

## EDITOR IN CHIEF'S PAGE

Uneventful. That is not the word I'd use to describe the six months since the publication of the spring edition of the Journal. On the contrary, nearly every day brought its own major headline. So I thought I'd provide a recap organized by categories as part of my semiannual time capsule. And if I've been successful, this will all tie back – admittedly loosely – to the work of the Journal.

### Big legislation

A major piece of legislation that will affect energy regulators and energy law practitioners became law since our last edition – the Inflation Reduction Act (IRA). Coupled with the Infrastructure Investment and Jobs Act passed last November, the two laws encompass sweeping provisions intended to spur the deployment of renewable energy technologies and infrastructure.

Clients of EBA members, EBA members, regulators and policymakers will have a lot to digest about how the IRA will work and how it will affect the energy sector. And it is not a wild guess to suggest that issues surrounding implementation of the IRA will become material for future articles in this Journal.

### Climate Change

“Five 1,000-year rain events hit the U.S. in five weeks.” That was the headline of an August 26, 2022 Washington Post article by DC area meteorologist Matthew Cappucci. The 16 inches of rain that fell on the Dallas area in mid-August, he wrote, “join[ed] the company of 1,000 year rain events that . . . struck Kentucky, St. Louis, eastern Illinois and Death Valley, California” in the prior three weeks. All of these extreme weather events occurred in areas that were “experiencing abnormally dry conditions or in severe drought beforehand.”<sup>1</sup> In fact, 92 U.S. heat records had been recorded by *mid July* by the Natl Oceanic and Atmospheric Administration. Dallas had recorded more than 25 100+ degree days by mid-July, more than it typically gets in an entire summer.

These were not the only extreme weather events to hit North America. Hurricane Ian caused nationwide power outages in Cuba and hit the Florida Gulf Coast with 150 MPH winds causing massive flooding. In the aftermath of that hurricane a Florida Power and Light spokesperson rightly claimed pride in quickly restoring electricity to all those in its service territory able to receive service. But the qualifier, beyond any utility's ability to address, was that thousands in Fort Meyers and Sanibel Island are no longer able to receive electric service - their homes have been destroyed.

Only a few weeks earlier, Puerto Rico, still recovering from the massive hurricane that hit the island five years earlier, was ravaged by Hurricane, then storm Fiona, which then went on to cause half a million Canadians to lose power.

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1. Matthew Cappucci, *Five 1,000-year rain events hit the U.S. in five weeks. Why?*, WASH. POST (Aug. 23, 2022), <https://www.washingtonpost.com/climate-environment/2022/08/23/flood-united-states-climate-explainer/>. Higher temperatures, he wrote, lead to higher humidity and “precipitation extremes.” *Id.* CORE/9990000.5520/178243984.1

A study published on Aug. 23rd in the Journal *Plants People Planet*, as recounted in a Washington Post article, found that with the “onslaught of invasive insects, a surge in deadly diseases and the all-encompassing peril of climate change as many as one in 6 trees native to the Lower 48 states are in danger of being wiped out,” including “coastal redwoods, capacious American chestnuts, elegant black ash and gnarled whitebark pine.”<sup>2</sup>

Reminders of climate change’s impacts were not confined to our continent.

The worst, and most tragic of these were the monsoon rains that struck Pakistan in mid-June. At one point, nearly a third of the country’s surface areas were under water. The heavy rains and flooding displaced seven million persons and adversely affected over thirty million Pakistanis.<sup>3</sup> Pakistan’s Minister for Climate Change Sherry Rehman called the floods “unprecedented” and “the worst humanitarian disaster of this decade.”<sup>4</sup> Not only were 7 million persons displaced, and more than a thousand killed, but the remaining swamplands have become breeding grounds for malaria, flooding has destroyed much of the country’s cotton and rice crops and is likely to ruin chances for winter wheat crops as well.

Extreme and record heat spread across Europe this summer. Wildfires caused by the extreme heat spread across Spain, Italy, France, Slovenia and Greece. And the extreme heat waves led to over 1000 heat-related deaths in Portugal, while temperatures in the United Kingdom exceeded 40 degrees Celsius for the first time.<sup>5</sup>

### **Free speech, Vile Speech and Disinformation**

In my spring E-i-C page I wrote about the Virginia Governor’s executive order, issued on his first day in office, setting up a “tip line” where persons could anonymously report teachers who the informants claimed had made students feel uncomfortable by teaching “inherently divisive concepts” or where “their children are not being respected.”<sup>6</sup> But this past summer Virginia’s governor announced new “model policies” that, among other things, mandate that “teachers and other school personnel can refer to a transgender student by a different name or pronoun only if parents request the switch in writing.” He then added that, in the name of protecting the “constitutionally protected free speech rights of teachers,” despite the parents’ written consent, teachers may nonetheless call students by their names assigned at birth.<sup>7</sup> Teachers fearful of prompting anonymous tips that they have made students feel uncomfortable will be understandably confused about the Virginia governor’s solicitude for their free speech right to make transgender students uncomfortable.

Kanye West’s Twitter account was suspended following his blatantly antisemitic tweets (and his lucrative endorsement contracts with several large companies

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2. Sarah Kaplan, *As many as one in six U.S. tree species is threatened with extinction*, WASH. POST (Aug. 23, 2022), <https://www.washingtonpost.com/climate-environment/2022/08/23/extinct-tree-species-sequoias/>.

3. Michelle Velez & Teele Rebane, *Hundreds of children among 1,000 people killed by Pakistan monsoon rains and floods*, CNN (Aug. 28, 2022), <https://www.cnn.com/2022/08/28/asia/pakistan-flooding-intl/index.html>.

4. *Id.*

5. Kylie Maclellan & Dominique Vidalon, *France battles huge wildfires, Britain bakes in record heat-wave*, REUTERS (July 19, 2022), <https://www.reuters.com/world/europe/record-temperatures-scorch-europe-wildfires-rage-across-south-2022-07-19/>.

6. Margaret Barthel, *Virginia Gov. Youngkin Sets Up Email ‘Tip line’ To Report Teachers, Schools*, DCIST (Jan. 27, 2022), <https://dcist.com/story/22/01/27/virginia-gov-youngkin-sets-up-email-tip-line-to-report-teachers-schools/>.

7. Hannah Natanson, *Virginia policy latest attempt to restrict rights of transgender students*, WASH. POST, <https://www.washingtonpost.com/education/2022/09/16/trans-students-virginia-bathroom-sports/> (last updated Sept. 17, 2022).

were also terminated). But a Texas law “prohibits large online platforms from censoring users or limiting their posts based on the political views they express.” Texas’s recently reelected Attorney General, who had had successfully defended the law in the Fifth Circuit, was suddenly quiet about whether that law would bar privately-owned media companies from blocking hate speech like West’s tweets on large media platforms.<sup>8</sup>

The absence of a Twitter account did not deter the former president from using his Truth Social media platform to threaten American Jews to “get their act together” before “it is too late” for failing to be appreciative enough for what he had done for Israel while President.<sup>9</sup> This threat came only weeks after he used a racist term in another Truth Social post to describe Elaine Chao, his former Secretary of Transportation, who had resigned following the January 6<sup>th</sup> attacks on the Capitol.<sup>10</sup> Whether the former President will be permitted to rejoin Twitter, as its new owner Elon Musk has previously promised, remains to be seen. But hours after Musk assumed ownership, Nazi memes and racial slurs began surging on the platform.<sup>11</sup> Days later, after Speaker Pelosi’s husband was attacked by an intruder shouting “where’s Nancy,” Musk himself posted a link to baseless story about the attack by a conspiracy website. Musk removed the tweet only hours later, but not before it had garnered 28,000 retweets and 100,000 likes.<sup>12</sup> Facing skittish advertisers<sup>13</sup> apparently not comforted by his modest promise that Twitter would not become a “free for all hellscape,”<sup>14</sup> Musk met with several civil rights groups and announced that users previously banned from Twitter would remain off the site while he sets up a content moderation panel.<sup>15</sup> But his chief information security officer, chief privacy officer and Twitter’s moderation and safety leader have all since resigned and Musk has openly discussed bankruptcy.<sup>16</sup>

And Florida’s recently reelected Governor, who had campaigned on reducing burdens on businesses, had a federal district court judge block enforcement against

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8. Will Oremus & Cristiano Lima, *Kanye’s antisemitic tweet could be a preview of social media’s future*, WASH. POST, <https://www.washingtonpost.com/technology/2022/10/10/kanye-west-antisemitic-tweet-musk-texas/> (last updated Oct. 10, 2022).

9. Paul LeBlanc, *Trump complains American Jews don’t appreciate his moves on Israel, drawing criticism*, CNN, <https://www.cnn.com/2022/10/16/politics/trump-american-jews-israel> (last updated Oct. 17, 2022).

10. Jordain Carney, *Elaine Chao, Donald Trump’s Transportation secretary, told the Jan. 6 committee she resigned because of her “personal values*, POLITICO (Oct. 13, 2022), <https://www.politico.com/minutes/congress/10-13-2022/leaderships-ask-for-help/>.

11. Drew Harwell, Taylor Lorenz & Cat Zakrzewski, *Racist tweets quickly surface after Musk closes Twitter deal*, WASH. POST, <https://www.washingtonpost.com/technology/2022/10/28/musk-twitter-racist-posts/> (last updated Oct. 28, 2022). See also Brian Bushard, *Twitter Removes Kanye’s Tweet After He Drops N-Word—And Musk Claims Platform Rules Unchanged*, FORBES (Nov. 4, 2022), <https://www.forbes.com/sites/brianbushard/2022/11/04/kanye-drops-n-word-on-twitter-as-musk-claims-platform-rules-unchanged/?sh=2f1ab78a2244> (noting finding by the Network Contagion Institute that there had been a 500 percent increase in the use of the n-word in the first twelve hours following Musk’s acquisition).

12. Oliver Darcy & Donie O’Sullivan, *Elon Musk, Twitter’s new owner, tweets conspiracy theory about attack on Paul Pelosi*, CNN, <https://www.cnn.com/2022/10/30/business/musk-tweet-pelosi-conspiracy/index.html> (last updated Oct. 31, 2022). The source for the story was a website that had claimed in 2016 that Hillary Clinton had died and had been replaced by a double. *Id.*

13. Katie Conger, Tiffany Hsu and Ryan Mac, *Elon Musk’s Twitter Faces Exodus of Advertisers and Executives*, N.Y. TIMES (Nov. 1, 2022), <https://www.nytimes.com/2022/11/01/technology/elon-musk-twitter-advertisers.html>.

14. Bushard, *supra* note 11.

15. Rebecca Kern & Mark Scott, *Musk personally led call with civil rights groups to address hate speech on Twitter*, POLITICO (Nov. 2, 2022), <https://www.politico.com/news/2022/11/02/musk-twitter-hate-speech-00064690>.

16. AJ McDougall, *5 Top Twitter Execs Quit in Elon Musk’s Most Chaotic Day Yet*, DAILY BEAST (Nov. 10, 2022), <https://www.thedailybeast.com/top-twitter-execs-joel-roth-lea-kissner-damien-kieran-robin-wheeler-resign-amid-elon-musk-takeover-chaos>.  
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private businesses of the “Stop Woke Act” he had pushed.<sup>17</sup> In limiting how private businesses teach diversity and inclusion the workplace, district judge Walker ruled, Florida had turned “the First Amendment upside down.” In Florida,” he stated, the First Amendment apparently bars private actors from burdening speech, while the state may burden speech freely.”<sup>18</sup>

For years, right wing conspiracy theorist Alex Jones had espoused the vile falsehood that the parents whose children were killed in the Sandy Hook massacre were “actors who faked the tragedy.”<sup>19</sup> Juries in Texas and Connecticut, rejecting Jones’s bogus First Amendment defense, awarded the families about a billion dollars in their defamation suits against the Infowars founder. And, citing Jones’s “depravity,” the judge presiding over the Connecticut case subsequently added \$473 million in punitive damages to the total.<sup>20</sup>

## Sports

Kat Gamache, the Journal’s Executive Editor noted to me that I have used (abused?) my editorial independence to work sports into every one of my previous Editor-in-Chief pages. I intend to keep my record intact.

Before hitting his 61<sup>st</sup> homerun of 2022 to tie Roger Maris’s 1961 American League record, and then breaking the record with his 62<sup>nd</sup> homerun, Aaron Judge broke a little-mentioned but even older American League home run record – the single season record for homeruns by a right-handed batter. The old record, shared by Jimmy Foxx and Detroit Tiger Hall of Famer Hank Greenberg (as a Detroit Tiger fan I had to mention that), was 58 homeruns and had stood for 84 years.

Forty-two year old Albert Pujols signed a one year contract last spring with the St. Louis Cardinals for what was supposed to be a farewell tour with his original team. But around mid-season he suddenly turned 25 and hit over twenty home runs, including his seven hundredth, becoming only the fourth player in baseball history to reach that milestone – improbably leading his team to the National League playoffs in the process.

Tennis greats Serena Williams and Roger Federer announced their retirements. WNBA star Britney Griner remains imprisoned in Russia. En route to their second World Series championship in four years, four Houston Astros pitchers combined to pitch only the second no-hitter in World Series history in a win over the Philadelphia Phillies. And showing signs of mortality, Aaron Rogers was intercepted three times in a loss to the lowly Detroit Lions, who went into the game with the worst record in the NFL.

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17. *Judge blocks Florida “woke” law, saying it violates the First Amendment*, CBS NEWS, ASSOCIATED PRESS, <https://www.cbsnews.com/news/florida-woke-law-blocked-by-judge-over-first-amendment-issues/> (last updated Aug. 19, 2022).

18. *Honeyfund.com, Inc. v Desantis*, No. 4:22cv227-MW/MAF, 2022 WL 3486962 (N.D. Fla. Aug. 18, 2022).

19. Jack Queen & Jacqueline Thomsen, *Alex Jones must pay Sandy Hook families nearly \$1 billion for hoax claims, jury says*, REUTERS (Oct. 12, 2022), <https://www.reuters.com/legal/jury-begins-third-day-deliberations-alex-jones-sandy-hook-defamation-trial-2022-10-12/>.

20. Andrea Salcedo, James Bikales and Joanna Slater, *Judge orders Alex Jones to pay \$473 million more to Sandy Hook families*, WASH. POST (Nov. 10, 2022), <https://www.washingtonpost.com/nation/2022/11/10/alex-jones-sandy-hook-infowars/>.  
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### **Life's Absurdities**

The Texas Republican Party Platform has been largely ignored by Texas's Governor, Attorney General and two U.S. Senators.<sup>21</sup> Among the things included in that platform this summer were both endorsement of a referendum that would allow Texas voters to declare their secession from the United States<sup>22</sup> and a change to the U.S. Constitution that would eliminate "anchor babies" by granting birth-right citizenship only to those "with at least one biological parent who is a US citizen."<sup>23</sup> It isn't clear from the platform whether proponents seek to change the U.S. Constitution before or *after* they have seceded from the United States. But it does appear that I would lose my citizenship under the platform. My parents were Holocaust survivors who came to America in the late 1940s as refugees. They still were not citizens when I was born in 1950. So I guess I'd be considered an "anchor baby."

### **Presidential Gaffes**

"Let Me Start Off With Two Words, Made In America." Television's late night hosts had a field day with President Biden's gaffe in an early October speech to supporters at an event in Maryland. A few weeks earlier at a White House conference on hunger, nutrition and health, the President expressed his thanks to those in attendance, including Rep. Jackie Walorski, who had died in a car crash a month earlier. White House staffers in the press office, if polled, might well have been sympathetic to some limited form of censorship.

### **Foreign autocracies**

Autocratic governments and would-be autocrats around the world have gained adherents for promising to protect their populations from the xenophobic threat that immigration would change their cultures. Viktor Orban won reelection in Hungary. Far right parties made parliamentary gains in Sweden. Giorgia Meloni was elected Prime Minister of Italy. In case that name is not familiar to you, she is a member of Italy's far-right Fratelli d' Italia party, a descendant of the Italian Social Movement party, formed by Mussolini supporters after World War II. Ferdinand Marcos, Jr. was elected president of the Philippines. He is, of course, the son of that country's former dictator, Ferdinand Marcos, who was expelled from the country. As a precursor to Brazil's presidential election, President Bolsinaro claiming election fraud before the election, threatened military action if he was not declared the winner. As we prepare to go online with the newest edition, Bolsinaro lost his run-off with his predecessor, Luiz Lula daSilva. While he did not concede, in a hopeful sign for democracy, Bolsinaro did announce that the transition to the new government would proceed on January 1. Meanwhile, left wing dictatorships in Venezuela, led by Nicolas Maduro, and in Nicaragua by Daniel Ortega, continue to repress their populations, forcing many to flee and claim asylum here and elsewhere.

But there are some signs of resistance to autocracy. Russia's call up of 300,000 men to fight in Ukraine has led to more than 100,000 Russian men of draft age fleeing the country. And in Iran's theocracy, thousands of women continue to engage in nationwide protests, burning their headscarves and hijabs after

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21. Christopher Hooks, *Yes, the 2022 Texas GOP Platform Is Extreme. But Little of It Is New.*, TEXASMONTHLY (June 20, 2022), <https://www.texasmonthly.com/news-politics/texas-republican-convention-2022/>.

22. REPORT OF THE PERMANENT 2022 PLATFORM & RESOLUTIONS COMMITTEE (2022), TEXASGOP, <https://texasgop.org/wp-content/uploads/2022/06/6-Permanent-Platform-Committee-FINAL-REPORT-6-16-2022.pdf>.

23. *Id.*  
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22 year old Mahsa Amini died in police custody. She had been arrested by Iran's morality police because her hijab did not fully cover her hair. By the time of this writing several hundred women and nearly two dozen children had been killed by Iranian police during these protests.

### **Russia's War on Ukraine:**

Criticism within Russia of Putin's unprovoked invasion of Ukraine – its so-called “special military operation” – continues to be dangerous. New outlets reported that several Gazprom and Lukoil executives who had voiced concerns about it died suspicious deaths within months of each other. The depths to which Russia has sunk in its immoral war continue to shock the conscience. Reminiscent of the Hamas terrorist group's use of hospitals to launch indiscriminate rocket attacks on Israeli civilians – turning doctors, nurses and patients into human shields, Russia occupied the Zaporizhzhia nuclear power plant as the launching site for its rocket attacks on Ukrainian civilian populations. And in so doing, it has turned plant workers into both hostages and human shields.

Losing on the battlefield, embarrassed by the partial destruction of the bridge connecting the Russian mainland with Crimea and running low on its own munitions, Russia has turned to its fellow pariah nation, Iran, for “kamikaze” drones. These have been used both to terrorize Ukraine's civilian population centers and to damage that nation's vital infrastructure.

### **Changing of the Guard: Primary Elections**

Liz Cheney, one of the most conservative members of Congress, lost her Wyoming primary. She lost, it is clear, not because of her lack of conservative bona fides, but because of her refusal to give fealty to a twice impeached former president and because of her participation in the January 6<sup>th</sup> committee that investigated his role in trying to overturn the 2020 presidential election. But Brad Raffensperger, the Georgia Secretary of State who refused the former President's demand that he “find” 11,000+ more votes, defeated his election denier primary opponent and subsequently won reelection.

### **Notable Retirements**

After more than a half century at the National Institute of Health and nearly forty years as director of its National Institute of Allergy and Infectious Diseases, Anthony Fauci announced his retirement, effective at the end of this year. It is hard to comprehend his impact on global health. “Fauci's tenure as director of the infectious-diseases institute made him an adviser to seven presidents and put him on the front lines of every modern-day scourge, including AIDS, the 2001 anthrax scares, Ebola, Zika and the coronavirus pandemic.”<sup>24</sup>

### **Deaths of Public Figures**

**Mikhail Gorbachev**, the last leader of the former Soviet Union who oversaw its peaceful breakup, died in late August at the age of 91. The winner of the 1990 Nobel Peace Prize was admired in the West but not by most Russians, many of whom see the dissolution of the USSR as a great tragedy. Writing about his death, the famous dissident and *refusenik* – the first political prisoner released by Gorbachev and now a member of Israel's Knesset – had this to say about the significance of his passing:

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24. Yasmeen Abutaleb, *Fauci plans to step down in December after half a century in government*, WASH. POST, <https://www.washingtonpost.com/health/2022/08/22/fauci-retiring/> (last updated Aug. 22, 2022). CORE/9990000.5520/178243984.1

In nearly every dictatorship there are dissidents, and from time to time there are also Western leaders willing to risk either political fates to promote human rights abroad. But Gorbachev was a product of the Soviet regime, a member of its ruling elite who believed in its ideology and enjoyed its privileges – yet decided to destroy it nevertheless. For that, the world can be grateful. Thank you, Mikhail Gorbachev.<sup>25</sup>

A few weeks later, **England’s Queen Elizabeth** passed away at age 96, 70 years after taking the throne. Her life was marked by an unswerving dedication to her public duties. Indeed, only two days before her death she had engaged in her last official acts -- accepting the resignation of former British Prime Minister Boris Johnson and the appointment of Liz Truss as the new Prime Minister of Great Britain.

Only six weeks after England’s longest-serving monarch passed away, Liz Truss resigned, becoming the shortest-serving Prime Minister in that country’s history. With her demise as Prime Minister imminent, one British paper began a daily publication of a photo of a head of lettuce, posing the question: Which will have the longer shelf life, the head of lettuce or Truss’s term in office? It turned out to be the former.<sup>26</sup>

Few will mourn the passing of al-Qaida leader **Ayman al-Zawahiri**, who was killed in a U.S. drone strike in Kabul, Afghanistan at the end of July. Al-Zawahiri and his predecessor, Osama bin Laden, had planned the 9/11 attack on the World Trade Center towers that killed nearly three thousand Americans. Al Zawahiri had served as bin Laden’s deputy and later his successor after the former was killed by U.S. soldiers a decade earlier.<sup>27</sup>

#### **Former President Trump still in the news:**

“I don’t f---ing care that they have weapons. They are not here to hurt *me*. Take the f---ing mags (magnetometers) away.” These were the chilling words of the former President at the January 6 2021 “Stop the Steal” rally, as recounted by Cassidy Hutchinson, a senior aid to White House Chief of Staff Mark Meadows during her dramatic testimony before the House January 6<sup>th</sup> Committee.<sup>28</sup> The former president’s words and actions or inaction were the focus of summer headlines surrounding his role in the mob attacks on the Capitol. But he continued to make other headlines almost daily.

Finally sitting for a long-delayed deposition in the New York Attorney General’s civil investigation into the operations of the Trump Organization, the former president “took the Fifth” over four hundred times in a three hour deposition, following in the footsteps of his son, Donald Jr., who invoked the Fifth over five hundred times a few months earlier. And months later, the Organization’s CFO, Alan Weiselberg, pleaded guilty to fifteen counts of tax fraud and evasion and agreed to cooperate in the criminal trial of the company.<sup>29</sup>

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25. Natan Sharansky, *Gorbachev played a complicated but unique role in world history*, WASH. POST (Aug. 30, 2022), <https://www.washingtonpost.com/opinions/2022/08/30/sharansky-gorbachev-death/>.

26. Matthew Weaver, *Iceberg lettuce in blond wig outlasts Liz Truss*, GUARDIAN (Oct. 20, 2022), <https://www.theguardian.com/politics/2022/oct/20/iceberg-lettuce-in-blonde-wig-outlasts-liz-truss>.

27. Matthew Lee, Nomaan Merchant & Mike Balsamo, *CIA drone strike kills al-Qaida leader Ayman al-Zawahiri in Afghanistan*, PBS, <https://www.pbs.org/newshour/politics/cia-drone-strike-kills-al-qaida-leader-ayman-al-zawahiri-in-afghanistan> (last updated Aug. 1, 2022).

28. Jonathan Allen, *‘They’re not here to hurt me’: Former aide says Trump knew Jan. 6 crowd was armed*, NBC NEWS (June 28, 2022), <https://www.nbcnews.com/politics/congress/jan-6-panel-looks-trump-white-house-cassidy-hutchinson-testimony-rcna35550>.

29. Josh Gerstein, Erin Durkin & Kyle Cheney, *Trump, company and family members sued by New York AG over alleged fraud scheme*, POLITICO (Sept. 21, 2022), <https://www.politico.com/news/2022/09/21/trump-company-and-family-members-sued-by-ny-ag-over-alleged-fraud-scheme-00058011>.  
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On Aug. 26<sup>th</sup>, at the direction of a federal district court magistrate, DOJ was directed to partially unseal the affidavit used to establish probable cause for its search and recovery of boxes of sensitive government documents from the former President's home/private club at Mar-a-Lago as part of its investigation into possible criminal violations of the Espionage Act.

### **Gun violence**

My Editor in Chief page last May mentioned that there had been 10 mass shootings (defined as four or more shooting victims) in a ten day period and bemoaned that months later those shootings would not be remembered. Since then we've *averaged* more than one mass shooting a day. Indeed, days after publication there was a racially-motivated attack that killed ten black shoppers at a Buffalo area supermarket followed by an antisemitic attack in the heavily-Jewish Chicago suburb, Highland Park. And, giving the lie to the NRA's adage that "the only thing that stops a bad guy with a gun is a good guy with a gun,"<sup>30</sup> a month later 19 good guys -- armed police officers -- stood by for more than an hour while a person armed with an assault rifle gunned down nineteen children and two beloved teachers at an elementary school in Uvalde, Texas.

In some states individuals cannot purchase handguns until age 21, but face no similar restriction on the purchase of assault rifles. There were public pleas after Uvalde for making the age requirement the same. Unsurprisingly, Congress did not raise the age for purchasing assault weapons. South Dakota's senior Senator explained his opposition this way: "[I]n my state, they use them to shoot prairie dogs and, you know, other types of varmints."<sup>31</sup> Uvalde and Buffalo did, however, finally prompt the first, if exceedingly modest, federal gun control legislation in more than a quarter century. But that same week the Supreme Court discovered a new constitutional right - the right to carry loaded weapons outside the home.<sup>32</sup> Citing this new constitutional right, the Court struck down a more than century-old New York law limiting carriage of such weapons. And less than a week after the Court handed down its decision, four plaintiffs filed suit against the District of Columbia, maintaining that they had Second Amendment rights to carry loaded weapons on Metro. That is sure to be great news to Metro officials already suffering steep ridership losses because of concerns over safety and COVID. Knowing fellow passengers may be carrying concealed, loaded weapons will undoubtedly make riders feel safer.

### **Supreme Court**

The last week of the Supreme Court's 2021-22 term was a dramatic one. The *New York State Rifle and Pistol Ass'n v. Bruen* case I mentioned earlier, struck down a century-old New York law restricting the carriage of loaded weapons outside the home.

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30. NRA: 'Only Thing That Stops A Bad Guy With A Gun Is A Good Guy With A Gun', NPR (Dec. 21, 2012), <https://www.npr.org/2012/12/21/167824766/nra-only-thing-that-stops-a-bad-guy-with-a-gun-is-a-good-guy-with-a-gun>.

31. Tom Lawrence, *Prairie dogs and politics: Thune provides absurd reason for people to own mass-murder weapon in wake of Uvalde tragedy*, SOUTH DAKOTA STANDARD (June 10, 2022), <https://www.sdstandardnow.com/home/prairie-dogs-and-politics-thune-provides-absurd-reason-for-people-to-own-mass-murder-weapon-in-wake-of-uvalde-tragedy>.

32. Law clerks for Justice Scalia, who wrote the majority decision in the *Heller* Supreme Court case, and Justice Stevens, who wrote the lead dissent, maintain that while the two justices disagreed whether the Second Amendment protected "an individual right to keep a usable handgun at home," they agreed that "Heller merely established the constitutional baseline that the government may not disarm citizens in their homes." Kate Shaw & John Bash, *We Clerked for Justices Scalia and Stevens. America Is Getting Heller Wrong*, N.Y. TIMES (May 31, 2022), <https://www.nytimes.com/2022/05/31/opinion/supreme-court-heller-guns.html>.  
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That same week the Court further narrowed its Establishment Clause jurisprudence in *Kennedy v. Bremerton*, upholding the right of a football coach to conduct a “private prayer” at the fifty-yard line joined by more than a hundred players and fans. In ruling for the coach, the Court dismissed the school system’s concerns that his actions would be perceived as endorsement by the school of Christian prayers. Muslim cornerbacks, Hindu wide receivers and Jewish punters pray that you won’t lose your starting positions!

The *Dobbs* decision, varying little from the draft version leaked a few months earlier, struck down the nearly fifty-year old *Roe v. Wade* decision, ending women’s constitutional right to abortion. The reverberations from that decision are still being felt.

Not long after the decision an Ohio trigger law forced a 10 year old pregnant rape victim to travel to neighboring Indiana for an abortion. Indiana’s Attorney General Rokita announced that he was opening an investigation, claiming that the doctor (Caitlin Bernard) who had performed the abortion had “a long history” of non-compliance with Indiana’s reporting laws. This, it was widely reported, was despite any evidence of non-compliance by the doctor. Subsequent physical threats to the doctor prompted the FBI to investigate and the doctor has since indicated she was considering a defamation suit against the state Attorney General.<sup>33</sup>

In August, Kansas voters rejected a referendum that would have overturned Kansas Supreme Court precedent upholding women’s abortion rights. In November, voters in Michigan, California and Vermont voted in favor of referenda to add abortion rights to those states’ constitutions. Kentucky voters rejected a referendum that would have added new abortion restrictions. In contrast, South Carolina’s senior senator had introduced a bill in September that would have outlawed abortions after 15 weeks in all fifty states.

Of most interest to FERC practitioners, the Supreme Court struck down the Obama-era Clean Power Plan in *West Virginia v. EPA*, under an expanded “major questions doctrine.” Under this doctrine, agency rules posing major questions, i.e., questions of “deep economic and political significance,” will be held to exceed the agency’s authority absent a clear expression from Congress that the agency has been granted the power it claims. In the interests of full disclosure, this editor has previously opined (1) that nearly all of FERC’s and the FPC’s major initiatives over the last sixty years would likely have failed the doctrine’s test and (2) that this new test could risk regulatory instability.<sup>34</sup>

## Covid

Despite President Biden’s offhand, erroneous – maybe wishful - remark that the COVID pandemic was over, more than 8,000 persons are still dying from COVID each month.<sup>35</sup> And uptake for the newest covalent booster continues to be slow, worrying health officials.<sup>36</sup> Deaths from the disease, moreover, are not

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33. Sarah McCammon & Becky Sullivan, *Indiana doctor says she has been harassed for giving an abortion to a 10-year-old*, NPR (July 26, 2022), <https://www.npr.org/2022/07/26/1113577718/indiana-doctor-abortion-ohio-10-year-old>.

34. See, e.g., Harvey L. Reiter, *Would Ferc’s Landmark Decisions Have Survived Review Under The Supreme Court’s Expanding “Major Questions Doctrine” And Could The Doctrine Stifle New Regulatory Initiatives?*, EBA BRIEF, Spring 2022, at 1, [https://www.eba-net.org/assets/1/6/EBA\\_Brief\\_-\\_Volume\\_3\\_Issue\\_1\\_Final1.pdf](https://www.eba-net.org/assets/1/6/EBA_Brief_-_Volume_3_Issue_1_Final1.pdf); Harvey L. Reiter, *Expanding ‘Major Questions Doctrine’ Risks Regulatory Stability*, BLOOMBERG LAW (Jul. 12, 2022), <https://news.bloomberglaw.com/environment-and-energy/expanding-major-questions-doctrine-risks-regulatory-stability>.

35. *COVID Data Tracker*, CDC, <https://covid.cdc.gov/covid-data-tracker/#datatracker-home>.

36. Cecelia Smith-Schoenwalder, *Slow Updated Booster Shot Uptake Deepens Worry Over Future U.S. COVID-19 Surge*, U.S. NEWS (Oct. 14, 2022), <https://www.usnews.com/news/articles/2022-10-14/slow-updated-booster-shot-uptake-deepens-worry-over-future-u-s-covid-19-surge>.  
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spread evenly across the country. The highest death rates are in areas with the lowest vaccination rates.<sup>37</sup>

### Political Stunts

Florida's governor chartered a plane to fly Venezuelan immigrants fleeing leftist dictator Nicolas Maduro from Texas, not Florida, to Martha's Vineyard island *after* the tourist season on the pretext that it would offer them more economic opportunities. "States like Massachusetts, New York and California," his spokesperson explained, "will better facilitate the care of these individuals who they have invited into our country by incentivizing illegal immigration through their designation as 'sanctuary states' and support for the Biden administration's open border policies."<sup>38</sup> Ironically, many immigrants have since begun arriving in Florida to help in the rebuilding process in the aftermath of Hurricane Ian.<sup>39</sup>

### The Mid-Term Elections

As we go to print, control of Congress remains undecided. The "red wave" predicted by some pundits did not materialize.<sup>40</sup> Control of the House of Representatives may be changing hands, but if so, only by a small margin. By contrast, control of the Senate will not change; it is possible, depending on the outcome of a December runoff election in Georgia, that Democrats will actually have gained a seat. And in a comforting sign for American democracy, several of the election deniers who lost their elections conceded defeat, a few even graciously offering their best wishes to their opponents.<sup>41</sup> Perhaps this will also provide some comfort to our Canadian neighbors. In 1991 Canadians were almost equally divided whether our democratic system or theirs worked better. But after the January 6<sup>th</sup> insurrection, only five percent of Canadians "preferred the American system."<sup>42</sup>

So how do all of these events relate to the work of the Journal? They don't, not directly anyway. But all of us are affected by the world around us, including the clients we represent and the agencies that develop energy policies and the legislators who shape energy law. Our recent symposium reflects on the fragile nature of democracies and the strain put on European democracies by a Russian dictator and his control over fossil fuels they rely upon – too heavily – to run their economies. How do we balance the need to supply these countries with the fossil fuels they need while advancing the goal of reducing the planet's carbon emissions to mitigate the impacts of climate change? These were the big issues discussed during that symposium. It has been transcribed and included in the current edition of the Journal. The Journal is proud to include its important content in this edition.

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37. Lydia Denworth, *People in Republican Counties Have Higher Death Rates Than Those in Democratic Counties*, SCIENTIFIC AMERICAN (July 18, 2022), <https://www.scientificamerican.com/article/people-in-republican-counties-have-higher-death-rates-than-those-in-democratic-counties/>.

38. Matthew Impelli, *DeSantis Warned by Fox's Rivera He Will 'Feel the Wrath' of Latino Voters*, NEWSWEEK (Oct. 5, 2022), <https://www.msn.com/en-us/news/politics/desantis-warned-by-fox-s-rivera-he-will-feel-the-wrath-of-latino-voters/ar-AA12DYV4?ocid=msedgntp&cvid=dea82c15b2f542e9822195d7ed07cb74>.

39. David C. Adams, *After Hurricane Ian, immigrants help with rebuilding. But will they get fair work conditions?*, UNIVISION NEWS (Oct. 11, 2022), <https://www.univision.com/univision-news/united-states/who-will-protect-migrant-workers-who-help-rebuild-floridas-west-coast-after-hurricane-ian>.

40. Interestingly, there was a small blue wave in my home state of Michigan, where Democratic candidates for Governor, Secretary of State and Attorney General all won reelection, one Congressional seat changed hands and Democrats took majorities in both houses of the Michigan legislature for the first time in forty years.

41. Emma Brown & Amy Gardner, *Key election deniers concede defeat after disputing Trump's 2020 loss*, WASH. POST (Nov. 9, 2022), <https://www.washingtonpost.com/politics/2022/11/09/election-deniers-mid-terms-democracy/>.

42. Damien Cave, *The World's Democracies Ask: Why Can't America Fix Itself?*, N.Y. TIMES (Nov. 8, 2022), <https://www.nytimes.com/2022/11/08/world/us-international-democracy.html>.  
CORE/9990000.5520/178243984.1

Once again, I want to thank the peer review editors, the EBA staff and the students at Tulsa, including, in particular student editor in chief, Sotheby Shedeck, for all their hard work in producing the latest edition of the Journal. I would be remiss not to give a special plug to the unsung work of our reports editors. While the committee reports are not part of the Journal's print edition, they are a vital part of the Journal and a rich research tool for practitioners. Shorn of editorializing, they provide readers with summaries of the latest developments in all facets of energy law and regulation. And let me also express my gratitude to the FELJ board for their unwavering support of this publication. Oh – I almost forgot – Go Redwings!

Harvey L Reiter  
November, 2022