



## The Long and the Short from the Supreme Court

### Supreme Court Decided Cases

***Mallory v. Norfolk Southern Railway Co.***—The Supreme Court upheld the constitutionality of a Pennsylvania law requiring out-of-state companies that want to do business in the state to register and consent to appear in a Pennsylvania court if they are sued. This type of law is known as a “long-arm” statute.

The court held that the law does not violate 14th Amendment due process requirements. Justice Neil Gorsuch, writing for the 5-4 majority, said it did not matter if the conduct at issue in the lawsuit occurred in a different state, nor did it matter if the company’s principal place of business was in another state.

Robert Mallory worked for Norfolk Southern Railroad in Ohio and Virginia for nearly 20 years. Norfolk Southern is headquartered in Virginia but registered to do business in Pennsylvania, making it a “foreign corporation” under Pennsylvania law. After he left the company, he lived in Pennsylvania before moving back to Virginia. He was diagnosed with colon cancer and sued Norfolk Southern in Pennsylvania, claiming he developed the disease from working for the railroad.

Norfolk Southern argued for dismissal of the case because Mallory never worked for the company in Pennsylvania, and the company was incorporated in Virginia. It further argued that Pennsylvania’s exercise of personal jurisdiction over a foreign company would violate the 14th Amendment’s due process clause.

The court reasoned that having registered in Pennsylvania, Norfolk Southern acquired the benefits and the burdens of domestic corporations, which meant that it could be sued in Pennsylvania. It relied on a 1927 case—*Pennsylvania Fire Co. v. Gold Issue Mining and Milling Co.* which held that an out-of-state corporation that has consented to in-state suits in order to do business in the forum is susceptible to suit there.

All states and Washington, D.C., have some type of long-arm statute in place allowing out-of-state companies to be sued if certain requirements are met.

***Moore v. Harper***—In this case, the Supreme Court rejected the independent state legislature theory, holding that “state courts retain the authority to apply state constitutional restraints when legislatures act under the power conferred upon them by the Elections Clause.” Chief Justice John Roberts wrote the 6-3 opinion for the majority. Justices Clarence Thomas, Samuel Alito and Neil Gorsuch dissented.

This case is interesting on two fronts: its constitutional question and its procedural path back and forth to the court.

Following the 2020 census the North Carolina legislature redistricted. The maps were challenged in court. At trial, a redistricting expert testified that the North Carolina legislature adopted Congressional,



state house, and state senate maps which were more favorable to Republicans than about 99.9% of comparison maps.

The North Carolina trial court and the North Carolina Supreme Court held that the state legislature engaged in partisan gerrymandering which violated numerous provisions of the North Carolina constitution including its “Free Elections” clause.

The U.S. Constitution’s Elections Clause states that the “Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.” The Supreme Court had to decide what was meant by the term “legislature”—the body or the process.

On the procedural side, there is more to tell. In the November 2022 midterm elections, North Carolina’s Supreme Court flipped from Democratic to Republican control. The newly constituted court granted a rehearing request and overruled its prior decision soon after. Between the court’s change in partisan control and its reversal of its prior ruling, the U.S. Supreme Court agreed to take the case and heard oral argument.

The justices now had to decide two issues in this case: whether the case was now moot because the North Carolina court overruled the opinion that was the subject of the appeal to the Supreme Court; and whether the Constitution’s elections clause gives state legislatures exclusive authority to set the rules regarding federal elections—authority that would bar the North Carolina Supreme Court from reviewing the Legislature’s congressional districting plans for compliance with state law. The latter argument relies on what is known as the independent state legislature theory.

The court readily dispensed with the mootness issue holding that under the cases and controversies clause in Article 3, Section 2 of the Constitution, a live controversy as to partisan gerrymandering, still existed. They reasoned that, while the North Carolina Supreme Court in the first Harper decision struck down the state’s 2021 voting maps for partisan gerrymandering, the court’s second Harper decision only looked at the ability of a court to address claims of gerrymandering under the North Carolina Constitution—not whether the actual 2021 maps were the result of gerrymandering. The justices concluded that the use of the 2021 maps was still at issue because if they were to reverse the North Carolina Supreme Court’s first decision, the 2021 maps would be reinstated and the partisan gerrymander claim would still exist.

The justices also rejected the independent state legislature theory, stating that “since early in our nation’s history, courts have recognized their duty to evaluate the constitutionality of legislative acts.” They noted that even before the Constitutional Convention of 1787, state courts were placing limits on state legislative actions. These early court actions were the precursor to, and laid the foundation for, judicial review. The elections clause “does not insulate state legislatures from the ordinary exercise of state judicial review,” Roberts wrote.



[\*Allen v. Milligan\*](#)—The court held that Alabama’s 2021 congressional redistricting plan which contains one majority-black district likely violates §2 of the Voting Rights Act (VRA) because it dilutes the votes of Black residents.

Section 2 tracks the language of the 15th Amendment to the Constitution, prohibiting voting practices or procedures that discriminate based on race, color or membership in certain language minority groups. Challenges to redistricting plans make up a large portion of the cases arising under Section 2, which is violated when “it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens.” The law applies if a class of people, in this case Black voters in Alabama, have less opportunity than other members of the electorate to participate in the voting process due to an act of the state legislature.

A three-judge panel ruled the map violated Section 2 by impermissibly packing Black voters into one district and spreading them out throughout others – called packing and cracking. The panel, citing the 1986 Supreme Court case [\*Thornburg v. Gingles\*](#), found that Black Alabamians, 27% of the state’s population, are sufficiently numerous to constitute a voting-age majority in a second geographically compact congressional district; that voting, in the challenged districts is intensely racially polarized; and that under the totality of the circumstances, black voters have less opportunity than other Alabamians to elect Congressional candidates of their choice.

Demographic information for Alabama supports the plaintiffs’ case. Most Black voters in the state are geographically located in a region referred to as the “Black Belt,” due to its majority Black population. Black voters in Alabama [overwhelmingly support Democratic candidates](#), while white Alabamians overwhelmingly support Republican candidates. The proposed [congressional map](#) broke up the Black Belt region, created one majority Black district and allocated portions of the rest of the region to districts with primarily white populations, a practice in redistricting called “[packing and cracking](#).” These factors at face value fulfill the requirements in *Gingles*.

Alabama argued that only purposeful discrimination is prohibited under the Voting Rights Act. It urged the court to adopt a new standard for interpreting Section 2: a “race-neutral benchmark.” Alabama argued that computers can generate millions of districting options that comply with traditional districting requirements without using race as a factor. A mapmaker could then “calculate the median or average number of majority-minority districts in the entire multimillion-map set,” and that number would serve as the race-neutral benchmark. The state reasoned that because mapmakers used computer technology to create the maps without adding race as a factor in the algorithm, the maps were race-blind and not in violation of Section 2.

The court held that the Voting Rights Act prohibits discriminatory effects, not just discriminatory intent. This part of the ruling was the true heart of the case. If the justices accepted Alabama’s argument and



ruled in the state’s favor, cases brought under Section 2 would be even more difficult to win, as petitioners would have to prove the state had discriminatory intent when designing a redistricting plan.

With the case remanded to district court, the Alabama Legislature is now tasked with creating a second House district to provide an opportunity for a Black candidate to win. This will likely result in a new map just in time for the [2024 election](#).

**[303 Creative LLC v. Elenis](#)**—In *303 Creative v. Elenis* the U.S. Supreme Court held that the First Amendment prohibits Colorado from forcing a website designer to create expressive designs speaking messages with which the designer disagrees.

Lorie Smith owns 303 Creative LLC where she designs websites. She wants to start creating wedding websites, but she doesn’t want to create websites that celebrate same-sex marriages, and she wants to explain on her website that doing so would compromise her Christian beliefs. Colorado’s Anti-Discrimination Act’s (CADA) “accommodations clause” prohibits public accommodations from refusing to provide services based on sexual orientation. CADA’s “communications clause” prohibits communicating that someone’s patronage is unwelcome because of sexual orientation. The Supreme Court held that CADA violates Smith’s First Amendment rights to free speech. Justice Gorsuch, writing for the majority explained that Colorado cannot “force an individual to speak in ways that align with its views but defy her conscience about a matter of major significance.” He explained that Smith was faced with an irreconcilable choice—to violate Colorado law and only design websites for heterosexual couples, or follow Colorado law and violate her deeply held religious beliefs. He further opined that the decision in this case would provide protections to other business owners offering speech-related services such as movie directors, artists and speechwriters.

Justice Sonia Sotomayor wrote the dissent and stated that the decision is “a sad day in the American constitutional law and in the lives of LGBTQ people.” She further stressed that the majority’s opinion in this case “declares that a particular kind of business, though open to the public, has a constitutional right to refuse to serve members of a protected class.”

Many states and local governments have adopted laws and ordinances prohibiting sexual orientation discrimination, similar to CADA.

**[Haaland v. Brakeen](#)**—In this case, the Supreme Court upheld the constitutionality of the Indian Child Welfare Act (ICWA) in a case addressing sovereignty in adoption proceedings involving Native American children. Texas, Indiana, Louisiana and non-Native individuals wanting to adopt Native children brought the case. The plaintiffs challenging the constitutionality of the ICWA, which was enacted in 1978 to keep Indian children connected to Indian families. The act prioritizes child placement with Indian families from the child’s tribe or another Indian tribe and protects the right of the child’s tribe to intervene. The entire 5th U.S. Circuit Court of Appeals heard the [case](#) in 2019. It held, and the



Supreme Court affirmed that Congress' power to legislate Indian affairs is well-established and broad; therefore, the ICWA "is consistent with Congress' power under Article I of the Constitution." Justice Amy Coney Barrett wrote the opinion for the seven-member majority. Justices Clarence Thomas and Samuel Alito dissented.

The court addressed the challengers' claim that the act unconstitutionally abridged states' traditional authority over issues of family law and held that Congress' Article I powers preempt state family law. Although state law traditionally governs domestic relations, "the Constitution does not erect a firewall around family law," and under Article I, conflicting state family laws are preempted. Specifically, the court held in a [prior case](#) that it has the power to preempt state law in adoption proceedings involving Indian children. Thomas and Alito argued that the majority ruling impermissibly infringes on state authority.

The court also rejected the challengers' argument that the act forces state agencies to provide "extensive services" to the parents of Indian children and therefore violated the anti-commandeering doctrine under the 10th Amendment. The court reasoned that to find an anti-commandeering violation, the challengers must show that Congress has mandated a state's executive or legislative branch to do certain things. Citing the recent case of [Murphy v. National Collegiate Athletic Assn.](#), the court concluded that the ICWA applies to "any party ... thus sweeping in private individuals and agencies as well as government entities.

With respect to the child placement hierarchy, the court further held the burden of finding a higher-ranked placement under the ICWA is on the tribe or other objecting party, not the state; therefore, "petitioners assert an anticommandeering challenge to a provision that does not command state agencies to do anything."

[Minnesota](#), [Wyoming](#), and [New Mexico](#) along with Colorado, Montana, North Dakota and Oregon have enacted ICWA statutes since 2019.

[\*Sackett v. EPA\*](#)—In a unanimous decision the Supreme Court established a more stringent test to determine whether the Clean Water Act applies to a wetland. Justice Alito wrote the opinion. The ruling was a setback for the Environmental Protection Agency and a victory for an Idaho couple, Mr. and Mrs. Sackett, who have been in litigation with the federal government for over 15 years in their efforts to build a house on an empty lot near a large lake.

The Sacketts' legal battle began shortly after they began backfilling their property to prepare the lot, which is about 300 feet from Priest Lake, for construction back in 2007. The Sacketts received a notice from the EPA to stop work because their lot contains wetlands protected by the CWA, which bars the





discharge of pollutants, including rocks and sand, into “navigable waters.” The CWA defines navigable waters as “waters of the United States.” The EPA reasoned that the wetlands on the Sacketts’ lot fed into a non-navigable creek that then led to Priest Lake.

In agreeing that the Sacketts’ lot is a wetland, the U.S. Court of Appeals for the 9th Circuit applied the test outlined by Justice Anthony Kennedy in [Rapanos v. United States](#): Is there a “significant nexus” between the wetlands and waters that are covered by the CWA, and do the wetlands “significantly affect” the quality of those waters.

The Supreme Court reversed the 9th Circuit’s ruling. Instead, Justice Samuel Alito explained, courts should apply a more stringent test: The Clean Water Act extends only to wetlands that have a continuous surface connection with “waters” of the United States — i.e., with a relatively permanent body of water connected to traditional interstate navigable waters, [33 U.S.C. § 1362\(7\)](#) — making it difficult to determine where the water ends and the wetland begins.

Following the decision, the Environmental Protection Agency [announced](#) it plans to review the ruling and consider next steps, as the current WOTUS rulemaking is frozen in 26 states as a result of injunctions from the [U.S. District Court for the District of North Dakota](#) and the [U.S. District Court for the Southern District of Texas](#). Some states may respond to this ruling by establishing stronger state wetland protections. A bigger implication may be the erosion or overturning the Chevron Doctrine.

[\*\*\*National Pork Producers Council v. Ross\*\*\*](#)—The court affirmed a Ninth Circuit ruling that challengers to California’s Proposition 12 failed to state a claim under the dormant Commerce Clause. Justice Gorsuch delivered the opinion.

In 2018, California voters adopted Proposition 12. Among other things, the proposition forbids the sale in the state of pork that was produced by pigs that had been “confined in a cruel manner.” Confinement is cruel “if it prevents a pig from lying down, standing up, fully extending [its] limbs, or turning around freely.”

Specifically, the pork producers allege that the California law violated the Dormant Commerce Clause by impermissibly regulating extraterritorial conduct outside of the state and that the law imposes an undue burden on interstate commerce.

They alleged that the pork industry is highly interconnected and that “[t]o ensure they are not barred from selling their pork products into California, all the producers and the end-of-chain supplier will require assurances that the cuts and pork products come from hogs confined in a manner compliant with



Proposition 12.” They claim the result will be that all suppliers must either comply with California’s law or incur additional costs to segregate their products. And that this will result in a 9.2 % increase in production cost for pork.

The Supreme Court held that while states (and local governments) may not use their laws to “discriminate purposefully against out-of-state economic interests California’s law was not discriminatory as it applied equally to in-state and out of state producers of pork, so there was no violation of the Dormant Commerce Clause.

In rejecting the petitioner’s claims, the court noted such an application could invalidate a host of laws in the country’s “interconnected national marketplace,” including state income tax laws, environmental laws, securities requirements, quarantine laws, inspection laws, franchise laws, torts laws, among others. Any of these laws can have a “considerable influence on commerce outside their borders.”

*Tyler v. Hennepin County*—A county sold petitioner’s home for \$40,000 to satisfy a \$15,000 tax bill, and kept the remaining \$25,000. The court unanimously held that “history and precedent” establish that the county “could not use the toehold of the tax debt to confiscate more property than was due.” Thus, petitioner “has stated a claim under the Takings Clause of the 5th Amendment and is entitled to just compensation.”

*Students For Fair Admissions, Inc. v. Harvard and UNC*—In a 6-3 decision, the U.S. Supreme Court held that admissions programs at Harvard and the University of North Carolina violate the equal protection clause of the 14th Amendment, and that race can no longer be used as a factor in admissions. Chief Justice Roberts wrote for the majority. A core principle of the equal protection clause is elimination of all official state sources of racial discrimination. Both schools consider race in the admissions process, with the ultimate goal being to ensure there is no “dramatic drop-off” in minority admissions from the prior class.

Using the strict scrutiny standard of review, the court needed to answer a two-part test: whether racial classifications furthered a compelling governmental interest; and whether the government’s use of race is narrowly tailored, or necessary, to achieve that compelling interest.

The schools listed their compelling state interests as training future leaders, acquiring a world view based on diverse outlooks, and preparing engaged and productive citizens. The court held that these are too subjective to be measured, and juxtaposed them with judicially recognized compelling interests in prior case law, such as whether temporary racial segregation of inmates in prison prevents harm to other incarcerated persons (*Johnson v. California*, 543 U. S. 499). The court concluded that whether a



particular mix of minority students produces “engaged and productive citizens” or effectively “train[s] future leaders” is “standardless.”

The court also held that the schools failed the second prong of the strict scrutiny test because they could not “articulate a meaningful connection between the means they employ and the goals they pursue.”

The court rejected the universities’ argument that they should be accorded deference in their use of race as a factor in admissions, saying that deference can exist only within constitutionally permissible boundaries. The court agreed with the 1st U.S. Circuit Court of Appeals ruling that race-based admissions policies violated the 14th Amendment because under equal protection, race cannot be used as a negative or stereotype. The 1st Circuit held that Harvard’s race-based admissions process used race as a negative because it resulted in fewer Asian American admissions. It hammered its point home by stating “many universities have for too long wrongly concluded that the touchstone of an individual’s identity is not challenges bested, skills built, or lessons learned, but the color of their skin.”

Roberts noted that universities may consider in an applicant’s essay how race “has affected his or her life, be it through discrimination, inspiration or otherwise.”

Justice Sotomayor, writing for the dissent and summarizing her views from the bench, expressed deep disappointment in the ruling. It rolls back decades of progress in achieving racial diversity and equal opportunities in higher education, she stated. For over 40 years, the court has upheld the limited use of race under the equal protection clause as a valid way to promote diverse student bodies in colleges and universities, she said, adding that the majority opinion is based on the misperception that racial inequality was “a problem of a different generation” when, in fact, “entrenched racial inequality remains a reality today.”

In response to this ruling, President Biden has directed the Department of Education to [review college admission practices](#) and give “serious consideration” to adversities students have overcome, such as lack of financial means, where a student went to high school, and any racial discrimination or experiences of hardship a student faced. The review will also examine legacy admissions, which are believed to favor relatives of university alumni over disadvantaged applicants.

***[Biden v. Nebraska](#)***—In a 6-3 opinion, the court struck down the administration’s student loan forgiveness program and agreed with the six challenging states that they had standing to sue. Chief Justice John Roberts wrote the opinion for the majority. Justice Elena Kagan wrote the dissent.

The court held that the Higher Education Relief Opportunities for Students Act, or HEROES Act, does not authorize the administration’s student loan forgiveness plan. The HEROES Act permits the secretary of education to waive or modify provisions for loan forgiveness under the Higher Education Act in the event of a war or other military action, or a national emergency. The court noted that the loan





forgiveness plan would have erased about \$430 billion in student debt and lower the median amount of non-forgiven loan repayments from \$29,400 to \$13,600

During the COVID-19 pandemic, which was declared to be a national emergency, the Department of Education suspended student loan repayments. In August 2022, a few weeks before President Joe Biden declared the pandemic over, the education secretary received a [memorandum](#) from the Office of the General Counsel determining that the HEROES Act “grants the secretary authority that could be used to effectuate a program of targeted loan cancellation directed at addressing the financial harms of the COVID–19 pandemic.”

A few months later, the secretary invoked the HEROES Act to reduce or eliminate student loan debt of most borrowers nationwide. Six states—Missouri, Nebraska, Kansas, South Carolina, Iowa and Arkansas—argued that the loan forgiveness plan exceeded the education secretary’s statutory authority. The 8th U.S. Circuit Court of Appeals issued a nationwide preliminary injunction, which the federal government appealed.

The court held that at least one state, Missouri, had standing to challenge the loan forgiveness plan. Missouri had created a loan servicing entity, the Missouri Higher Education Loan Authority, or MOHELA. The court determined that MOHELA was an instrumentality of the state, subject to state supervision, and stood to lose \$44 million yearly if the loan forgiveness plan went forward. Therefore, Missouri would suffer an actual “injury,” satisfying Article 3 standing requirements of the U.S. Constitution. Once standing is established, the court can move on to the merits of the case.

The court rejected the administration’s argument that the secretary had authority under the HEROES Act to cancel student loan debt on the grounds that the statute permits only a waiver or modification of financial assistance, not a rewriting of the statute. The court explained that “statutory permission to ‘modify’ does not authorize basic and fundamental changes in the scheme designed by Congress.” Modifications imply modest adjustments to a statute, not a complete overhaul, the court said. The court also rejected the idea that the loan forgiveness plan was a waiver of provisions under the HEROES Act because the “plan specifies particular sums to be forgiven and income-based eligibility requirements. The addition of these new and substantially different provisions cannot be said to be a ‘waiver’ of the old in any meaningful sense.”

The court also addressed the limitations of executive authority and invoked the so-called major questions doctrine, which holds that if Congress wants to give an administrative agency the power to make “decisions of vast economic and political significance,” it must say so clearly. The court rejected the government’s position that the education secretary would have such power to rewrite the statute and erase \$430 billion in student debt, stating “the ‘economic and political significance’ of the Secretary’s



action is staggering by any measure.” The court reasoned that the Congress that enacted the HEROES Act did not grant such power to the education secretary.

Kagan, writing for the dissent, argued the court should not have heard this case at all because the states lacked standing. Article 3 standing requires an injury in fact, not a theoretical injury; she said the majority overstepped its own authority by hearing the case. The challenging states “have no personal stake in the secretary’s loan forgiveness plan. They are classic ideological plaintiffs: They think the plan a very bad idea, but they are no worse off because the secretary differs.” In her view, the text of the HEROES Act makes clear that the plan is legal. “The statute provides the Secretary with broad authority to give emergency relief to student-loan borrowers, including by altering usual discharge rules. What the Secretary did fits comfortably within that delegation. But the court forbids him to proceed. As in other cases, the rules of the game change when Congress enacts broad delegations allowing agencies to take substantial regulatory measures.”

## Cases For Next Term

Granted CERT and will be heard next year:

[\*\*Alexander v. South Carolina State Conference of the NAACP\*\*](#), 22-807—The court noted probable jurisdiction to review a three-judge district court’s ruling that a South Carolina congressional district is the product of an unconstitutional racial gerrymander. South Carolina’s Congressional District 1 was redrawn after the 2020 Census. The panel found that the new map moved a significant number of Charleston’s Black population from District 1 to District 6.

[\*\*O’Connor-Ratcliff v. Garnier\*\*](#), 22-324—At issue is “[w]hether a public official engages in state action subject to the First Amendment by blocking an individual from the official’s personal social-media account, when the official uses the account to feature their job and communicate about job-related matters with the public, but does not do so pursuant to any governmental authority or duty.”

Two members of a California school district, the Poway Unified School District Board of Trustees, who used personal public Facebook and Twitter accounts to communicate with the public about official business matters related to the board and the district. The board members created the pages before they were elected and used them as campaign tools. They also had private social media accounts where they posted to family and friends.

Parents of children attending schools in the district were blocked from board members’ social media accounts after they criticized board members’ posts and responded with numerous repetitive replies and hundreds of comments. The parents sued the board under 42 U.S.C section 1983, claiming that blocking



them constituted a “state action” that deprived parents of their First Amendment freedom of speech rights. The district court and the 9th U.S. Circuit Court of Appeals agreed.

**Lindke v. Freed**, 22-611—At issue is the similar question, “[w]hether a public official’s social media activity can constitute state action only if the official used the account to perform a governmental duty or under the authority of his or her office.”

James Freed, the Port Huron, Mich., city manager, blocked Kevin Lindke from his Facebook account and deleted his critical comments. Freed created his Facebook account as a college student and maintained it over the years as his personal account. Before he was hired as a city manager, he converted his personal Facebook account to a public figure page. He posted family pictures and events as well as his press releases and other information as city manager.

Lindke began criticizing Freed on other Facebook accounts, then began posting critical comments about Freed on Freed’s personal Facebook page. Freed deleted the comments and eventually blocked Lindke from his page entirely. Subsequently, Facebook deactivated and reactivated his page several times, and Freed eventually decided to unpublish his page because he did not want a page he could not manage.

Lindke filed suit under Section 1983 alleging Freed’s deletion of his comments and subsequent blocking constituted state action and violated his First Amendment rights. Freed argued there was no state action under Section 1983. The district court and the 6th Circuit Court of Appeals agreed with Freed.

**Loper Bright Enterprises v. Raimondo**—The Chevron Doctrine is implicated in this case. In the 1984 case of **Chevron U.S.A. v. Natural Resources Defense Council**, the Supreme Court held that courts should defer to an agency’s interpretation of an ambiguous statute as long as the agency’s interpretation is reasonable.

*Loper* involves the Magnuson-Stevens Fishery Conservation and Management Act (“the Act”) that Congress enacted after determining that overfishing of the fisheries off the coasts of the United States threatened “the food supply, economy, and health of the Nation.” This statute designates the Secretary of Commerce and the National Marine Fisheries Service (“the Service”) to develop a comprehensive fishery management program. Pursuant to the Act, the Service promulgated a rule that required the Atlantic herring fishery to adopt an industry-funded monitoring program. A group of herring fishing companies filed suit to challenge the Service’s rule as too expensive and overly burdensome, alleging they had very limited vessel space and financial resources. They allege the Service exceeded its statutory authority because the Act does not specifically state that industry may be required to pay for the monitoring program. They asked the courts to overrule *Chevron*, or hold that where a statute does not expressly provide for the specific power exercised by the agency, no statutory ambiguity exists and no agency deference should be provided.



The lower courts ruled in favor of the agency. Justice Thomas and Justice Gorsuch have criticized *Chevron* in past opinions arguing that according agency deference when a statute is ambiguous is akin to handing judicial interpretation over to the executive branch. [Seventeen states](#) filed an *amicus* brief in support of the herring fishing companies stating that historically, courts have applied *Chevron* inconsistently, and “[t]he confused status quo has real costs for the people who live and work within our borders... Regulation is costly; over-regulation and mercurial regulation even more so. Waiting longer to intervene forces painful tradeoffs, and they hurt the states and our residents.”

[\*Moore v. United States\*](#)—This case involves a provision of the 2017 Tax Cuts and Jobs Act known as the “mandatory repatriation tax.” This provision is a one-time tax that sought to obtain tax revenue on large earnings that companies held abroad, even if those earnings were reinvested in the company and the taxpayer did not receive them.

Under Article I of the Constitution as originally ratified, Congress could only levy “direct taxes” if such taxes were apportioned among the states meaning the taxes had to be in proportion to their state populations. The 16th Amendment provides an exception to this requirement and permits Congress to tax “incomes from whatever source derived without apportionment among the several states.”

Charles and Kathleen Moore own a 13% stake in an Indian corporation that supplies affordable equipment to small farmers in poor regions of India. The corporation earned yearly profits, chose to reinvest its earnings into the business and neither distributed dividends to its shareholders nor received any income from their shares. In 2018, the Moores learned that under the 2017 law, they had to pay a one-time tax for their share of the company’s lifetime earnings in the amount of \$14,729. They contend that the repatriation tax violates the 16th Amendment, and that income must be distributed before it can be taxed and therefore the mandatory repatriation tax is a direct tax that is not apportioned among the states.

The 9th Circuit Court of Appeals rejected that argument and the case is now before the Supreme Court.

[\*United States v. Rahimi\*](#), 22-915—At issue is “[w]hether 18 U.S.C. 922(g)(8), which prohibits the possession of firearms by persons subject to domestic-violence restraining orders, violates the Second Amendment on its face.” Respondent Zackey Rahimi assaulted his girlfriend, C.M., grabbing her wrist, knocking her to the ground, dragging her back to his car, and shoving her back inside. C.M. fled the scene when Rahimi retrieved a gun to fire a shot after seeing a bystander. Rahimi called C.M. after the incident and threatened to shoot her if she told anyone about the assault.

A few months later, Texas issued a domestic violence restraining order against Rahimi. While that order was still effective, he became a suspect in a series of shootings. Upon searching his home, police found guns and ammunition. Rahimi plead guilty to violating a federal ban on the possession of a firearm while he was the subject of a domestic violence restraining order pursuant to 18 U.S.C. [§ 922\(g\)\(8\)](#).



The 5<sup>th</sup> Circuit Court of Appeals initially upheld his conviction. After the Supreme Court ruled in the case of *New York State Rifle & Pistol Association v. Bruen*, which struck down New York’s proper-cause requirement as violating the 14th Amendment by violating law-abiding citizens’ Second Amendment rights, the 5th Circuit withdrew its former opinion and issued a new opinion vacating Rahimi’s conviction. Under the *Bruen* standard, courts must determine whether "the Second Amendment's plain text covers an individual's conduct[.]" 142 S.Ct. at 2129-30. If so, then the "Constitution presumptively protects that conduct," and the government "must justify its regulation by demonstrating that it is consistent with the nation's historical tradition of firearm regulation." The 5th Circuit reasoned that Rahimi was still only a suspect in the additional shootings and the domestic violence restraining order was not a conviction, but rather an order pursuant to a civil proceeding. It determined that the federal statute impermissibly infringed upon Rahimi’s Second Amendment rights and is unconstitutional; therefore, Rahimi’s conviction must be thrown out.

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