding whether this type of remedial legislation was valid. First, the court must determine whether Congress unequivocally intended to abrogate sovereign immunity. Second, it must determine whether Congress was acting “pursuant to a valid grant of constitutional authority.”10 The Fourteenth Amendment confers power

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2 The Eleventh Amendment reads in its entirety: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI. The Court has long held, however, that the Amendment also applies to suits against unconscripting states brought by its own citizens. See, e.g., Hans v. Louisiana, 124 U.S. 1, 15 (1889). Regarding the concept of sovereignty, see, e.g., Alden v. Maine, 527 U.S. 706, 728 (1999) (Clearinghouse No. 52332) (stating that “sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself … [W]e cannot … assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States.”) (citations omitted).


5 Id. at 1982–83.

6 The Sixth Circuit had held that Americans with Disabilities Act suits based upon equal protection principles were barred by the Eleventh Amendment but that cases based upon due process principles were not. Popovich v. Cuyahoga County Court, 276 F.3d 808 (6th Cir. 2002) (Clearinghouse No. 53265) ( en banc). In Lane the Sixth Circuit employed this reasoning to reach a similar result. See Lane v. Tennessee, 315 F.3d 680 (6th Cir. 2002).

7 U.S. CONST. amend. XIV, § 5.

8 Lane, 124 S. Ct. at 1985 (quoting Mississippi University for Women v. Hogan, 458 U.S. 718, 732 (1982)).

9 Id. at 1987–88 (listing Court’s recent Section 5 cases).

10 Id. at 1985.
upon Congress to prohibit a broader swath of conduct than that which would violate the Amendment itself.11 Section 5 legislation is valid, however, only if it exhibits “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”12

Because Title II clearly abrogated state sovereign immunity, the Lane decision focused on the second prong of the test, whether Congress had the authority under Section 5 to enact Title II. The Court’s first step was to determine the scope of the constitutional right at issue.13 It concluded that, in enacting Title II, Congress sought to address the equal protection right against disability discrimination, which required showing that the discrimination had no rational basis.14 The specific right of access to the court was based also upon both the due process clause of the Fourteenth Amendment and the due process and confrontation clauses of the Sixth Amendment, which guarantee various rights, including the right to be present at crucial stages of a trial and the meaningful opportunity to be heard.15 Moreover, a defendant’s right to trial by a jury composed of a reasonable cross section of the community is thwarted by the exclusion of “identifiable segments” such as people with disabilities, the Court found.16 Because infringements of these fundamental rights are “subject to more searching review,” the Court was satisfied that legislation to address violations of these rights might sweep more broadly.17

The majority reviewed the evidence of violations of the rights of people with disabilities that Congress had considered when it enacted the ADA. The evidence included judicial findings of unconstitutional state action as well as statistical, legislative, and anecdotal evidence of the widespread exclusion of persons with disabilities from the enjoyment of public services.18 The majority concluded that the evidence made it “clear beyond peradventure” that lack of access to public services, programs, and facilities was an appropriate subject for legislation.19 Congress, the Court held, enacted Title II against “a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights.”20

The majority turned to the question of whether Title II was an appropriate response to the identified pattern of discrimination. The remedy that Title II prescribes is limited: states are required only to make reasonable accommodations and to make reasonable efforts to remove barriers, the majority found.21 However, because Title II reaches such a wide array of conduct, the majority declined to consider whether the many applications of Title II were appropriate and answered only the narrower question presented by the facts. The majority found that Title II’s application in this case was valid.22

Chief Justice Rehnquist, joined by Justices Kennedy and Thomas, dissent-
The chief justice authored the majority opinion in Board of Trustees of the University of Alabama v. Garrett, and his dissent highlights the tension between these two ADA opinions.\textsuperscript{23} The dissent argued that Congress failed to identify a pattern of actual, relevant constitutional violations; the dissent took issue with the majority’s consideration of what the dissent saw as the random collection of evidence of discrimination against the disabled.\textsuperscript{24} Rejecting this evidence as “outdated” and generalized, the dissent argued that because the evidence related to discrimination other than violation of due process rights and to discrimination by nonstate actors, it was irrelevant.\textsuperscript{25} Overall, according to the dissent, “there is nothing in the legislative record or statutory findings to indicate that disabled persons were systematically denied the right to be present at criminal trials, denied the meaningful opportunity to be heard in civil cases, unconstitutionally excluded from jury services or denied the right to attend criminal trials.”\textsuperscript{26}

In a separate dissent, Justice Scalia repudiated his former support for the congruence and proportionality test; he argued that courts should simply apply the language of the Fourteenth Amendment, which does not authorize legislation as broad as Title II.\textsuperscript{27} Reviewing applications of the test, including decisions which upheld legislation, he ruefully yields to the lessons of experience.

The congruence and proportionality standard, like all such flabby tests, is a standing invitation to judicial arbitrariness and policy-driven decisionmaking. Worse still, it casts this Court in the role of Congress’ taskmaster. Under it, the courts (and ultimately this Court) must regularly check Congress’ homework to make sure that it has identified sufficient constitutional violations to make its remedy congruent and proportional.\textsuperscript{28}

Lane almost certainly will be clarified in future Supreme Court decisions, but the questions that it raises must already affect litigation strategy. The most crucial question is whether Lane changed the test for determining the constitutionality of Section 5 legislation. Lane allows plaintiffs to establish that legislation is congruent and proportional by showing that the statutory provision “as applied” is appropriately tailored to serve its objectives.\textsuperscript{29} Previous cases had looked at the statutory provision as a whole.\textsuperscript{30} Moreover, in establishing the validity of the legislation, Lane looked not only to the legislative record but also placed considerable emphasis on the federal case law finding unlawful discrimination. By contrast, past decisions emphasized the need for Congress to identify widespread violations in the record leading up to enactment of the legislation.\textsuperscript{31}

The Court’s 7-to-2 decision in the second states’ rights case, Tennessee Student Assistance Corporation v. Hood, was decidedly less dramatic because it essentially

\textsuperscript{24}Lane, 124 S. Ct. at 1999 (Rehnquist, C.J., dissenting).
\textsuperscript{25}Id.
\textsuperscript{26}Id. at 2000 (Rehnquist, C.J., dissenting).
\textsuperscript{27}Id. at 2007 (Scalia J., dissenting).
\textsuperscript{28}Id. at 2008–9 (Scalia J., dissenting).
\textsuperscript{29}See id. at 1992–93 (holding that “Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services”).
\textsuperscript{30}E.g., Garrett, 531 U.S. at 365–74 (applying Section 5 analysis to Title I of the Americans with Disabilities Act as a whole); City of Boerne, 521 U.S. at 529–36 (applying Section 5 analysis to Religious Freedom Restoration Act as a whole).
\textsuperscript{31}Compare Lane, 124 S. Ct. at 1989, with Garrett, 531 U.S. at 370–72 (rejecting the use of documents that are not “legislative findings” to establish “adverse, disparate treatment by state officials”).
dodged the sovereignty question. In *Hood* the Court held that a bankruptcy court’s exercise of *in rem* jurisdiction to hear arguments about discharging a student loan did not infringe state sovereignty and, therefore, did not qualify as a suit against the state under the Eleventh Amendment.

Hood had an outstanding balance on her student loan guaranteed by the Tennessee Student Assistance Corporation, a governmental corporation, when she filed a Chapter 7 bankruptcy petition. Hood did not list her student loans in the bankruptcy proceeding, and the general discharge did not cover them. She subsequently filed a summons and complaint against the corporation and sought to reopen her bankruptcy proceeding for the limited purpose of seeking a determination by the bankruptcy court that the student loans were dischargeable as an “undue hardship” pursuant to the federal bankruptcy code. When the corporation, asserting Eleventh Amendment sovereign immunity, filed a motion to dismiss the complaint for lack of jurisdiction, Hood responded that Congress had abrogated the state’s immunity in the bankruptcy code.

The Supreme Court granted review of the case to decide whether Congress validly abrogated the Eleventh Amendment. However, it concluded that a proceeding initiated by the debtor to determine the dischargeability of a debt was not a suit against the State for purposes of the Eleventh Amendment, it did not reach the question on which certiorari was granted. The Court noted that a bankruptcy court was exercising *in rem* jurisdiction over the debtor’s property, not personal jurisdiction over the states. “A debtor does not seek monetary damages or any affirmative relief from a State by seeking to discharge a debt, nor does he subject an unwilling State to a coercive judicial process. He seeks only a discharge of his debts.” Thus the Eleventh Amendment concerns for protecting states against affronts to their sovereignty were not present in the case. That the proceeding involved service of a summons did not alter the basic nature of the suit and transform it into a suit against the State.

The third federalism case, *Frew v. Hawkins*, involved the intersection of two areas of federal law, the Eleventh Amendment and consent decrees. *Frew* was filed in Texas in 1993 by mothers of children eligible for Medicaid Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) services. They complained that the Texas program failed to comply with various federal provisions of the EPSDT program. The case was certified as a class action on behalf of over one million children.

After a protracted period of negotiation, the parties agreed to resolve the case through a consent decree. In contrast to the more general provisions of the Medicaid Act, the consent decree was nearly eighty pages long and included a number of specific actions to be taken by the State. By its terms, the decree created a “mandatory, enforceable” obligation on the State. The federal district court held a fairness hearing, which included testimony from state officials attesting to the virtues of the agreement, and approved the consent decree in 1996.

Two years later the class filed a motion to enforce the decree. In addition to denying the allegations of the motion, the state officials claimed that the Eleventh Amendment immunized the State from enforcement of the decree even if the

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34 See U.S. Const. art. I, § 8, cl. 4 (providing that Congress shall have the power “to establish ... uniform Laws on the subject of Bankruptcies through the United States”); 11 U.S.C. § 106(a) (2003) (bankruptcy code abrogation provision).
35 *Hood*, 124 S. Ct. at 1912.
36 Id. at 1914.
State was out of compliance. The district court rejected the Eleventh Amendment argument, found that the consent decree had been violated, and ordered the state officials to develop remedies for the violations.38

On the state officials’ appeal, the Fifth Circuit reversed the district court.39 The Fifth Circuit held that the Eleventh Amendment prevented enforcement of the consent decree unless the violation of the decree was also a violation of a Medicaid Act provision that imposed a clear and binding obligation on the State. Whether or not the State had complied with the consent decree, the court found that it had not violated the general mandates of the federal law. Because the children had not established a violation of federal law, the district court lacked jurisdiction under the Eleventh Amendment to remedy the consent decree violations.

If a state enters a consent decree, state officials may be sued in federal court to enforce the decree, the Supreme Court unanimously decided, resolving the Fifth Circuit’s conflict with other circuits.40 The opinion by Justice Kennedy discussed first the reach of the Eleventh Amendment. While the Eleventh Amendment insulates the states from suits by individuals absent their consent, it permits suits for prospective injunctive relief against state officials acting in violation of federal law. This Ex parte Young exception also allows courts to order measures ancillary to appropriate prospective injunctive relief.41 Turning to the decree, the Court noted: a consent decree is a federal court order that springs from a federal dispute and furthers the objectives of federal law.42 In exercising their prospective powers under Ex parte Young, “[f]ederal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, a consent decree may be enforced.”43

The decision was not entirely ungenerous to the states, however. The Court recognized that states had legitimate concerns that “enforcement of consent decrees can undermine the sovereign interests and accountability of state governments” by, for example, improperly depriving state officials of their designated legislative powers.44 It pointed to Federal Rule of Civil Procedure 60(b)(5), which allows a party to move for relief if continued enforcement of a consent decree is no longer equitable. The Court instructed the lower courts promptly to exercise their equitable powers to make the necessary changes when the state establishes reason to modify the decree. The instruction to the lower courts was based on “principles of federalism [which] require that state officials with front-line responsibility for administering the program be given latitude and substantial discretion.”45

Standing

One of the most anticipated decisions of the term, Elk Grove Unified School District v. Newdow (the “Pledge of Allegiance” case), proved anticlimactic for those interested in the constitutional issues on the merits: the Court ducked the volatile First Amendment controversy by holding that the plaintiff lacked standing to bring

39Frazar v. Gilbert, 300 F.3d 530 (5th Cir. 2002) (Clearinghouse No.50456).
40Regarding the conflict among circuits, see, e.g., Kazlowski v. Coughlin, 871 F.2d 241 (2d Cir. 1989); Wisconsin Hospital Association v. Reivitz, 820 F.2d 863, 868 (7th Cir. 1987).
41Frew, 124 S. Ct. at 903.
42Id. at 904. The Court rejected the State’s reliance on Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984) (Clearinghouse No.12902), because that case involved state law rather than vindication of the supreme authority of federal law. Frew, 124 S. Ct. at 904.
44Frew, 124 S. Ct. at 905.
45Id. at 906.
In so doing, the Court may have further narrowed the already limited access to the federal courts for plaintiffs whose federal claims are intertwined with “elements of [a] domestic relationship.” The potential importance of this holding necessitates a detailed explanation of the case’s convoluted history.

The plaintiff, Michael Newdow, is an atheist whose daughter attended kindergarten in the defendant public school district, where she participated in the daily exercise of reciting the pledge of allegiance. In 2000 he sued the school district, on behalf of himself and his daughter as “next friend,” contending that the official recitation of the pledge, and particularly the phrase “under God,” constituted “religious indoctrination” of his child in violation of the free exercise and establishment clauses. A divided panel of the Ninth Circuit stunned the national legal and political communities by holding that the school district’s policy and the 1954 Act of Congress that added the phrase “under God” to the pledge violated the First Amendment.

Newdow and his daughter’s mother, Sandra Banning, had been involved in protracted and contentious proceedings in California state court over the custody of their daughter. After the Ninth Circuit issued its opinion, Banning filed a motion to intervene and dismiss the complaint; the motion alleged that (1) state court orders had granted Banning exclusive legal custody of her daughter, including the sole right to make all decisions regarding her daughter’s legal interests, education, and welfare; (2) neither Banning nor her daughter had any objection to the recitation of the pledge of allegiance; (3) Banning’s daughter would be harmed if the litigation continued because others might incorrectly perceive the child to share her father’s atheist views; and (4) Banning had concluded that being a party to the lawsuit was not in her daughter’s best interest. At Banning’s behest the state court issued an order enjoining Newdow from suing as his daughter’s “next friend” or otherwise representing her interests in the federal litigation. In light of these developments, the Ninth Circuit issued a second opinion in which it reconsidered Newdow’s standing to challenge the school district policy on his own behalf. Interpreting California child custody law, the Ninth Circuit concluded that Newdow’s status as a noncustodial parent did not deprive him of Article III standing “to object to allegedly unconstitutional government action affecting his child” and that Banning’s objections as the sole legal custodian could not defeat Newdow’s right “to seek redress for an alleged injury to his own parental interests.”

As the Supreme Court could not refrain from pointing out, nine judges dissented from the denial of en banc review.

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47 Id. at 2309.
48 Id. at 2306.
49 Id. at 2306–7.
50 Id. at 2307 (citing Newdow v. U.S. Congress, 292 F.3d 597, 612 (9th Cir. 2002)).
51 Id. at 2307–8. The Supreme Court delicately characterized the relationship among the three as one of “legal disharmony.” Id. at 2310.
52 Id. at 2307–8.
53 Id.
54 Newdow v. U.S. Congress, 313 F.3d 500 (9th Cir. 2002) (Newdow II).
55 Id. at 502–3; Newdow, 124 S. Ct. at 2307–8.
56 Newdow v. U.S. Congress, 124 S. Ct. 386 (2003); Newdow v. U.S. Congress, 328 F.3d 466 (9th Cir. 2003) (Newdow III). As the Supreme Court could not refrain from pointing out, nine judges dissented from the denial of en banc review. 124 S. Ct. at 2308.
In a 5-to-3 decision with the majority opinion authored by Justice Stevens, the Court characterized Newdow as a non-custodial parent, “deprived under California law of the right to sue as [his daughter’s] next friend,” whose “prosecution of the lawsuit may have an adverse effect on the person who is the source of [his] claimed standing.”57 Under such circumstances, where a plaintiff’s “standing to sue is founded on family law rights that are in dispute,” the Court concluded that considerations of “prudential standing” required the federal court “to stay its hand rather than reach out to resolve a weighty question of federal constitutional law.”58

The Court did not conceal its awareness that the merits of the case raised issues of extraordinary political and legal controversy, and indeed in the Court’s view this very fact required a most searching inquiry into the question of standing: “The command to guard jealously and exercise rarely our power to make constitutional pronouncements requires strictest adherence when matters of great national significance are at stake.”59 The Court reviewed the “two strands” of its standing jurisprudence: Article III standing, “which enforces the Constitution’s case or controversy requirement,” and “prudential” standing, which embodies “‘judicially self-imposed limits on the exercise of federal jurisdiction.’”60

The majority opinion apparently did not dispute the Ninth Circuit’s conclusion that Newdow had alleged a sufficient “injury in fact” to satisfy the requirements of Article III standing.61 Instead the Court turned immediately to a discussion of the less-often-litigated dimensions of prudential standing, which are limitations “‘related to Article III concerns but [are] essentially matters of judicial self-governance’” and which include, for example, “‘the general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked.’”62

The Court observed that “[o]ne of the principal areas in which [it] has customarily declined to intervene is the realm of domestic relations.”63 More than a century ago, the Court carved out a domestic relations “exception” to its statutory diversity jurisdiction. The exception precluded federal courts from issuing divorce, alimony, or child custody decrees in cases founded upon diversity jurisdiction.64 More recently the Court “acknowledged that it might be appropriate for the federal courts to decline to hear a case involving ‘elements of the domestic relationship.”’65 Although “to answer a substantial federal question that transcends or exists apart from the family law issue” might be necessary in “rare instances,” in general the federal courts should “leave delicate issues of domestic relations to the state courts.”66

Because “the disputed family law rights are entwined inextricably with the threshold standing inquiry,” and especially given that “the interests of the

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57Newdow, 124 S. Ct. at 2312.
58Id.
59Id. at 2308.
60Id. (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–62 (1992), and quoting Allen v. Wright, 468 U.S. 737, 751 (1984)).
61Id. at 2308–9. Curiously the opinion does not expressly acknowledge the point.
62Id. at 2309 (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975), and Allen, 468 U.S. at 751).
63Id.
64In Re Burros, 136 U.S. 586, 593–94 (1890).
65Newdow, 124 S. Ct. at 2309 (quoting Ankenbrandt v. Richards, 504 U.S. 689–705 (1992)).
66Id. (citing Palmore v. Sidoti, 466 U.S. 429, 432–34 (1984)).
affected persons ... are potentially in conflict,” the majority concluded that prudential considerations dictated dismissal of the case.\footnote{Id. at 2309 n.5, 2310–11, 2312.} Acknowledging that it ordinarily would defer to the Ninth Circuit’s interpretation of state family law issues, and not expressly disputing the lower court’s conclusion that state law “vests in Newdow a cognizable right to influence his daughter’s religious upbringing,” the majority nevertheless determined that the California family law cases relied upon by the Ninth Circuit “speak not at all” to the standing concerns raised by Newdow’s efforts to “reach outside the private parent–child sphere to restrain the acts of a third party.”\footnote{Id. at 2311 (citing Newdow II, 313 F.3d at 504–5), 2312.} Given that the interests of Newdow, Banning, and their daughter were, with respect to the claims on the merits, “in many respects antagonistic,” and given that the family law judge expressly prohibited Newdow from raising any federal claims as his daughter’s “next friend,” the majority concluded that “the prudent course” was to “stay its hand” and deny Newdow the standing to litigate the constitutional issues on his own behalf.\footnote{Id. at 2310, 2312. Indeed, the Court raised the possibility that Newdow’s federal claims were in conflict with his daughter’s own “constitutionally protect[ed] interests.” Id. at 2311 n.7.}

Challenging Agency Inaction

In \textit{Norton v. Southern Utah Wilderness Alliance} the Court considered the scope of the Administrative Procedure Act (APA) cause of action authorizing challenges to an agency’s failure to act.\footnote{All three justices would have upheld the constitutionality of the Pledge of Allegiance, albeit through widely divergent legal analyses. Compare \textit{Newdow}, 124 S. Ct. at 2321 (O’Connor, J., concurring in the judgment) with id. at 124 S. Ct. 2327 (Thomas, J., concurring in the judgment). In light of the probable views on the issue of Justice Scalia—who recused himself from participation in this case—apparently the next challenger to the constitutionality of the Pledge will face a formidable uphill battle in the Supreme Court.} The plaintiffs sought to challenge the failure of the Bureau of Land Management to prohibit off-road vehicles in “wilderness study areas” in Utah.\footnote{Id. at 2312 (Rehnquist, C.J., concurring in the judgment).} The bureau is required by statute to manage wilderness study

67 Id. at 2309 n.5, 2310–11, 2312.
68 Id. at 2311 (citing Newdow II, 313 F.3d at 504–5), 2312.
69 Id. at 2310, 2312. Indeed, the Court raised the possibility that Newdow’s federal claims were in conflict with his daughter’s own “constitutionally protect[ed] interests.” Id. at 2311 n.7.
70 All three justices would have upheld the constitutionality of the Pledge of Allegiance, albeit through widely divergent legal analyses. Compare Newdow, 124 S. Ct. at 2321 (O’Connor, J., concurring in the judgment) with id. at 124 S. Ct. 2327 (Thomas, J., concurring in the judgment). In light of the probable views on the issue of Justice Scalia—who recused himself from participation in this case—apparently the next challenger to the constitutionality of the Pledge will face a formidable uphill battle in the Supreme Court.
71 Id. at 2312 (Rehnquist, C.J., concurring in the judgment).
72 Id. at 2314 (citing 28 U.S.C. § 1332).
73 Id. at 2315–16.
74 Id. at 2316.
76 A wilderness study area is a tract that is the subject of a pending proposal by the Bureau of Land Management for designation as wilderness. This status may continue for years since only Congress may designate an area as wilderness. See id. at 2376–77.
areas so as “not to impair the suitability of such areas for preservation as wilderness.” The bureau is required also to develop land-use plans, through notice and comment, that describe allowable uses and goals for the land. The plaintiffs claimed that the bureau’s failure to prohibit the use of off-road vehicles in certain wilderness study areas violated the agency’s obligation not to impair the suitability of the land as wilderness and that it had failed to implement provisions in the land-use plans for these areas. In a unanimous decision written by Justice Scalia, the Court held that neither of these claims was cognizable as a challenge to agency inaction under the APA.

Justice Scalia began his analysis by observing that the APA creates a general cause of action to challenge “final agency action.” The statute defines “action” as “the whole or a part of an agency rule, order, license, sanction, relief or the equivalent or denial thereof, or failure to act.” This language suggests, Justice Scalia concluded, that agency inaction is subject to challenge under the APA only if it is a failure to do something that would qualify as “action” within the meaning of the statute.

Turning to language in the APA that authorizes a reviewing court to compel an agency action “unlawfully withheld or unreasonably delayed,” Justice Scalia concluded: the APA permits courts to order only the performance of discrete, legally required acts, akin to mandamus.

Justice Scalia’s equation of a challenge to agency inaction with a challenge to agency action has potential bite. The Court previously rejected APA challenges as insuf-

ficiently focused on a specific agency “action.” This latest holding makes agency “inaction” a comparable term of art that also requires showing a failure to perform a legally compelled, specific action.

With this discussion as a frame, Justice Scalia considered whether the plaintiffs’ claims satisfied these requirements. The land management bureau’s duty to “not impair” a wilderness study area does not mandate, he found, banning off-road vehicles with sufficient clarity for that omission to be actionable under the APA. He also rejected plaintiffs’ attempt to circumvent the lack of a clear legal requirement by seeking a general order that the agency comply with the nonimpairment requirement. Although nonimpairment is legally required, Justice Scalia found it insufficiently discrete:

If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved—which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management.

Justice Scalia rejected the claim that the bureau’s land-use plan created a legal obligation to ban off-road vehicles. Conceding the possibility that the bureau

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79 Id. § 551(13).
80 Norton, 124 S. Ct. at 2379.
81 Id. § 706(1); Norton, 124 S. Ct. at 2379–80. The Court did not discuss the Administrative Procedure Act language on challenging actions that are “unreasonably delayed.”
83 Norton, 124 S. Ct. at 2380.
84 Id. at 2381.
could violate the terms of a land-use plan in a manner that would be actionable under the APA, Justice Scalia found that the terms of the plan in question were in the nature of projections that constitute an agenda for the future use of the area rather than a concrete set of binding commitments. Under this view of land-use plans—that statements about future activity are merely aspirational rather than enforceable mandates—challenging an agency action as inconsistent with such a plan would be much easier than challenging agency inaction.

Judicial Deference to Administrative Interpretations of Statutes

The term was relatively quiet on the Chevron-deference front. In Alaska Department of Environmental Conservation v. Environmental Protection Agency the Court considered the Environmental Protection Agency (EPA) interpretation of the Clean Air Act as permitting the agency to issue an order preventing Alaska’s Department of Environmental Conversation from granting a permit application to a mining company. In a 5-to-4 decision, the Court rejected the claim that the statute permitted the EPA to issue such an order only if the state agency omitted a consideration required by the Clean Air Act, rather than when the state included such a consideration but the EPA found its conclusion “unreasonable.”

Upholding the EPA’s interpretation, Justice Ginsburg noted that Chevron deference was inapplicable because the interpretation had been stated only in “internal guidance memoranda.” But the majority opinion is nonetheless “chock full of Chevron-like language,” as Justice Kennedy’s dissent pointed out. Thus Justice Ginsburg describes EPA’s view as “permissible” and “rational” rather than simply determining whether it is the correct reading of the statute. Having found that EPA had the power to issue such an order, the Court concluded that its exercise of that power was not arbitrary and capricious in this instance.

In Barnhart v. Thomas, a decision that is of interest principally to those who work in social security disability law, the Court unanimously sustained the Social Security Administration’s interpretation of the Social Security Act as mandating the denial of benefits to an individual who had the capability to perform her past work but was precluded from doing so because the occupation had become technologically obsolete. Applying Chevron, the Court found that the agency’s interpretation “is at least a reasonable construction of the text.” As in other recent decisions upholding agency interpretations, the Court dodged the question of whether the statute was clear or ambiguous—the distinction that once seemed so crucial to Chevron analysis.

88Here the Environmental Protection Agency disagreed with the state’s finding as to what antipollution measures satisfied the statutory requirement that the company use the “best available control technology.” Id. at 990.
89Id. at 1001.
90Id. at 1018 (Kennedy, J., dissenting).
91Id. at 1004.
92Id. at 1006–8.
94Id. at 380.
Federal Court Access Issues in the U.S. Supreme Court’s 2003–2004 Term

Statutes of Limitation

Access to the courts for enforcement of federally protected rights may be affected by restrictive or expansive interpretations of statutes of limitation. In Jones v. R.R. Donnelley & Sons Company the plaintiffs were a class of African American former employees of the defendant manufacturing company.95 The plaintiffs contended that they suffered various forms of race-based discrimination during their employment. Their complaint alleged violations of 42 U.S.C. § 1981, which was enacted in 1866 and, in its original version, provided in relevant part that “all persons ... shall have the same right in every State and Territory to make and enforce contracts ... as is enjoyed by white citizens.”96 Responding in 1991 to a potentially limiting ruling, Congress enacted a new subsection to 42 U.S.C. § 1981 to include within its reach the “termination of contracts and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.”97

A year earlier Congress enacted 28 U.S.C. § 1658, which stated that “a civil action arising under an Act of Congress enacted after [December 1, 1990,] may not be commenced later than four years after the cause of action accrues.”98 The Jones plaintiffs’ discrimination claims, which were predicated on the 1991 amendments to Section 1981, were filed within four years of their accrual.99 However, the defendant sought dismissal of the complaint on the theory that the plaintiffs’ causes of action ultimately “ar[ose] under” the original 1866 Civil Rights Act, and therefore were subject not to the four-year federal statute set forth in 28 U.S.C. § 1658 but to Illinois’s two-year limitations period for personal injury actions (under which plaintiffs’ claims would not have been timely filed).100

Justice Stevens, writing for a unanimous Court, held that the four-year statute of limitations set forth in Section 1658 applied to plaintiffs’ claims. Finding no “obvious answer” in the “bare text” to the meaning of the disputed statutory phrase “arising under,” the Court concluded that Congress intended the four-year limitations period to apply whenever “the plaintiff’s claim against the defendant was made possible by a post-1990 enactment,” whether the enactment amended a preexisting statute or created a wholly new cause of action.101 The Court observed that its reading of Section 1658 was consistent with “Congress’ interest in alleviating the uncertainty inherent in the practice of borrowing state statutes of limitations while at the same time protecting settled interests [of litigants].”102

Appellate Review of a Preliminary Injunction

In a case involving another kind of access—minors’ access to the Internet—the Court briefly mentioned the relevant standards for a preliminary injunction and for appellate review of a preliminary injunction but added several new “practical reasons” to the analysis.103 Upholding the district court’s injunction

96Id. at 1839 (quoting 14 Stat. 27 (1866)).
98Jones, 124 S. Ct. at 1839 (quoting 28 U.S.C. § 1658(a) (1990)).
99Id. at 1839–40.
100Id. at 1840.
101Id. at 1841–42, 1845. The Court looked to the legislative history of Section 1658 to ascertain “the purposes it was designed to accomplish.” Id. at 1845.
102Id. at 1845. The Court also complained that the analysis required for ascertaining which state statute of limitations should be “borrowed” for purposes of a given federal claim had “created so much unnecessary work for federal judges.” Id. at 1844.
103Ashcroft v. American Civil Liberties Union, 124 S. Ct. 2784 (2004).
of the Child Online Protection Act, which criminalized posting of content “harmful to minors.” The 5-to-4 majority opinion by Justice Kennedy in Ashcroft v. American Civil Liberties Union referred in passing to the likelihood of success on the merits and irreparable harm as the traditionally necessary elements for the district court to issue the injunction and reiterated that both the courts of appeal and the Supreme Court had “always applied the abuse of discretion standard on the review of a preliminary injunction.”

However, the Court went farther than merely regurgitating the standards for appellate review of a preliminary injunction. It delineated several “important practical reasons to let the injunction stand pending a full trial on the merits.” Although this analysis came in the context of a First Amendment challenge, it appears to be applicable to other situations and therefore to preliminary injunctions that legal aid attorneys might seek to protect. The essence of these “practical reasons”—though not stated as such—is that, once a preliminary injunction is in place, a presumption arises that the irreparable harm occasioned by vacating the injunction will usually trump other considerations.

The Court’s first practical reason was that “the potential harms from reversing the injunction outweigh those of leaving it in place by mistake.” This analysis would apply to a preliminary injunction against a reduction in benefits or health care. The second practical reason was that “there are substantial factual disputes remaining in the case.” The third practical reason was that “the factual record does not reflect current technological reality.” Although this factor might not transfer easily to the benefits arena, it should at least be considered.

The fourth practical reason was to “permit the District Court to take account of a changed legal landscape.” Although the challenge to the Child Online Protection Act took a particularly long time—the appeal of the preliminary injunction went twice to the Supreme Court and the court of appeals—the possibility is very real that, in a more typical case, at least a year could pass between the issuance of a preliminary injunction and a decision by the appellate court. The Supreme Court is suggesting that if new laws potentially affecting the resolution of a preliminary injunction motion are passed in the interim, the district court should have the first opportunity to consider their applicability.

Although in any given appeal none of these factors might be directly on point, the overall implication of American Civil Liberties Union is that a preliminary injunction is best left untouched unless the defendant offers a compelling reason for reversal. At the very least, when defending the issuance of a preliminary injunction, advocates would be wise, at some point, to quote the Court’s first practical reason: “the potential harms from reversing the injunction outweigh those of leaving it in place by mistake.”

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104 id. at 2790–91 (citation and internal quotation marks omitted); Child Online Protection Act, 47 U.S.C. § 231 (2002).
105 American Civil Liberties Union, 124 S. Ct. at 2794.
106 id.
107 id.
108 id.
109 id. at 2795.
110 id. at 2794. If the circuit in question has no appropriate language to underscore the relative hardships, the Ninth Circuit reiterated its 20-year-old recognition of the importance of benefits to poor people: “Faced with a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly in plaintiffs’ favor.” Lopez v. Heckler, 713 F.2d 1432, 1437 (9th Cir. 1983) (Clearinghouse No. 33,630). This language was recently reaffirmed in two companion decisions upholding preliminary injunctions that had stopped planned reductions in health care. Harris v. Board of Supervisors, 366 F.3d 754, 766 (9th Cir. 2004); Rodde v. Bonta, 357 F.3d 988, 999 (9th Cir. 2004) (Clearinghouse No. 55,598).
Mandamus to the District Court

In *Cheney v. U.S. District Court* the underlying issue was the effort by two nonprofit entities to force a committee appointed by the president to comply with the procedural and disclosure requirements of the Federal Advisory Committee Act. The National Energy Policy Development Group, chaired by the vice president, was formally composed only of federal government officials, but the plaintiffs contended that nonfederal employees attended so many meetings that they had become *de facto* members of the committee and that therefore the exemption from Federal Advisory Committee Act disclosure requirements was not applicable.

After denying the government’s motion to dismiss, the district court allowed the plaintiffs “to conduct a ‘tightly-reined’ discovery to ascertain the [National Energy Policy Development Group’s] structure and membership, and thus to determine whether the *de facto* membership doctrine applies.” When the government sought a writ of mandamus and filed a notice of appeal, a divided panel of the court of appeals dismissed both, holding that an alternative avenue of relief was available: the government officials could claim executive privilege. Since that privilege had not yet been claimed, however, the issue was hypothetical, and the court of appeals viewed that it had “no authority to exercise the extraordinary remedy of mandamus.”

On the “merits” of the issue, the Supreme Court laid out in detail the restrictions surrounding the exercise of mandamus, with the emphasis on its use only in “exceptional circumstances” or a “clear abuse of discretion.” It reiterated the three conditions that must be satisfied: (1) that no other means to obtain relief is available; (2) that the right to issuance of the writ is clear and indisputable; and (3) that the court exercise its discretion to determine that issuance of the writ is appropriate under the circumstances.

The Court concluded that the critical feature of the instant case was the vice president’s participation and his assertion that the discovery order would impinge on his and others’ ability to advise the president: “These facts and allegations

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112 See *Cheney*, 124 S. Ct. at 2583.
113 *Id.* at 2584.
114 *Id.* at 2585 (quoting *In re Cheney*, 334 F.3d 1096, 1105 (D.C. Cir. 2003)). On a similar rationale, the court of appeals also rejected the government’s right to appeal the discovery order. See *id.* The Supreme Court, however, did not decide that issue.
115 *Id.* at 2586.
116 *Id.*
117 *Id.* at 2587.
118 *Id.*
remove this case from the category of ordinary discovery orders where interlocutory appellate review is unavailable, through mandamus or otherwise.”

This separation-of-powers approach determined the outcome. In a lengthy discussion the Supreme Court distinguished the case on which the Court of Appeals had relied, *United States v. Nixon*, which involved enforcement of criminal subpoenas: “The observation in *Nixon* that production of confidential information would not disrupt the functioning of the Executive Branch cannot be applied in a mechanistic fashion to civil litigation.”

The Supreme Court in *Cheney* clearly was concerned about the extensive nature of the discovery requests, as opposed to the relatively narrow subpoena orders in *Nixon*. 

In the end the Court determined that, since “[e]xecutive privilege is an extraordinary assertion of power not to be lightly invoked,” the government was not required to invoke the privilege in order to raise a separation-of-powers argument. Therefore the court of appeals was premature in ending its inquiry merely because the government had not raised executive privilege. The matter had to be returned to the court of appeals, the court to which the government made the request for the writ, to consider these points and to determine whether, in its discretion, the writ should issue.

While much of *Cheney* is concerned with the executive privilege and separation-of-powers issues—issues that do not commonly arise in legal aid cases—its discussion of mandamus makes it worthwhile reading for that unusual situation in which mandamus jurisdiction to review an interlocutory order is presented.

### Attorney Fees from the Federal Government

In *Scarborough v. Principi* the Court addressed the requirements for a fee application under the Equal Access to Justice Act, a critical statute that waives the federal government’s sovereign immunity and authorizes payment of attorney fees to a prevailing party in an action against the United States unless the government can demonstrate that its position in the underlying litigation was “substantially justified.”

*Scarborough* had prevailed in an action for disability benefits against the Department of Veterans Affairs in the Court of Appeal for Veterans Claims. After the Court of Appeal for Veterans Claims issued its judgment, Scarborough’s counsel filed a fee application, seeking $19,333.75 in fees and $117.80 in costs. Although in all other respects the application undisputedly met the requirements of Subsection 2412(d)(1)(B) of the Equal Access to Justice Act, it failed to allege that “the position of the United States was not substantially justified.”

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119 Id.
121 See *Cheney*, 124 S. Ct. at 2589–91.
122 Id. at 2592 (citation and internal quotation marks omitted).
125 *Scarborough*, 124 S. Ct. at 1860.
126 Id. at 1862.
127 Id.
United States was not substantially justified divested the court of subject-matter jurisdiction to award fees, the secretary of veterans affairs moved to dismiss the fee application.128

Scarborough’s counsel immediately filed an amendment to the fee application that included a new paragraph alleging that “the government’s defense of Appellant’s claim was not substantially justified,” and he opposed the motion to dismiss on the ground that the defect in his original application was curable, not jurisdictional.129 Nevertheless the Court of Appeal for Veterans Claims granted the government’s motion, and the Federal Circuit affirmed, holding that, as a waiver of sovereign immunity, the procedural elements of the Equal Access to Justice Act must be strictly construed in favor of the government.130

After the Supreme Court vacated and remanded the court of appeals’ decision in light of a potentially relevant intervening decision, the Federal Circuit again upheld dismissal of the fee application.131 In an opinion written by Justice Ginsburg for a seven-member majority, the Supreme Court reversed the Federal Circuit. The Court “clarif[ied],” as an initial matter, that the issue before it “does not concern the federal courts’ subject matter jurisdiction” and exhorted “courts and litigants [to use] the label ‘jurisdictional’ not for claim-processing rules, but only for prescriptions delin- eating the classes of cases (subject matter jurisdiction) and the persons (personal jurisdiction) falling within a court’s adjudicatory authority.”132 The Equal Access to Justice Act provision at issue here constituted a time prescription “relate[d] only to postjudgment proceedings auxiliary to cases already within [the] court’s adjudicatory authority” and therefore did not implicate the Court’s jurisdiction.133

Examining the purpose behind the statutory requirement that a fee application include an allegation that the government’s position was not substantially justified, the Court determined that the requirement was “nothing more than an allegation or pleading requirement,” which did not alter the government’s ultimate burden to demonstrate substantial justification in the underlying dispute and which, like the verification requirement at issue in Edelman v. Lynchburg College, functioned merely as a “think twice” prescription that “stem[s] the urge to litigate irresponsibly.”134 The Court also analogized the Equal Access to Justice Act requirement to the issue raised in Becker v. Montgomery, where the Court held that a pro se litigant’s failure to “hand-sign” an otherwise timely filed notice of appeal was a “nonjurisdictional” and “curable” defect.135 The Court concluded that the relation-back doctrine found applicable in Edelman and Becker also permitted an out-of-time amendment to a timely filed Equal Access to Justice Act application which lacked the “not substantially justified” allegation.136

128 Id. at 1862–63. By the time the secretary of veterans affairs filed his response, the thirty-day period within which to file the application had passed. Id. at 1862.
129 Id. at 1863.
130 Id. (citing Scarborough v. West, 273 F.3d 1087, 1089–90 (Fed. Cir. 2001)).
132 Scarborough, 124 S. Ct. at 1865 (quoting Kontrick v. Ryan, 124 S. Ct. 906, 915 (2004)).
133 Id.
134 Id. at 1867 (quoting Edelman, 535 U.S. at 116); Edelman, 535 U.S. at 106.
136 Scarborough, 124 S. Ct. at 1868. The Court was not troubled by the “relation-back” principle set forth in Federal Rule of Civil Procedure 15(c)(2) being applicable to “pleadings”—a term which admittedly “does not encompass fee applications”—because the broader roots of the federal doctrine predated the codification of the federal rules. Id. at 1867 n.5.
Notwithstanding this general analysis, the government “insist[ed] most strenuously” that the relation-back doctrine should not apply in the context of the Equal Access to Justice Act because “[Section] 2412’s waiver of sovereign immunity from liability for fees is conditioned on the fee applicant’s meticulous compliance with each and every requirement of [Section] 2412(d)(1)(B) within 30 days of final judgment.” In response, the Court observed that in *Irwin v. Department of Veterans Affairs*, it had held that Title VII’s statutory time limits for filing employment discrimination charges were subject to equitable tolling, even against the government, and notwithstanding that the provision constituted a waiver of sovereign immunity. The lesson of *Irwin*, according to the Court, was that “[w]hen Congress waives sovereign immunity ... judicial application of a time prescription to suits against the Government, in the same way the prescription is applicable to private suits, ‘amounts to little, if any, broadening of the Congressional waiver.’”

As in *Irwin*, the Court in *Scarborough* declined to carve out a special exception in the government’s favor simply because the underlying claim was based upon a waiver of sovereign immunity and reaffirmed its prior holdings that “‘limitation principles should generally apply to the government in the same way that they apply to private parties.’” The Court thus concluded, especially in light of the government having suffered no prejudice as a result of the omission, that the “relation-back” analysis of *Edelman* and *Becker* was applicable to this Equal Access to Justice Act requirement, notwithstanding that the fee statute effected a waiver of sovereign immunity.

As in past terms, federal court access issues in the 2003–2004 term were often buried in decisions that are better known for other, more substantive questions. Indeed, the next term does not present, on its face, any cases that raise important access issues. These issues invariably crop up throughout a term’s cases, however, and, despite their often tedious appearance, they can be crucial to a client’s ability to get into federal court, stay there, and win an ultimate victory. Advocates should familiarize themselves with this latest collection of decisions since they may be more significant than immediately meets the eye.

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137 *Id*. at 1868.
138 *Id*. at 1869 (citing *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990)).
139 *Id*.
141 *Id*. at 1870. Justice Thomas, joined by Justice Scalia, dissented, complaining that the majority had “distort[ed] the scope” of *Irwin* and should have strictly construed the Equal Access to Justice Act application requirements and timeline. *Id*. at 1871 (Thomas, J., dissenting).