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Foreword

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FOREWORD

HON. WILLIAM H. PRYOR JR.*

We owe a debt of gratitude to the editors of the *University of Miami Law Review* for their devotion to studying the jurisprudence and administration of the Eleventh Circuit by publishing this annual Issue, a tradition of scholarship that honors fundamental principles of our Constitution. In *Federalist 78*, Alexander Hamilton argued that an independent federal judiciary, with judges bound by a standard of “good behavior,” would serve as “the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.”¹ He maintained that the courts would remain accountable to the American people by developing precedents: “To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.”² And he predicted that, over time, mastery of the complexity of precedents would require skillful attention: that is, “from the variety of controversies which grow out of the folly and wickedness of mankind, . . . the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them.”³ By regularly publishing critical scholarship about our growing caselaw, the editors of this journal help judges, attorneys, scholars, and students review how the courts of this Circuit serve, in Hamilton’s words, “as the bulwarks of a limited Constitution.”⁴ To that end, I offer the following overview of recent matters of judicial administration and jurisprudence before introducing the articles for this Issue.

* Chief Circuit Judge, United States Court of Appeals, Eleventh Circuit.

¹ THE FEDERALIST NO. 78, at 522 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

² *Id.* at 529.

³ *Id.*

⁴ *Id.* at 526.

I. COURT MEMBERSHIP

Last year, the Court of Appeals for the Eleventh Circuit returned to normality after a period of transition. With Judge Nancy Abudu's recent investiture to fill the seat formerly held by Judge Beverly Martin, the Court again has twelve active judges and no vacancies. And several senior judges—Judges Gerald Tjoflat, Lanier Anderson, Joel Dubina, Susan Black, Ed Carnes, Frank Hull, Stanley Marcus, and Julie Carnes—continue to assist us in our case work. Last year, Judge Larry Edmondson, who previously served as Chief Circuit Judge, retired. We will miss him, and we appreciate his many contributions to our Circuit.

A few years ago, Judge Tjoflat celebrated more than a half century on the federal bench, and in 2025, he will celebrate more than fifty years as a circuit judge. Even after taking senior status, he has continued to author majority opinions for the en banc Court.⁵ In 2022, the Supreme Court affirmed⁶ Judge Tjoflat's decision in *Patel v. United States Attorney General*.⁷ The Supreme Court appointed a former law clerk for our Circuit, Taylor Meehan, to serve as amicus curiae to defend that ruling after the Attorney General sided with the petitioner.⁸

II. NOTEWORTHY DECISIONS

With its smaller docket in recent years, the Supreme Court has reviewed few decisions from the Eleventh Circuit. In June 2023, in *Allen v. Milligan*, the Supreme Court, with Chief Justice Roberts writing, affirmed 5–4 the preliminary injunction entered by a three-judge district court in the Northern District of Alabama⁹ after it found that the congressional redistricting plan adopted by the Alabama Legislature likely violated Section 2 of the Voting Rights Act of 1965.¹⁰ The next week, the Supreme Court, with Justice Alito writing, unanimously affirmed the decision of the Eleventh Circuit

⁵ See, e.g., *United States v. Campbell*, 26 F.4th 860 (11th Cir. 2022) (en banc); *Pitch v. United States*, 953 F.3d 1226 (11th Cir. 2020) (en banc).

⁶ *Patel v. Garland*, 142 S. Ct. 1614, 1627 (2022).

⁷ *Patel v. U.S. Att'y Gen.*, 971 F.3d 1258, 1283–84 (11th Cir. 2020).

⁸ See *Patel*, 142 S. Ct. at 1621.

⁹ See *Singleton v. Merrill*, 582 F. Supp. 3d 924, 936 (N.D. Ala. 2022).

¹⁰ *Allen v. Milligan*, 143 S. Ct. 1487, 1498 (2023).

in *United States v. Smith*¹¹ that the Constitution permits a retrial of a criminal defendant whose earlier conviction had been vacated because he was tried in an improper venue.¹² And a week later, the Supreme Court, with Justice Thomas writing, ruled 6–3 in *Jones v. Hendrix* that a federal prisoner alleging an intervening change in the interpretation of a criminal statute cannot circumvent the restrictions of the Antiterrorism and Effective Death Penalty Act of 1996¹³ by petitioning for a writ of habeas corpus.¹⁴ That decision affirmed the Eighth Circuit,¹⁵ which had sided with the Eleventh Circuit,¹⁶ to resolve what had been a deep circuit split affecting thousands of federal prisoners.¹⁷ The Eleventh Circuit, sitting en banc, had overruled its earlier precedents on that issue in 2017 in *McCarthan v. Director of Goodwill Industries-Suncoast, Inc.*¹⁸ In the October 2023 Term, the Supreme Court will review two decisions from the Eleventh Circuit: *United States v. Jackson*,¹⁹ which involves whether a “serious drug offense” under the Armed Career Criminal Act²⁰ incorporates the federal drug schedules in effect when the federal firearm offense occurred or when the state drug crime occurred; and *NetChoice, LLC v. Attorney General*,²¹ which involves whether a Florida law regulating social-media content²² violates the First Amendment.

The Eleventh Circuit issued four precedential opinions on remand from the Supreme Court in 2023. In *Nance v. Commissioner, Georgia Department of Corrections*, it ruled that the timeliness of a Georgia prisoner’s complaint about his method of execution based on his medical conditions depended on when the claim “should have become apparent to a person with a reasonably prudent regard for

¹¹ 22 F.4th 1236 (11th Cir. 2022).

¹² See *Smith v. United States*, 143 S. Ct. 1594, 1600 (2023).

¹³ See 28 U.S.C. § 2254 (1996).

¹⁴ See *Jones v. Hendrix*, 143 S. Ct. 1857, 1864 (2023).

¹⁵ See *Jones v. Hendrix*, 8 F.4th 683 (8th Cir. 2021).

¹⁶ See *id.* at 687.

¹⁷ See *Jones*, 143 S. Ct. at 1864.

¹⁸ 851 F.3d 1076, 1080 (11th Cir. 2017) (en banc).

¹⁹ 55 F.4th 846 (11th Cir. 2022), *cert. granted sub nom.* *Jackson v. United States*, 143 S. Ct. 2457 (2023) (mem.).

²⁰ 18 U.S.C. § 924(e)(2)(A) (1984).

²¹ 34 F.4th 1196 (11th Cir. 2022), *cert. granted in part sub nom.* *Moody v. NetChoice, LLC*, 144 S. Ct. 478 (2023) (mem.).

²² FLA. STAT. §§ 106.072, 501.2041 (2022).

his rights,” that the prisoner stated a claim under the Eighth Amendment that the drug gabapentin had reduced his brain’s receptiveness to sedatives, and that he failed to state a claim that lethal drugs could not be injected into his veins with standard protocols.²³ In *United States v. Jackson*,²⁴ it ruled that *Concepcion v. United States*²⁵ did not abrogate the decision that a prisoner’s motion for a reduced sentence under the First Step Act²⁶ could not be used to relitigate his earlier drug-quantity finding.²⁷ Relatedly, in *United States v. Gonzalez*, it ruled that a sentence imposed after revocation of supervised release qualifies for a sentence reduction under the First Step Act, but that the district court did not err in denying a reduction in the light of *Concepcion*.²⁸ And in *United States v. Duldulao*, it vacated a physician’s convictions for dispensing and distributing controlled substances not for a legitimate medical purpose and not in the usual course of medical practice, and it remanded for a retrial in the light of *Ruan v. United States*.²⁹

The Eleventh Circuit also issued several en banc rulings in 2023. In *United States v. Dupree*,³⁰ the Court ruled that the definition of “controlled substance offense” in section 4B1.2(b) of the federal sentencing guidelines³¹ does not include inchoate offenses because, in the light of *Kisor v. Wilkie*,³² commentary cannot expand or alter unambiguous provisions of the guidelines.³³ In *Sosa v. Martin County*, it ruled that an individual detained in a county jail for three days based on mistaken identity for a valid arrest warrant failed to state a claim for relief under the Constitution for his overdetention.³⁴ In *Corporación AIC v. Hidroeléctrica Santa Rita*, it overruled two

²³ 59 F.4th 1149, 1151–52 (11th Cir. 2023).

²⁴ 58 F.4th 1331 (11th Cir. 2023).

²⁵ 142 S. Ct. 2389 (2022).

²⁶ Pub. L. No. 115-391, 132 Stat. 5194 (2018).

²⁷ *Jackson*, 58 F.4th at 1337–38.

²⁸ 71 F.4th 881, 884–85, 887 (11th Cir. 2023) (citing *Concepcion v. United States*, 142 S. Ct. 2389, 2404 (2022)).

²⁹ 87 F.4th 1239, 1249–50, 1271 (11th Cir. 2023) (citing *Ruan v. United States*, 142 S. Ct. 2370, 2382 (2022)).

³⁰ 57 F.4th 1269 (11th Cir. 2023) (en banc).

³¹ U.S. SENT’G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT’G COMM’N 2018).

³² 139 S. Ct. 2400 (2019).

³³ *Dupree*, 57 F.4th at 1273–74.

³⁴ 57 F.4th 1297, 1302–03 (11th Cir. 2023) (en banc).

earlier precedents³⁵ and held that, in a case governed by the Convention on the Recognition of Foreign Arbitral Awards, when the United States is the primary jurisdiction, the Federal Arbitration Act provides the grounds for vacatur of an arbitral award.³⁶ In *Carson v. Monsanto Co.*, it ruled that a settlement, which required the plaintiff to abandon some claims and to appeal an adverse ruling, did not deprive the Court of a justiciable controversy.³⁷ On the merits, it also ruled that a consumer suffering from cancer could sue the manufacturer of a popular weed control for failure to warn under Georgia law if ordinary principles of statutory interpretation made clear that an express preemption provision in the Federal Insecticide, Fungicide, and Rodenticide Act³⁸ did not require a different label for the product.³⁹ In *Drazen v. Pinto*, it overruled *Salcedo v. Hanna*⁴⁰ and held that a plaintiff who receives a single, unwanted text message has standing to sue a telemarketer for violating the Telephone Consumer Protection Act of 1991.⁴¹ And in *United States v. Pate*, it vacated a defendant's convictions because a federal criminal law⁴² that prohibits the filing of false tax liens against "an officer or employee of the United States" does not apply to former officers.⁴³

The Eleventh Circuit decided several other significant appeals. In *PDVSA US Litigation Trust v. Lukoil Pan Americas*, it ruled that determining who had the authority to litigate in the name of the Venezuelan state petroleum company was a nonjusticiable political question.⁴⁴ In *City of South Miami v. Governor*, it vacated an injunction and ruled that several organizations lacked standing to sue the governor and attorney general regarding a Florida law⁴⁵ that requires

³⁵ See *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434 (11th Cir. 1998); see also *Inversiones y Procesadora Tropical INPROTSA, S.A. v. Del Monte Int'l GmbH*, 921 F.3d 1291 (11th Cir. 2019).

³⁶ 66 F.4th 876, 880 (11th Cir. 2023) (en banc) (citing 9 U.S.C. § 201 *et seq.*).

³⁷ 72 F.4th 1261, 1265–66 (11th Cir. 2023) (en banc).

³⁸ 7 U.S.C. § 136v(b) (1996).

³⁹ *Carson*, 72 F.4th at 1267–68.

⁴⁰ 936 F.3d 1162 (11th Cir. 2019).

⁴¹ 74 F.4th 1336, 1345–46 (11th Cir. 2023) (en banc) (citing 47 U.S.C. § 227 *et seq.*).

⁴² 18 U.S.C. § 1521 (citing 18 U.S.C. § 1114).

⁴³ 84 F.4th 1196, 1198 (11th Cir. 2023) (en banc) (citing 18 U.S.C. § 1114).

⁴⁴ 65 F.4th 556, 562 (11th Cir. 2023).

⁴⁵ FLA. STAT. §§ 908.101–908.109.

local police to cooperate with federal immigration officials.⁴⁶ In *League of Women Voters v. Secretary of State*, it vacated an injunction against the enforcement of laws⁴⁷ regulating ballot drop boxes, the solicitation of voters at polls, and the delivery of voter registration forms by organizations.⁴⁸ In *Eknes-Tucker v. Governor*, it vacated a preliminary injunction against the enforcement of an Alabama law⁴⁹ that prohibits the administration of puberty blocking drugs or cross-sex hormone treatments for minors for the treatment of gender dysphoria.⁵⁰ In *In re Blue Cross Blue Shield Antitrust Litigation*, it upheld a settlement agreement of a multidistrict antitrust class action.⁵¹ In *Pernell v. Florida Board of Governors*, it ruled that a common-law privilege shields legislators from a subpoena for records related to the legislators' motives for passing the Florida Individual Freedom Act.⁵² And in *State v. Meadows*, it ruled that a former White House chief of staff could not remove a state prosecution under the federal-officer removal statute.⁵³

III. CASELOAD TRENDS

Federal courts watch annual case filing statistics and trends closely. Those statistics affect the money we receive for our annual budget. Since 2004, as the chart below illustrates, our case filing statistics have steadily declined, setting aside years like 2016, when filings of original proceedings spiked due to the Supreme Court's decision in *Johnson v. United States*.⁵⁴ In the last fiscal year, the Eleventh Circuit received 4,279 total appellate filings, a roughly 45-percent decrease from the 7,707 filings in 2005.⁵⁵ Our appellate filings are now where they were in the early 1990s.

⁴⁶ 65 F.4th 631, 634 (11th Cir. 2023).

⁴⁷ FLA. STAT. §§ 97.0575(3)(a), 101.69(2)–(3), 102.031(4)(a)–(b).

⁴⁸ 66 F.4th 905, 951 (11th Cir. 2023).

⁴⁹ ALA. CODE § 26-26-4 (2022).

⁵⁰ 80 F.4th 1205, 1210–11 (11th Cir. 2023).

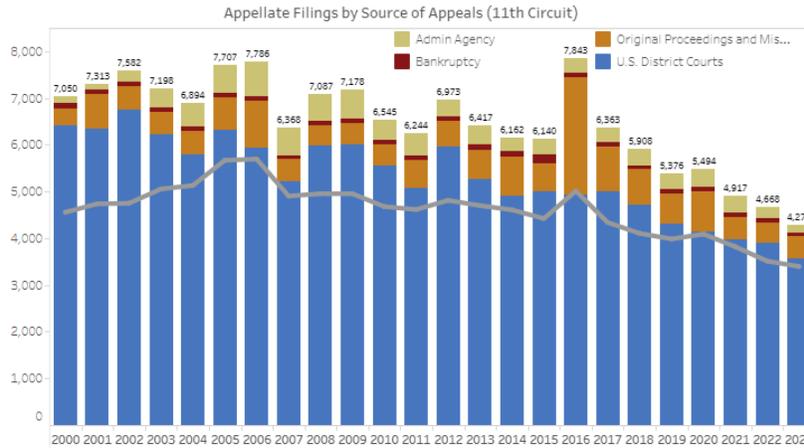
⁵¹ 85 F.4th 1070, 1083 (11th Cir. 2023).

⁵² 84 F.4th 1339, 1341 (11th Cir. 2023) (citing FLA. STAT. § 1000.05).

⁵³ 88 F.4th 1331, 1335 (11th Cir. 2023) (citing 28 U.S.C. § 1442(a)(1)).

⁵⁴ 576 U.S. 591 (2015).

⁵⁵ *United States Court of Appeals – Judicial Caseload Profile*, U.S. COURTS, https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_approfile0630.2023.pdf (last visited Apr. 1, 2024).



Historically, we have administered large caseloads in part by certifying to the Chief Justice the need for visiting judges from other circuits to assist us with our oral argument calendar,⁵⁶ but in the light of our declining caseload, we stopped certifying that need in 2020. Still, we have long maintained a custom of inviting district judges,⁵⁷ especially recent appointees, to assist us with oral argument, and that custom endures. When occasionally needed, district colleagues familiar with our precedents serve as visiting judges for oral argument panels.

The Eleventh Circuit hears oral argument in about twenty percent of its fully briefed appeals. For the court year that started on October 1, 2023, the Court will have twenty-three panels of three judges hearing sixteen appeals a week. In contrast, for the court year that began on October 1, 2019, the Court had thirty-two panels hearing thirteen cases a week. The Court will have only two days in the 2023–24 court year, during which a district judge will assist the Court with the oral argument calendar. Only panels of circuit judges

⁵⁶ See 28 U.S.C. § 292(d) (authorizing the Chief Justice of the United States to “designate and assign temporarily a district judge of one circuit for service in another circuit, either in a district court or court of appeals, upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises”).

⁵⁷ See *id.* § 292(a) (authorizing the chief judge of a circuit to “designate and assign one or more district judges within the circuit to sit upon the court of appeals” when “the business of that court so requires”).

decide appeals without oral argument, and only panels of active circuit judges hear capital appeals.

IV. COURT PERSONNEL & RESOURCES

Throughout its history, our Circuit has enjoyed stability in the Office of Circuit Executive. Our first Clerk of Court, Norman Zoller, served as Circuit Executive for twenty-five years until he retired in 2008. James Gerstenlauer then served in that role for fourteen years after previously serving as Clerk of Court. When Mr. Gerstenlauer retired in 2022, his deputy, Ashlyn Beck, succeeded him. As Circuit Executive, Ms. Beck works with the Judicial Council, the Court of Appeals and court unit executives, and the Chief District Judges and District Clerks to manage the administrative duties of the Circuit day-to-day. She serves as Chief Operating Officer of the Circuit, aided by our new Deputy Circuit Executive, Keith Muse. They recently assisted a committee of judges and attorneys in planning our next circuit judicial conference, which will be held in Point Clear, Alabama in 2024, and they are now assisting another committee of judges and attorneys in planning our 2026 judicial conference in Miami.

The Circuit recently renamed the Circuit Library as the Eleventh Circuit Research and Information Center. After the retirement of Elaine Fenton, the only Circuit Librarian the Eleventh Circuit had ever had, we transitioned from the traditional library model and appointed Michael Shubeck, who previously supervised the information-technology staff, to lead the Center in this digital era in which we hope to make its research and information services more productive and economical. The Circuit closed several satellite libraries, canceled unnecessary book subscriptions, and reoriented the mission of this unit. The Center also supports the judges and administrators on the Judicial Council's Civics Education Committee, which is working on several public education initiatives.

Technological advances remain a focus for our court units. The Clerk's Office and information technology staff continue to upgrade and improve the accuracy of the search feature for court opinions on the public website. In 2021, the Court changed the format of its opinions to make them easier to read and more professional in appearance. The Court is also upgrading its audio and visual technology in

the Atlanta courtrooms. Consistent with Rule 34 of the Federal Rules of Appellate Procedure, the Court recently established an internal operating procedure to live-stream public arguments on the website.⁵⁸ The rule also permits panels to hear oral argument by audio or video conferencing.

Before turning to the articles published in this survey, I ask for your assistance. The Eleventh Circuit Historical Society is a private, nonprofit organization that maintains a history of the courts of the Eleventh Circuit as well as the judges and other officials who have served them. It also fosters public appreciation of the federal courts in the Eleventh Circuit. I encourage the readers of this survey to join the Historical Society.⁵⁹

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This year, the editors of the *Review* offer four scholarly articles for our edification. In *Machine Speech: Towards a Unified Doctrine of Attribution and Control*, Brian Sites reviews the caselaw and developing doctrine about how courts treat the speech of artificial intelligence, such as ChatGPT, in the civil law of defamation and copyright and the criminal law of confrontation and expert testimony. In *Gate Keeping & Class Certification: The Eleventh Circuit's Stringent Approach to Admitting Expert Evidence in Support of Class Certification*, Pravin Patel, Mark Pinkert, and Patrick Lyons provide a comparative analysis of how federal courts apply the Federal Rules of Evidence in admitting evidence for the certification of class actions. In *Choice of Law Issues in Insurance Cases in the Eleventh Circuit Arising from Lex Loci Contractus*, Tom Schulte, Andrea DeField, and Jorge Aviles describe how federal and state courts apply choice-of-law rules in insurance cases and offer practical guidance for policyholders. And in *Secrecy on Steroids: How Overzealous State Confidentiality Laws Expose Leakers and Whistleblowers to Retaliatory Prosecution*, Frank LoMonte and Anne Marie Tamburro describe the results of a research project that found

⁵⁸ Memorandum from Eleventh Cir. U.S. Ct. of Appeals on Revisions to Cir. Rules 146 (Dec. 1, 2023), https://www.ca11.uscourts.gov/sites/default/files/court_docs/clk/Rules_Bookmark_DEC23.pdf.

⁵⁹ See ELEVENTH CIR. HIST. SOC'Y, <https://sites.google.com/site/circuit11history/home> (last visited Apr. 1, 2024).

hundreds of categories of public records that Florida law treats as confidential, and they explain how these laws threaten whistleblowers and should be reformed.

I hope you will enjoy and profit from reading this annual survey.