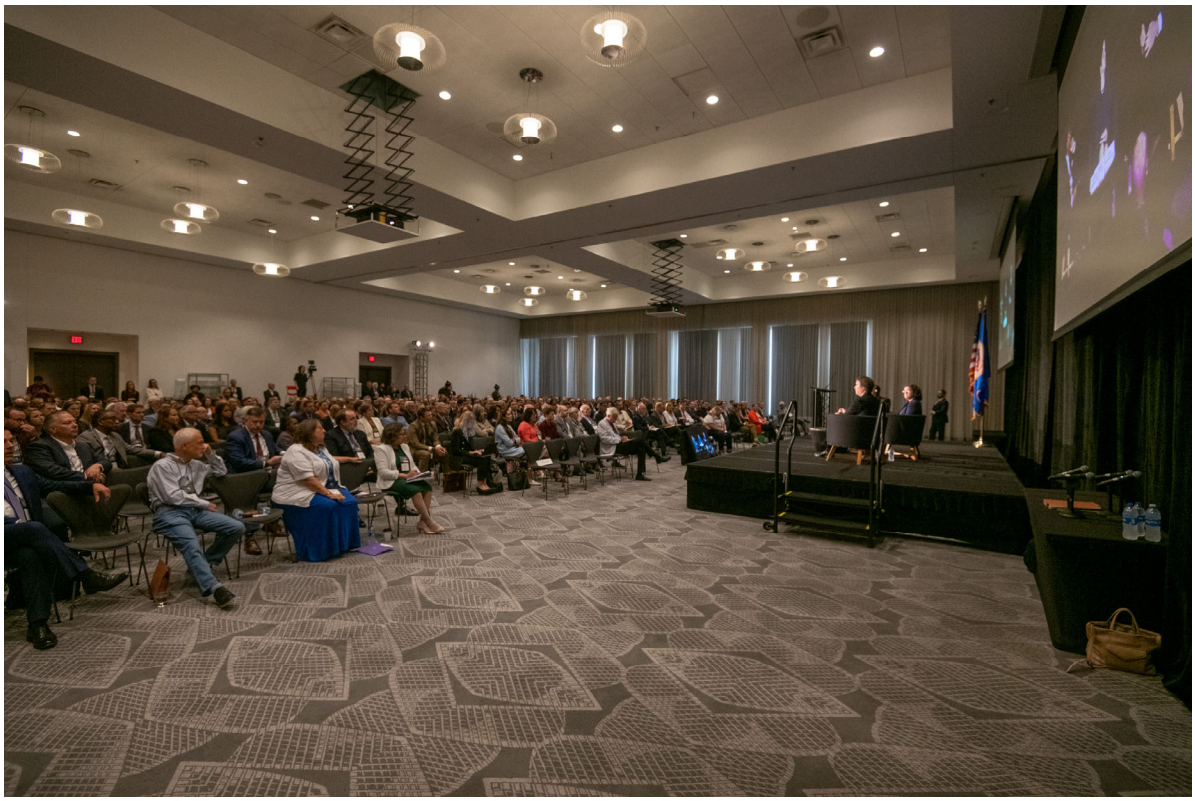
Bar Association for the United States Court of Appeals for the Eighth Circuit

NEWSLETTER

Fall 2023



The Eighth Circuit Judicial Conference was held in Minnesota from July 12-14. The conference included an interview with Justice Brett Kavanaugh, circuit justice for the Eighth Circuit. Full coverage pages 2-5.

Also in this Issue:

Minnesota hosts Judicial Conference

This article originally appeared in Bar Talk, the newsletter of the District of Minnesota Chapter of the Federal Bar Association. It is reprinted with permission.

By Devin T. Driscoll

The Eighth Circuit Judicial Conference was held at the Radisson Blu Mall of America in Bloomington from July 12th to July 14th.

Full judicial conferences of the U.S. circuit courts—meaning gatherings open to both bench *and* bar—are typically convened biennially "for the purpose of considering the business of the courts and advising means of improving the administration of justice within such circuit." 28 U.S.C. § 333. The conference program committee, which was chaired by Chief Judge Patrick J. Schiltz, assembled an outstanding program of speakers and panelists on a broad range of civil, criminal, and bankruptcy topics.

The conference's first day featured a conversation with Associate Justice Brett M. Kavanaugh of the United States Supreme Court, who is currently serving as the Circuit Justice for the Eighth Circuit. The conversation was moderated by Eighth Circuit Chief Judge Lavenski R. Smith and Judge Sarah E. Pitlyk of the Eastern District of Missouri. Judge Pitlyk clerked for Justice Kavanaugh when he was a judge on the D.C. Circuit.

Also featured during the first day's programming were two plenary CLE presentations: the first focused on the broadcasting of civil and criminal proceedings and the second focused on the issue of judicial safety and security. The former was a lively panel discussion featuring two state-court judicial officers: Minnesota District Court Judge Peter A. Cahill and Iowa Chief Justice Susan Christensen. Judge Cahill described his experience with the live broadcasting of the murder trial of Derek Chauvin. Chief Justice Christensen discussed the Iowa judicial branch's longstanding practice of livestreaming court proceedings. Both justices advocated for greater use of broadcasting in the federal courts.

The second program of the day featured remarks from two speakers: Judge Esther Salas of the District of New Jersey and Mark Lanterman, a long-time expert in protecting privacy and uncovering cyber fraud. Judge Salas described the assassination attempt against her which resulted in the tragic murder of her son and shooting of her husband. The horrible events were perpetrated by a self-proclaimed men's rights activist. Judge Salas discussed how the tragedy spurred her to seek state and federal legislation that better protects the private information of judicial officers. Mr. Lanterman demonstrated how easily such personal information can be found online in the absence of such legislative protection.

The second day of the conference featured three plenary CLE presentations. The first, a multi-panel discussion—led by Senior Judges Susan Richard Nelson and Donovan Frank – focusing on the success of reentry, diversion, and veterans' courts, both at the state and, increasingly, at the federal level. The second, a Supreme Court update moderated by Eighth Circuit Judge David Stras. And the third, a presentation on gun and violent crime prevention, moderated by United States Attorney Andy Luger.

CLE breakout session topics included the application of the Fourth and Fifth Amendments to new technology featuring expert Professor Orin Kerr of the University of California, Berkeley School of Law. Chief Judge Schiltz moderated an update on proposed Federal Rule of Evidence 107 on the issue of illustrative aids. The Chief Judge served on the committee that drafted the proposed rule. Finally, Judge Nancy E. Brasel, led a discussion featuring the work of the Judicial Conference of the United States which is considering the future of remote court proceedings in the federal system. Judge Brasel serves on a Judicial Conference subcommittee that is drafting the proposed policy.

In addition to the CLE offerings, the conference featured a Bench and Bar Re

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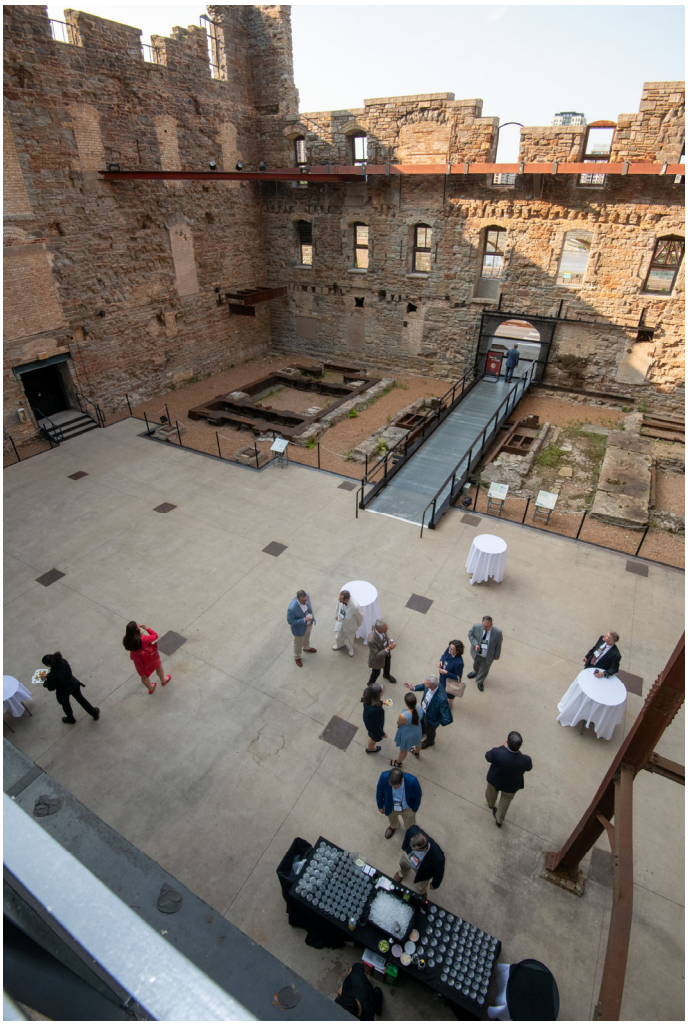
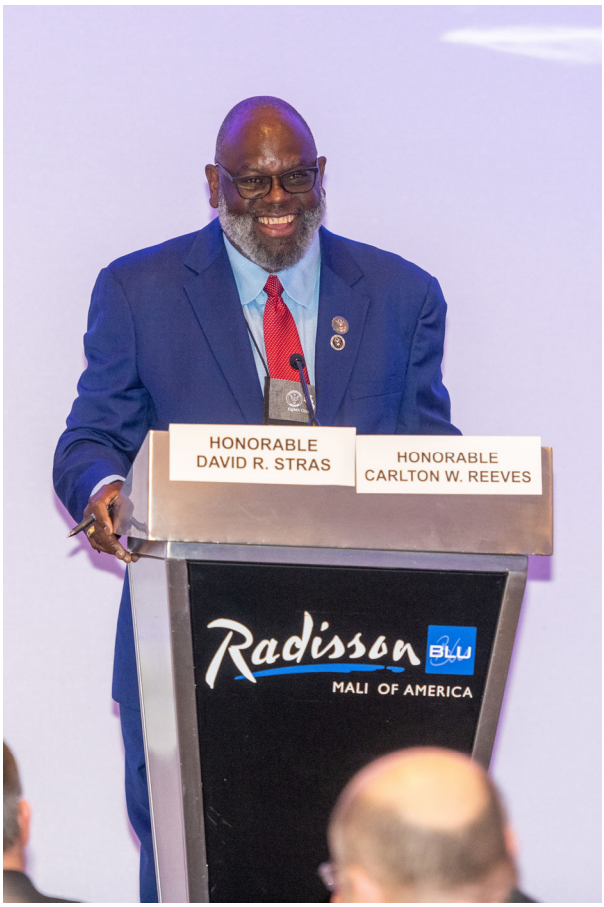
ception at the Mill City Museum in Minneapolis; a special outing to a performance of *Into the Woods* at the Guthrie Theater; and a fantastic luncheon presentation featuring Judge Carlton W. Reeves of the Southern District of Missouri, who began his term as the Chair of the United States Sentencing Commission in August 2022.

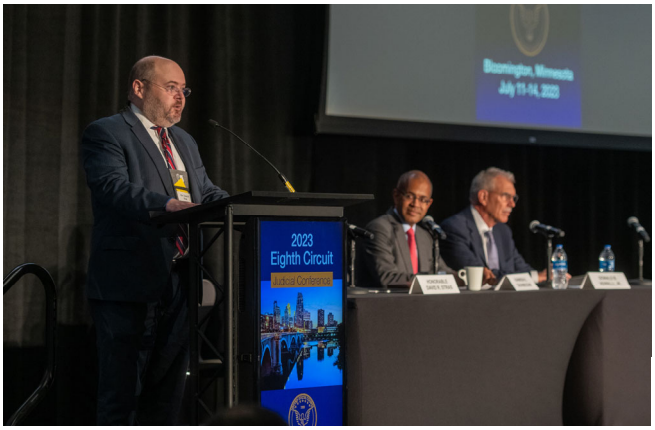
Devin T. Driscoll is a senior associate at Fredrikson and Byron, P.A., with a practice focused on business litigation, environmental and energy litigation, eminent domain litigation, and appellate matters.



The Bench/Bar Reception was held at Mill City Museum on July 13.



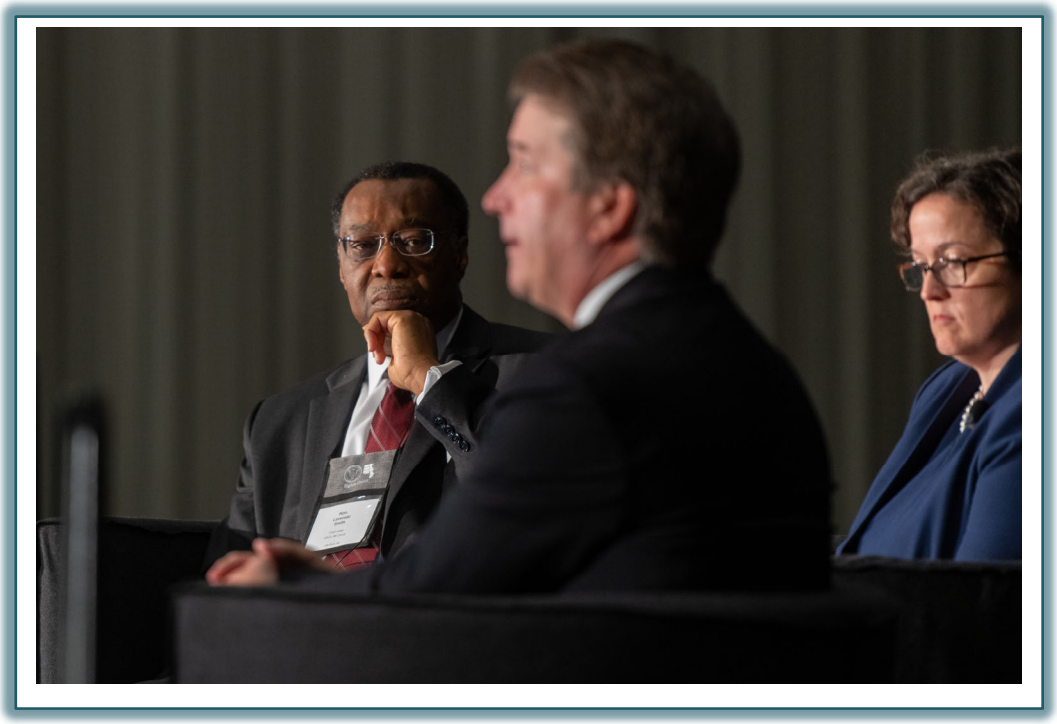
The Hon. Carlton Reeves, U.S. District Judge for the Southern District of Mississippi, and chair of the United States Sentencing Commission, spoke at the conference luncheon on July 13.



The Hon. David Stras moderated a discussion about the U.S. Supreme Court with Kannon Shanmugam and Donald Verilli.

The Hon. Esther Salas, U.S. District Court Judge for the Eastern District of Missouri, spoke at a session entitled "Safe and Secure? Are You Sure?" Judge Salas described the assassination attempt against her which resulted in the tragic murder of her son and shooting of her husband. Judge Salas's advocacy led to the passage of "Daniel's Law" in New Jersey, and she has continued to advocate for greater protections for judges.

The Hon. Lavenski R. Smith, Chief Judge of the Eighth Circuit Court of Appeals, and the Hon. Sarah E. Pitlyk, U.S. District Court Judge for the Eastern District of Missouri, interviewed the Hon. Brett M. Kavanaugh at the Eighth Circuit Judicial Conference on July 13, 2023.



2023 Richard S. Arnold Award

Since 2012, the Eighth Circuit Bar Association has presented Richard S. Arnold Awards for Distinguished Service to ten deserving individuals at Eighth Circuit Judicial Conference during the years when the conference includes practitioners. The awards are made by the Association based on nominations provided by the chief judges of each district in the Circuit. This year's award recipients are pictured below with Eighth Circuit Bar Association President Landon Magnuson and Treasurer Tim Vavricek.

The award is named for former Chief Judge Richard S. Arnold, who had a distinguished career that included graduating first in his class at Yale University and Harvard Law School. Judge Arnold clerked for Justice William Brennan on the United States Supreme Court before entering private practice and serving on the Eighth Circuit Court of Appeals for decades.

Jenniffer M. Horan, E.D. Ark.
David R. Matthews, W.D. Ark.
Timothy J. Hill, N.D. Iowa
Alfredo Parrish, S.D. Iowa
Donald M. Lewis, D. Minn.
Gerald R. Ortbals, E.D. Mo.
Jennifer Gille Bacon, W.D. Mo.
David R. Stickman, D. Neb.
Mark A. Friese, D. N.D.
Clint Sargent, D. S.D.

Looking Back Over 20 years

The founding president reflects on the origins of the Association

By Eric Magnuson

Why do we have bar associations, and how do they get started? These are questions none of us probably give much thought. As the founding president of the 8th Circuit Bar Association, I've been asked to reflect on its origin and its significance, and those questions immediately sprang to mind.

Throughout my career, I have been active in bar organizations. I have found them to be extremely rewarding, both because of the work that they do, and because of the people that I have met through them. There is no better way to expand your professional network than to become active in a bar association that has committed members and purpose. Over the years, I have been a participating member of the ABA, the FBA, the Minnesota State Bar Association, and a number of specialty bars. Through my active participation on those organizations, I have met hundreds of colleagues who share my interests in particular areas of law and practice. My career has benefited from those associations, making me a better lawyer and increasing the scope of my practice.

The Association of the Bar of the United States Court of Appeals for the Eighth Circuit (more later on how we chose that somewhat cumbersome name), came into being in December 2002. It had its genesis in a meeting of interested lawyers from across the Circuit held in the Thomas Eagleton Courthouse in St. Louis. As a result of my work with the ABA (I had served as cochair of the Section of Litigation Appellate Practice Committee and the Torts and Insurance Practice Section Appellate Advocacy Committee), I knew several lawyers who practiced in the 8th Circuit. I had also formed a good working relationship with the Court, having served on various committees and programs designed to improve court technology and procedure, and having regularly attended the Circuit Judicial Conferences.

> As I reflect on my career, one of the things of which I am most proud is having been the founding President of the Association and an active participant for more than 20 years. It seems today that lawyer involvement in bar associations across the country is waning. Yet those associations, and the relationships that they foster, can be among the most valuable opportunities that lawyers, young and old, can experience.

Michael Gans (one of the best court clerks in the federal judiciary) was an enthusiastic supporter of the idea of a bar association for the Circuit, and quickly enlisted the support of the judges. We came up with a notice that was sent by the Court to lawyers admitted to practice in the Circuit, announcing an organizational meeting to discuss the formation, purpose, and structure of a circuit-wide bar organization. In early 2002, a couple of dozen interested lawyers convened in St. Louis, and the Association was born.

It's one thing to conceive of a bar association, but another thing to actually get it up and running. We first needed some consensus on how it would be organized. The original articles of incorporation provided for a nonvoting membership, and an organization run by a board of directors (a structure that continues today). The original incorporators were two Kansas City lawyers, Terry Schackmann and Dennis Owens. Dennis was also active in the ABA and quickly saw the value of a circuit bar association. He suggested the formal name of the Association, patterned after the New York bar association. If you knew Dennis, you knew that he was a fan of

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the grandiose. His suggestion stuck, although the formal name is now used only on occasion.

Articles of incorporation were only the first step. The Association needed a board through which to conduct business, and to adopt bylaws. The original bylaws designated a slate of officers, and the officers picked the first Board of Directors from interested lawyers across the circuit.

The formal bylaws were drafted so that membership of the Board would be rotating. Board members would serve three-year terms, and the original terms were staggered so that going forward, one-third of the board members would be elected each year. Board seats were allocated to each judicial district within the circuit, and in addition, five at-large seats were created. The officers of the association also served as directors.

With the governmental structure in place, the Association turned its thoughts to how it could best serve its members. The early officers and directors recognized that to attract members, the Association had to provide value. That was best accomplished by creating educational and networking opportunities, as well as disseminating information about the court and its cases, without high membership costs. Educational programs and an informative, useful newsletter were priorities.

The purposes of the Association are clearly set forth in the bylaws today. The Association's goals included improving the administration of justice in the Circuit, raising the standards of practice by working with the trial and appellate courts, and educating the bar on those matters. In addition, the Association assists the courts in holding the Eighth Circuit Judicial Conference and proposing qualified persons for membership on the Attorney Advisory Committee.

The Association has been committed to those goals for the last twenty years. From the barely formed thoughts of the original founders, the Association has blossomed into an effective and well-regarded presence in the Eighth Circuit. Membership is open to judges, law clerks, and court staff and practicing lawyers in both the public and private sectors. The Association has a number of active committees and publishes on a regular basis a short but useful newsletter highlighting significant cases and other developments within the Circuit. The Association also sponsors and works with the Court to develop meaningful educational programs. And it does all of this with exceedingly modest annual dues.

As I reflect on my career, one of the things of which I am most proud is having been the founding President of the Association and an active participant for more than 20 years. It seems today that lawyer involvement in bar associations across the country is waning. Yet those associations, and the relationships that they foster, can be among the most valuable opportunities that lawyers, young and old, can experience. My hope is that the Eighth Circuit Bar Association will continue and expand its good work in the next 20 years, for the benefit of the Court and the lawyers and the parties who appear before it.

Eric Magnuson is a partner in the Minneapolis office of Robins Kaplan LLP, and chair of his firm's Appellate Advocacy and Guidance Group. He served as Chief Justice of the Minnesota Supreme Court from 2008 to 2010. He is a past president of the American Academy of Appellate lawyers and Founding President of the 8th Circuit Bar Association.

SCOTUS decides three cases from circuit

By Ryan Marth

For an institution once content to hide in the shadows of the national news, the Supreme Court once again made its presence known in October Term 22. The Court (especially its conservative flank) followed up a noteworthy OT21 with an equal amount of controversy in OT22. In case you may have forgotten, in OT21, the court overruled abortion protections (*Dobbs v. Jackson Women's Health Organization*), expanded firearms rights (*N.Y. State Rifle & Pistol Club v. Bruen*), and rolled back environmental regulations (*W. Virginia v. EPA*), to name just a few decisions. Not to be outdone, OT22 featured landmark rulings that struck down affirmative-action programs in college admissions (*Students for Fair Admissions v. Harvard*) and allowed businesses to rely on their religious beliefs to defy state civil-rights laws that required them to serve same-sex couples (*303 Creative v. Elenis*). One of the term's most impactful decisions—affecting tens of millions of student-loan borrowers—originated right here in the Eighth Circuit. That case (*Biden v. Nebraska*) struck down President Biden's student-loan forgiveness program, on the basis that it exceeded the authority that Congress granted the Secretary of Education.

Based on the headlines, one would be tempted to believe that consensus on the Court was a thing of the past. The numbers don't necessarily bear this out, however. For example, the Court issued unanimous decisions in 25 (42.4%) of the 59 cases for which it granted certiorari on paid petitions. This reverses the gradual decline of unanimous decisions over the past decade and represents a marked increase over the 29% total from OT21. OT22 statistics compiled by author; OT21 statistics available at Angie Gau, *As unanimity declines, conservative majority's power runs deeper than the blockbuster cases*, SCOTUSblog, (Jul 3, 2022). The 6-3 alignment—the most common in OT21—was present in only 11 (18.6%) decisions this term. And of the 11 decisions, only 5 (two of which arose from the Eighth Circuit) broke down cleanly between the Court's conservative and liberal wings.

The Justices split the Court's writing duties fairly evenly in the past term, with each Justice authoring between 8.5% and 11.9% of majority opinions. Justice Thomas was the most frequent dissenter (14 authored dissents), followed by Justices Kagan and Gorsuch (12 dissents each).

The Eighth Circuit, for its part, was the source of 3 of the Court's 59 merits decisions (5%), higher than in 7 of the past 11 years and slightly higher than the 4.6% average over that same time period. It's affirmance rate (33%) was higher than 7 of the past 10 years with Eighth Circuit-originating cases and marginally higher than the 11-year average of 25.5%.

As noted above, one of the decisions (*Biden v. Nebraska*) that came through the Eighth Circuit grabbed national headlines for its impact on the President's student-loan forgiveness program. That case was equally discussed in legal circles for its reliance on the controversial "major decisions" doctrine. Another (*Tyler v. Hennepin County*) addressed a low-income homeowner's battle against the tax man that featured prominently in local media. Editorial, *Heartless State Law Headed to High Court*, startribune.com (Jan. 25, 2023). In the third, the Court's ideological wings split over an incarcerated man's attempt to gain his freedom after a Supreme Court decision in another case brought his conviction into question. Each case is discussed more fully below.

Tyler v. Hennepin County, Minnesota – County Can't Keep the Change From Property-Tax Sale.

In *Tyler*, the Court took up the case of Geraldine Tyler, an elderly woman who had racked

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Term	Number of Cases	Docket Percent	Aff'd – Rev'd – Split	Affirmed Percent
2022	3	5 %	1-2	33%
2021	2	3%	0-2	0%
2020	4	6%	1-3	25%
2019	1	1%	1-0	100%
2018	4	5%	1-3	25%
2017	3	4%	1-2	33%
2016	2	3%	0-2	0%
2015	6	7%	3-2-1	60%
2014	8	11%	1-7	13%
2013	2	3%	0-2	0%
2012	2	3%	0-2	0%
2011	0	-	-	-
2010	4	5%	1-3	25%
Average	3.2	4.6%	0-2	25.5%

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up $2,300 in back property taxes ($15,300 with county-imposed interest), when her relatives neglected to make tax payments on her Minneapolis condominium after she moved into an assisted-living facility. The county sold the condo at a forfeiture auction for $40,000 but, instead of refunding the remaining $ 24,700 to Tyler after her debt was satisfied, deposited the balance in its own coffers.

Tyler brought a class action against the county, alleging that, by keeping sale proceeds over and above the amounts needed to satisfy debtors' tax obligations, the county had engaged in an improper taking. The district court dismissed the case, and the Eighth Circuit affirmed, holding that "where state law recognizes no property interest in surplus proceeds from a tax foreclosure sale conducted after adequate notice to the owner, there is no unconstitutional taking." *Tyler v. Hennepin County, Minnesota*, 26 F.4th 789, 790 (8th Cir. 2022).

In a unanimous decision authored by Chief Justice Roberts, the Supreme Court reversed. The Court first addressed the county's argument that Tyler lacked standing because her property was encumbered by $61,000 in debt, aside from her unpaid taxes. According to the county, because Tyler owed more on her condo than it was worth, she had no equity and thus no property interest in the real estate that she claims the county "took." The Court rejected this argument, reasoning that her additional debt was not in the record below and even if it were, it was immaterial because, had she received the proceeds from her sale, she could have used them to satisfy those obligations. *Tyler v. Hennepin County, Minnesota*, 598 U.S. 631, 637 (2023).

On the merits of Tyler's takings claim, the Court first evaluated whether the county "took" Tyler's property when it pocketed the difference between the condo's sale price and her outstanding tax bill. Pointing to a 1935 Minnesota statute that stated that a homeowner forfeits her interest in her home once the government seizes it to pay delinquent property taxes, the county argued that there was no taking because state law had deprived Tyler of a property interest. *Id*. at 639 (citing 1935 Minn. Laws pp. 713–714, § 8.) The Court rejected this exclusive reliance on state law, reasoning that allowing states to narrowly define "property interests" would allow them to unilaterally circumvent the Takings Clause. Instead the Court started its analysis with the principle that property interests were defined under

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the Takings Clause with reference to "existing rules and understandings." *Id*. at 638 (citing *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 164 (1998)). The Court then embarked upon an eight-century tour of property law dating from the Magna Carta to the majority rule under state and federal law that taxpayers have a property interest in the unencumbered portion of any property sold to satisfy a tax obligation. *Id*. at 639-44.

Finally, the Court rejected the county's argument that Tyler had "constructively abandoned" her property by failing to pay her taxes. Abandonment, the Court held, could occur only when the property owner's actions (or inactions) signaled her intention to relinquish all rights in the property. Nonpayment of taxes did not rise to this level, the Court reasoned, because under Minnesota law, a homeowner could continue to reside in her home and enjoy all the rights of ownership for years, even after failing to pay taxes. *Id*. at 646-47.

Biden v. Nebraska – Major Impact, Major Decision, Major Reversal.

When many of the nation's headline-grabbing cases originate from the coastal circuits, the Eighth Circuit can seem like a judicial "flyover country." Not so in *Biden v. Nebraska*, which addressed several states' challenge to President Biden's $ 430 billion student-loan-forgiveness plan, by which the Secretary of Education cancelled all federally guaranteed student debt that met certain criteria. The case is significant both for its result (finding the President's plan unconstitutional) and also for its reasoning (invoking the amorphous "major questions doctrine").

A little historical context helps here. During the early days of the COVID-19 pandemic, then-President Trump's education secretary, Betsy DeVos, suspended the loan-payment obligations on all federally held student loans. Student-loan forgiveness was also a hotly debated topic during the 2020 Democratic primary, which occurred before and during the pandemic. During the primary, then-candidate Biden announced his plans to forgive federally guaranteed loans for borrowers who fell under certain income thresholds. As President, however, Biden met resistance for his plan in the evenly divided Senate and thus was unable to pass it through the legislative process. He therefore instructed DeVos's successor, Miguel Cardona, to enact a rule that discharged up to $20,000 of federally backed debt per borrower.

Secretary Cardona rooted his action in the HEROES Act—a post-9/11 amendment to the Education Act. *Biden v. Nebraska*, 600 U.S. ___, 143 U.S. 2355, 2363 (citing 20 U.S.C. § 1098aa(b)(1)). The Act empowers the Secretary to "waive or modify any statutory or regulatory provision applicable to [federally backed student loans] as the Secretary deems necessary in connection with a war or other military operation or national emergency." *Id*.

Six states sued to block the law, claiming that, in cancelling vast amounts of student debt, the Secretary exceeded his statutory authority under the HEROES Act. The district court dismissed the suit for lack of standing and the Eighth Circuit reversed, holding that at least Missouri likely had standing to challenge the action and agreeing that the states' challenge raised "substantial questions," such that equities favored stalling the forgiveness program while the case was pending. The court therefore issued a nationwide preliminary injunction to prevent the cancellation from taking effect. The Supreme Court granted certiorari and affirmed in a 6-3 decision. *Id*. at 2365.

The Court agreed with the Eighth Circuit that Missouri had standing to challenge the law, as the state was home to MOHELA, a non-profit corporation created by the state to participate in the student-loan market. According to Missouri, this entity stood to suffer a concrete harm by losing out on administrative fees if the Secretary's plan went into force. According to the majority,

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MOHELA was a creature of state law formed to serve a public purpose, which was sufficient to confer standing upon the state to challenge the plan. *Id*. at 2366. Justice Kagan, joined by Justices Sotomayor and Jackson disagreed, pointing out that none of MOHELA's funds wind up in state coffers and that MOHELA has the power to sue in its own name, which it refused, and acted openly hostile to the state's challenge. *Id*. at 2387 (Kagan, J. dissenting).

On the merits, Chief Justice Roberts began with a textual analysis of the HEROES Act. As the Chief Justice viewed the statute, the term "modify" connotated an incremental change that the Secretary's action exceeded, by ushering in a "novel and fundamentally different loan forgiveness program." *Id*. at 2369. The majority supported its interpretation of the Secretary's authority by pointing to previous Secretaries' invocations of their authority under the Act, which amounted to minor adjustment to loan obligations. *Id*. Nor did the Secretary's authority to "waive" loan obligations save the plan, reasoned the majority, because "waiver" allowed the Secretary only to excuse borrowers' discreet obligations rather than to excuse entirely the repayment obligations of millions of borrowers. *Id*. at 2370. The dissenting Justices disagreed, arguing that the Congressionally granted authority to "waive or modify," constituted a broad delegation of power once a "national emergency" such as the COVID-19 pandemic existed. *Id*. at 2392 (Kagan, J. dissenting).

Of course, statutory-interpretation disagreements between the Court's "left" and "right" are nothing new. And the fact that a six-Justice majority believed that the Secretary overstepped his authority should have been sufficient to strike down the loan-forgiveness plan. *Id*. at 2396 (Kagan, J. dissenting). But the majority did not stop there. Rather, it stressed that its decision was consistent with the recently coined "major questions doctrine," under which courts should give Congress—or a clear Congressional delegation—the final word on decisions "on such magnitude and consequence on a matter of earnest and profound debate across the country." *Id*. at 2374. The fact that the plan had such a substantial impact on the federal purse reinforced the majority's decision that mass loan forgiveness was best left to Congress. *Id*. Writing separately only on this "major questions" issue, Justice Barrett attempted to define the "major questions" doctrine as a substantive canon that injects into the statutory analysis "common sense as to the manner in which Congress is likely to delegate a policy of such economic and political magnitude to an administrative agency." *Id*. at 2378 (Barrett, J. concurring).

Jones v. Hendrix – Saving Clause Can't Save Federal Inmate.

In *Jones v. Hendrix*, 599 U.S. 465 (2023), the Court resolved a dispute over an inmate's ability to seek habeus corpus relief in the district in which he is incarcerated after previously petitioning under 28 U.S.C. § 2255, in the district in which he was convicted.

The Western District of Missouri sentenced Marcus Jones to two concurrent sentences after a jury convicted him of two firearms-related offenses, under 18 U.S.C. § 1922. While serving his sentences in an Arkansas federal prison, Jones successfully petitioned under § 2255 to vacate one of the sentences but sought no other relief. Several years later, the Supreme Court decided *Rehaif v. United States*, 588 U.S. ___ (2019), which held that a defendant's knowledge of the condition that disqualifies him from owning a firearm is an element of the offense. This was welcome news to Jones, whose conviction was based on Eighth Circuit precedent, interpreting the statute to the contrary.

The problem for Jones, however, was that he had already petitioned under §2255, and that statute, as modified by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), permits successive petitions for postconviction relief only in the case of "'newly discovered

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evidence,' § 2255(h)(1), or 'a new rule of constitutional law,' § 2255(h)(2)." At first blush, §2255(h) would bar Jones's attempt to test the legality of his conviction because he would be based on a change in *statutory* rather than *constitutional* law. Jones pointed to an exception in the AEDPA, however—known as the "saving clause"—for subsequent habeus corpus petitions under 28 U.S.C. § 2241, when a subsequent petition under §2255 would be "inadequate or ineffective to test the legality of the prisoner's detention." Because §2255 would not allow him a second petition, Jones argued, its remedy was "ineffective," and thus filed his petition for habeus corpus under §2241.

The district court dismissed the petition and the Eighth Circuit affirmed, rejecting Jones's argument that the saving clause allowed successive habeus petitions that fell outside of AEDPA's two enumerated exceptions. This "deepened a split among the Courts of Appeals," prompting the Supreme Court to grant *certiorari*. *Jones*, 599 U.S. at 471.

In a 6-3 decision authored by Justice Thomas, the Court sided with the Eighth Circuit. The majority started by analyzing the history of §2255, emphasizing that it was a procedural reform to federal postconviction practice, which required that petitions be filed in the district in which an inmate was convicted, as opposed to the district in which he was incarcerated. *Jones*, 599 U.S. at 473. To make this reform effective, the majority noted, Congress barred prisoners from seeking relief under §2241—the general habeus corpus statute under which prisoners previously sought relief—unless the §2255 remedy was "inadequate or ineffective" to test the legality of the detention. Under the majority's reasoning, the AEDPA further restricted the grounds for *successive* §2255 petitions to only those petitions that relied on newly discovered evidence or changes to constitutional law. Accordingly, prisoners could not use the AEDPA as an "end run" around the amendments' restrictive intent by arguing that successive petitions outside of the AEDPA's permitted petitions were suddenly "ineffective." *Jones*, 599 U.S. at 475.

The majority supported its reading of the text by highlighting instances in which it would be logical for prisoners to file petitions under §2241, unhindered by §2255's restrictions on successive petitions. Some of these examples include challenges to the validity of a prisoner's sentence, such as arguments that the prisoner has not received good-time credits, that he is being held in a manner not authorized by the sentence, or that an administrative sanction was unjustified. *Jones*, 599 U.S. 475-76.

Justices Sotomayor (with Justice Kagan joining) and Jackson wrote separate dissents, each emphasizing that the majority's result leaves a confirmed innocent man behind bars. Justices Sotomayor and Kagan agreed with the Solicitor General that the procedural reforms embodied in the original §2255 and the AEDPA were not intended to alter preexisting substantive habeus law that prisoners could file successive petitions when intervening judicial decisions determine that their conduct was not covered by the statutes under which they were convicted. *Jones*, 599 U.S. at 492-94 (Sotomayor, J. dissenting).

Further emphasizing the constitutional implications of foreclosing postconviction relief for a potentially innocent person, Justice Jackson urged a literal reading of §2255, which would preserve the §2241 remedy in instances in which §2255—for whatever reason—was not available to the prisoner. *Jones*, 599 U.S. at 498 (Jackson, J. dissenting). Such a reading of §2255, Justice Jackson argues, is consistent with both Congress's intent to preserve prisoners' habeus remedies and the general interpretation of saving clauses to preserve rights in light of the general operation of a statute. *Jones*, 599 U.S. at 500.

Ryan Marth is a partner at Robins Kaplan in Minneapolis.

CLE highlights appellate trends in the Eighth Circuit

By Eder Castillo

In April, The Eighth Circuit Bar Association presented a CLE panel on trends at the Court. The panelists were Judge Ralph Erickson, Judge David Stras, Clerk of Court Michael Gans, and Beth Carver of Dowd Bennett. Heather Quick of Iowa's Federal Defender's Office moderated.Here are nine takeaways:

1. Object at trial to preserve issues on appeal.

Judge Erickson remarked that trial lawyers were not raising enough objections, particularly during closing arguments in criminal cases. "[W]e are reviewing things on plain error that could have been a decisional point in your favor that you just haven't preserved . . . There's a theory that [you are] supposed to sit on [your] hands and not object . . . I don't think jurors are completely turned off by objections that are sustained."

2. Convert video exhibits to nonproprietary file formats.

Video exhibits can play an outsized role in criminal and civil rights appeals. When videos are provided to the Court in a proprietary file format, Court staff wastes hours trying to figure out how to view the videos. Judge Erickson called this "a big problem." At the district court, file your video exhibits in the MPEG format. On appeal, offer nonproprietary copies of the video to the Court and opposing counsel.

3. The Eight Circuit is a midwestern court.

When advocating before a midwestern court, Judge Erickson suggests using plain English, being direct, being fair to opposing counsel, not overstating your case, not being snarky, and avoiding personal attacks.

4. Most briefs should be limited to three issues.

"I've heard one of my colleagues [on the bench say], 'Our district judges are just too good to make 15 to 20 errors at trial,'" said Judge Stras. If you want to test whether you are arguing too many issues, Judge Erickson recommends handing your brief to an associate and giving them three hours to understand it, "If they come back completely baffled . . . we're [going to] be completely baffled two hours into it and we're gonna be angry the next five hours[.]"

5. Limit your brief to 35 pages.

Judge Stras promoted 35 pages as the "sweet spot" for briefs. Both judges agreed that briefs become hard to digest as they approach 60 pages.

6. Write an engaging summary of the case.

Clerk of Court Michael Gans suggested using the summary of the case to frame your issues and grab the Court's attention. Judge Erickson added that the summary of the case is the last thing some judges read before taking the bench.

7. Cite to the record correctly.

Under local rule 28A(j), briefs "should include parallel citations" when referring "to a document that appears in both an appendix and a district court docket." Gans said that this was "probably the most common correction on briefs." Failing to follow rule 28A(j) does not allow the Court's software to automatically turn the citation into a hyperlink. Both judges on the panel and most judges on the Court are reading your briefs electronically, so you should facilitate the hyperlinking process by citing to the record correctly.

8. Ask for oral argument.

Since the parties' input on whether to grant oral argument is merely a suggestion, Gans recommends always asking for oral argument and leaving it to the Court to decide whether argument is warranted. Beth Carver agreed and said she asks for oral argument on every case. Gans explained that the Court grants oral argument in cases involving novel issues or complicated facts. Judge Stras observed that the Court grants 20 to 30 minutes of argument per side in capital cases and consolidated or complex cases, 15 minutes in the average case, and 10 minutes in cases with one issue.

9. File a 28(j) letter if you could not answer an important question during your argument.

While the Court can use electronic devices during oral argument, advocates are expected to argue without relying excessively on their notes. Judge Erickson admitted that the Court asks some unfair questions during arguments. Under Federal Rule of Appellate Procedure 28(j), a 28(j) letter can be filed after oral argument but before a decision to cite supplemental authorities. If a judge on your panel insisted that you answer a question you could not answer, file a 28(j) letter.

Eder Castillo practices white-collar prosecution at the Hennepin County Attorney's Office in Minneapolis. In law school, he argued before the Eighth Circuit on behalf of an asylum applicant.

Eighth Circuit Bar Association seeks candidates for Board of Directors.

The Eighth Circuit Bar Association is seeking applicants for upcoming openings on its Board of Directors, including from the Eastern District of Arkansas, the Western District of Missouri, the District of Minnesota, and two at large positions. Directors will be elected for three-year terms starting in January 2024.

The Board consists of one member from each judicial district in the Eighth Circuit as well as five at-large members. Members of the Board of Directors are expected to attend monthly meetings and also serve on one or more committees. Any member of the Association is eligible for election to the board of directors. The board is seeking members with diverse backgrounds to serve on the board, including candidates reflecting diversity in gender, race, ethnic background, and professional experience. To apply, members should fill out an application form, which is available at https://forms.gle/ToAGJuikxnLV7adN9. To be considered for these openings, applicants are advised to apply on or before December 11, 2023. Directors must be active members of the Association (i.e., be current in their dues) to be considered.