NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with Fed. R. App. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted January 19, 2023*
Decided, January 20, 2023

Before

FRANK H. EASTERBROOK, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

No. 22-1841

MICHAEL F. HENRY, *Plaintiff-Appellant*,	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
v.	
UNITED STATES OF AMERICA, *et al.*, *Defendants-Appellees*.	No. 22 CV 01091 John J. Tharp, Jr., *Judge*.

O R D E R

Michael Henry filed suit in a state court of Illinois against three federal prosecutors (the United States Attorneys for each of the judicial districts in Illinois) and several other defendants. He asked for a judgment compelling the prosecutors to file criminal or civil suits to enforce some state laws that govern bidding for public contracts. The prosecutors removed the case to federal court under 28 U.S.C. §1442(a)(1). The district

* After examining the briefs and the record, we have concluded that oral argument is unnecessary. See Fed. R. App. P. 34(a); Cir. R. 34(f).

court eventually remanded all claims against state officials. (That aspect of the judgment is uncontested on appeal.) The claims against the federal defendants were dismissed, however, on sovereign-immunity grounds. The district judge stated that sovereign immunity deprives the state court of jurisdiction and so prohibits removal too. See *Ricci v. Salzman*, 976 F.3d 768, 771–72 (7th Cir. 2020).

Deeming the suit non-removable was a misstep, for at least three reasons.

First, 5 U.S.C. §702 waives the sovereign immunity of the United States and its officers for suits that do not seek money damages. Henry, who seeks only prospective relief, is a beneficiary of that waiver.

Second, sovereign immunity is not a truly jurisdictional doctrine in the first place. See *United States v. Cook County*, 167 F.3d 381 (7th Cir. 1999); *Blagojevich v. Gates*, 519 F.3d 370, 371 (7th Cir. 2008). Sovereign immunity contracts the scope of possible relief but does not divest any given tribunal of the authority (that is to say, jurisdiction) to resolve the controversy. The very fact that sovereign immunity can be waived shows that it is not jurisdictional; truly jurisdictional doctrines are waiver-proof. The consequences of sovereign immunity often are similar to the consequences of a jurisdictional defect, but the two differ in principle.

Third, even if federal courts were to understand sovereign immunity as contracting the scope of their jurisdiction, states would not be obliged to agree. Illinois is not bound by Article III of the Constitution and is free to entertain suits that federal courts must dismiss. The district court did not cite any statute or decision suggesting that Illinois deems its courts to lack jurisdiction of suits seeking orders to compel federal officials to begin criminal or civil prosecutions. State law does curtail such relief against state officials, see *People v. Provenzano*, 265 Ill. App. 3d 33, 37 (1994), but we could not find any equivalent doctrine for federal defendants—and it is not clear to us that the rule stated in *Provenzano* is jurisdictional in nature. The doctrine of intergovernmental immunity also may affect a state court's power to award the relief Henry wants, but again we lack reason to think that Illinois deems this doctrine a jurisdictional limit on its courts.

A jurisdictional dismissal of the federal defendants remains the right disposition, however. Prosecutors have discretion to choose when and where, if at all, to initiate proceedings. See, e.g., *Heckler v. Chaney*, 470 U.S. 821 (1985). Because this discretion is unreviewable—Henry does not contend that any federal statute curtails that discretion for claims of the sort he raises—people who want courts to compel prosecution cannot show any legal injury redressable by a judicial order, which means that they lack

standing to sue. See, e.g., *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973); *Leeke v. Timmerman*, 454 U.S. 83 (1981). The federal tribunal therefore lacks jurisdiction.

AFFIRMED