Written Materials and Resources

JULY 2024

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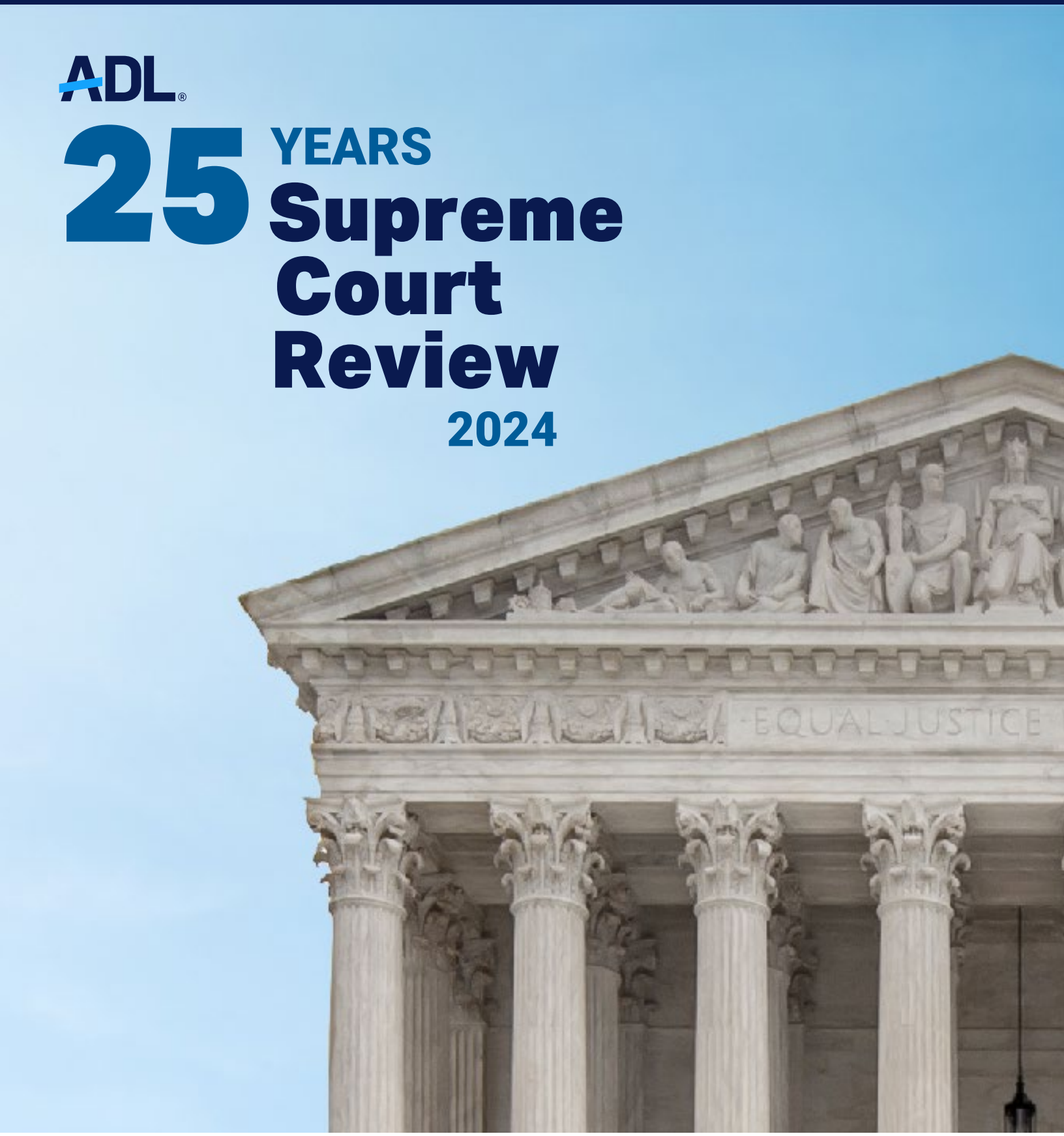
25 YEARS Supreme Court Review 2024



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NATIONAL CONSTITUTION CENTER

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25 YEARS Supreme Court Review 2024

A Joint Virtual Presentation by ADL and the National Constitution Center

Tuesday, July 9, 2024

12:00-1:30pm ET
11:00am-12:30pm CT
10:00-11:30am MT
9:00-10:30am PT

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Tuesday, July 9, 2024

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25th Annual Supreme Court Review

Tuesday, July 9, 2024

Speaker Biographies

Photo of Erwin Chemerinsky

Erwin Chemerinsky

Erwin Chemerinsky became the 13th Dean of Berkeley Law on July 1, 2017, when he joined the faculty as the Jesse H. Choper Distinguished Professor of Law.

Prior to assuming this position, from 2008-2017, he was the founding Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law, at University of California, Irvine School of Law. Before that he was the Alston and Bird Professor of Law and Political Science at Duke University from 2004-2008, and from 1983-2004 was a professor at the University of Southern California Law School, including as the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science. From 1980-1983, he was an assistant professor at DePaul College of Law.

He is the author of sixteen books, including leading casebooks and treatises about constitutional law, criminal procedure, and federal jurisdiction. His most recent books are *Worse than Nothing: The Dangerous Fallacy of Originalism* (2022) and *Presumed Guilty: How the Supreme Court Empowered the Police and Subverted Civil Rights* (2021).

He also is the author of more than 200 law review articles. He is a contributing writer for the Opinion section of the Los Angeles Times, and writes regular columns for the Sacramento Bee, the ABA Journal and the Daily Journal, and frequent op-eds in newspapers across the country. He frequently argues appellate cases, including in the United States Supreme Court.

In 2016, he was named a fellow of the American Academy of Arts and Sciences. In 2017, National Jurist magazine again named Dean Chemerinsky as the most influential person in legal education in the United States. In 2022, he was the President of the Association of American Law Schools.

Education: B.S., Northwestern University (1975), J.D., Harvard Law School (1978)

Photo of Miguel A. Estrada

Miguel A. Estrada

Miguel A. Estrada is a partner in the Washington, D.C. office of Gibson, Dunn & Crutcher.

Mr. Estrada has represented clients before federal and state courts throughout the country in a broad range of matters. He has argued 24 cases before the United States Supreme Court, and briefed many others. He has also argued dozens of appeals in the lower federal courts.

Best Lawyers® recognized Mr. Estrada as a 2023 “Lawyer of the Year” in Intellectual Property Litigation and as a 2020 “Lawyer of the Year” in Appellate Practice. He has been recognized by Benchmark Litigation as a 2020 U.S. Appellate Litigation “Star”. In 2014, The American Lawyer named Mr. Estrada a “Litigator of the Year,” praising his “brains and tenacity” and noting he is the lawyer to call for “a tough, potentially unwinnable case.” From 2014-2022, Chambers has named him as one of a handful of attorneys that it ranked in the top tier among the nation’s leading appellate lawyers.

Mr. Estrada was selected by his peers for inclusion in the 2022 edition of The Best Lawyers in America® in the area of Appellate Law, in addition to previous recognition by the publication in the specialties of Bet-the-Company Litigation, Commercial Litigation and Criminal Defense: White Collar, Intellectual Property Litigation, and Regulatory Enforcement Litigation in the areas of SEC, Telecom, and Energy. In 2017, he was elected as a member of the American Law Institute. In 2021, Mr. Estrada was named among the Lawdragon 500 Leading Lawyers in America.

Mr. Estrada joined Gibson Dunn in 1997, after serving for five years as Assistant to the Solicitor General of the United States. He previously served as Assistant U.S. Attorney and Deputy Chief of the Appellate Section, U.S. Attorney’s Office, Southern District of New York. In those capacities, Mr. Estrada represented the government in numerous jury trials and in many appeals before the U.S. Court of Appeals for the Second Circuit. Before joining the U.S. Attorney’s Office, Mr. Estrada practiced corporate law in New York with Wachtell, Lipton, Rosen & Katz.

Mr. Estrada served as a law clerk to the Honorable Anthony M. Kennedy in the U.S. Supreme Court from 1988 to 1989 and to the Honorable Amalya L. Kearse in the U.S. Court of Appeals for the Second Circuit from 1986 to 1987. He received a J.D. degree magna cum laude in 1986 from Harvard Law School, where he was editor of the Harvard Law Review. Mr. Estrada graduated with an A.B. degree magna cum laude and Phi Beta Kappa in 1983 from Columbia College, New York. He is fluent in Spanish and proficient in French.

Photo of Dr. Mary Anne Franks

Dr. Mary Anne Franks

Dr. Mary Anne Franks is the Eugene L. and Barbara A. Bernard Professor in Intellectual Property, Technology, and Civil Rights Law at George Washington Law School. Her areas of expertise include First Amendment law, Second Amendment law, law and technology, criminal law, and family law. Dr. Franks also serves as the President and Legislative & Tech Policy Director of the Cyber Civil Rights Initiative, the leading U.S.-based nonprofit organization focused on image-based sexual abuse. Her model legislation on the nonconsensual distribution of intimate images (NDII, sometimes referred to as "revenge porn") has served as the template for multiple state and federal laws, and she is a frequent advisor to the federal government, state and federal lawmakers, and tech companies on privacy, free expression, and safety issues. Dr. Franks is the author of the award-winning book, *The Cult of the Constitution* (Stanford Press, 2019); her second book, *Fearless Speech* (Bold Type Books) will be published in October 2024. She holds a J.D. from Harvard Law School as well as a doctorate and a master's degree from Oxford University, where she studied as a Rhodes Scholar. She is an Affiliate Fellow of the Yale Law School Information Society Project and a member of the District of Columbia bar.

Photo of Gregory G. Garre

Gregory G. Garre

Gregory Garre is a partner in the Washington, D.C. office of Latham & Watkins LLP and chair of the firm's Supreme Court and appellate practice. He previously served as the 44th Solicitor General of the United States, Principal Deputy Solicitor General, and Assistant to the Solicitor General, and is the only person to have held all of those positions within the Office of the Solicitor General. He has argued 49 cases before the Supreme Court, including *Harrington v. Purdue Pharma LP*, and scores of additional cases before the courts of appeals. His Supreme Court cases include *Fisher v. University of Texas*, *Ashcroft v. Iqbal*, *FCC v. Fox*, and *Massachusetts v. EPA*. Following his graduation from law school, he served as a law clerk to Chief Justice William H. Rehnquist, and to Judge Anthony J. Scirica of the United States Court of Appeals for the Third Circuit. He speaks frequently on issues related to the Supreme Court and appellate practice.

Photo of Amy L. Howe

Amy L. Howe

Until September 2016, **Amy Howe** served as the editor and reporter for SCOTUSblog, a blog devoted to coverage of the Supreme Court of the United States; she continues to serve as an independent contractor and reporter for SCOTUSblog. Before turning to full-time journalism, she served as counsel in over two dozen merits cases at the Supreme Court and argued two cases there. From 2004 until 2011, she co-taught Supreme Court litigation at Stanford Law School; from 2005 until 2013, she co-taught a similar class at Harvard Law School. She has also served as an adjunct professor at American University's Washington College of Law and Vanderbilt Law School. Amy is a graduate of the University of North Carolina at Chapel Hill and holds a master's degree in Arab Studies and a law degree from Georgetown University.

Photo of Fred Lawrence

Fred Lawrence

Frederick M. Lawrence is the 10th Secretary and CEO of the Phi Beta Kappa Society, the nation's first and most prestigious honor society, founded in 1776. Lawrence is a Distinguished Lecturer at the Georgetown Law Center, and in 2022 was a Senior Visiting Fellow at Sciences Po Ecole de Droit. He has previously served as president of Brandeis University, Dean of the George Washington University Law School, and Visiting Professor and Senior Research Scholar at Yale Law School. He was elected to the American Philosophical Society in 2018 and the American Law Institute in 1999. Lawrence is the recipient of the 2019 Ernest L. Boyer Award from the New American Colleges and Universities, and the Council of Colleges of Arts and Sciences' Arts & Sciences Advocacy Award in 2018. In 2023 he received an honorary Doctor of Humane Letter degree from Skidmore College.

An accomplished scholar, teacher and attorney, Lawrence is one of the nation's leading experts on civil rights, free expression, bias crimes and higher education law. Lawrence has published widely and lectured internationally. He is the author of *Punishing Hate: Bias Crimes Under American Law* (Harvard University Press 1999), examining bias-motivated violence and how such violence is punished in the United States. He frequently contributes op-eds to various news sources and has appeared on CNN, MSNBC and Fox News among other networks.

Lawrence has testified before Congress concerning free expression on campus and on federal hate crime legislation, was the key-note speaker at the meeting of the Organization for Security and Cooperation in Europe (OSCE) on bias-motivated violence, was a Senior Research Fellow at University College London, and the recipient of a Ford Foundation grant to study bias-motivated violence in the United Kingdom. Lawrence serves on the Board of Directors of the American Association of Colleges and Universities, the Executive Committee of the Board of Directors of the National Humanities Alliance, and the Editorial Board of the Journal of College and University Law. He is a trustee of Beyond Conflict, and has been a Trustee of Williams College and WGBH.

At Phi Beta Kappa, Lawrence has focused on advocacy for the arts, humanities and sciences, championing free expression, free inquiry and academic freedom, and invigorating the Society's 292 chapters and nearly 50 alumni associations. As president of Brandeis, Lawrence strengthened ties between the university and its alumni and focused on sustaining the university's historical commitment to educational access through financial aid. His accomplishments during his presidency included restoring fiscal stability to the university and overseeing record setting increases in admissions applications,

undergraduate financial aid and the university's endowment. He revitalized the university's Rose Art Museum, recruited and hired a new museum director, and commissioned the Light of Reason sculpture, creating a dynamic outdoor space for the Brandeis community.

Prior to Brandeis, Lawrence was dean and Robert Kramer Research Professor of Law at George Washington University Law School from 2005 to 2010. During his time at GW Law, Lawrence recruited the strongest classes in the school's history, and his five years as dean were five of the six highest fund-raising years in the school's history. He was Professor of Law at Boston University School of Law from 1988 to 2005, during which time he served as Associate Dean for Academic Affairs and received the Metcalf Award for Excellence in Teaching, the university's highest teaching honor.

Lawrence's legal career was distinguished by service as an assistant U.S. attorney for the southern district of New York in the 1980s, where he became chief of the Civil Rights Unit. He received a bachelor's degree in 1977 from Williams College magna cum laude where he was elected to Phi Beta Kappa, and a law degree in 1980 from Yale Law School where he was an editor of the Yale Law Journal.

Photo of Dahlia Lithwick

Dahlia Lithwick

Dahlia Lithwick is a senior editor at Slate, and in that capacity, has been writing their "Supreme Court Dispatches" and "Jurisprudence" columns since 1999. Her work has appeared in the New York Times, Harper's, The New Yorker, The Washington Post, The New Republic, and Commentary, among other places. She is host of Amicus, Slate's award-winning biweekly podcast about the law and the Supreme Court.

In 2018, Lithwick received the American Constitution Society's Progressive Champion Award, and the Hillman Prize for Opinion and Analysis. Lithwick won a 2013 National Magazine Award for her columns on the Affordable Care Act. She has been twice awarded an Online Journalism Award for her legal commentary. She was inducted into the American Academy of Arts and Sciences in October 2018. In 2021, she was a recipient of the Women's Media Center's Exceptional Journalism Awards. In 2021 she won a Gracie Award for Amicus Presents: The Class of RBG, which featured the last in-person audio interview with Ruth Bader Ginsburg.

Lithwick has held visiting faculty positions at the University of Georgia Law School, the University of Virginia School of Law, and the Hebrew University Law School in Jerusalem. She was the first online journalist invited to be on the Reporters Committee for the Freedom of the Press. She has testified before Congress about access to justice in the era of the Roberts Court and how #MeToo impacts federal judicial law clerks. She has appeared on CNN, ABC, The Colbert Report, the Daily Show and is a frequent guest on The Rachel Maddow Show.

Ms. Lithwick earned her BA in English from Yale University and her JD degree from Stanford University. Her new book, *Lady Justice*, was an instant *New York Times* bestseller. She is co-author of *Me Versus Everybody* (Workman Press, 2006) (with Brandt Goldstein) and of *I Will Sing Life* (Little, Brown 1992) (with Larry Berger). Her work has been featured in numerous anthologies including *Jewish Jocks* (2012), *What My Mother Gave Me: Thirty-one Women on the Gifts That Mattered Most* (2013), *About What Was Lost* (2006); *A Good Quarrel* (2009); *Going Rouge: Sarah Palin, An American Nightmare* (2009); and *Thirty Ways of Looking at Hillary* (2008).

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Overview of Cases Discussed

Alexander v. South Carolina State Conference of the NAACP (SCOTUS Decided: May 23, 2024)

Facts/Issue – After the 2020 Census, South Carolina adopted a new congressional map that impacted thousands of Black voters by moving them to a different voting district, making it easier for the Republican-controlled legislature to secure an additional Republican district seat. At issue in this case is whether South Carolina's new redistricting map constitutes a prohibited racial gerrymander, even if the legislature's intent was a political gerrymander. A three-judge district court panel found that the legislature imposed a 17% racial target in South Carolina's First Congressional District, which was predominantly Black.

Judgment/Holding – The Supreme Court reversed the district court's finding that the First District in South Carolina was an unconstitutional gerrymander. The Court stated that race may not be used as a proxy for political characteristics, and that the district court applied the wrong standard of review for plaintiffs' intentional vote dilution claim. The challengers did not satisfy the demanding burden of showing that the "legislature subordinated traditional race-neutral districting policies... to racial considerations."

Loper Bright Enterprises v. Raimondo (SCOTUS Decided: TBD)

Facts – At issue in this case is the administrative law principle of "*Chevron* deference," which compels federal courts to defer to a federal agency's interpretation of an ambiguous or unclear statute. A group of commercial herring fishermen challenged a National Marine Fisheries Service rule regarding industry-funded monitoring requirements. The district court granted summary judgment for the government based on the agency's interpretation of its authority and its adoption of the rule through required notice and comment procedure. The U.S. Court of Appeals for the D.C. Circuit affirmed.

The question presented is whether the Court should overrule *Chevron v. Natural Resources Defense Council* or at least clarify whether statutory silence on controversial powers creates vagueness requiring deference to the agency.

Judgment/Holding – As of June 27, the case is awaiting a decision by the U.S. Supreme Court.

Relentless v. Department of Commerce (SCOTUS Decided: TBD)

Facts – At issue in this case is an explicit ask that the Court overrule *Chevron* deference or "at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statue does not constitute an ambiguity requiring deference to the agency." The case also involves a National Marine Fisheries Service (NMFS) requirement, this one directing fishing vessels to carry federal monitors on board and pay for specific monitors under the Magnuson-Stevens Fishery Conservation and Management Act (MSA). The district court granted summary judgment in favor of NMFS, ruling that the MSA's ambiguity on industry monitors allows for agency interpretation under Chevron deference. The U.S. Court of Appeals for the First Circuit affirmed.

Holding/Judgment – As of June 27, the case is awaiting decision by the Supreme Court.

Lindke v. Freed (SCOTUS Decided: March 15, 2024)

Facts/Issue – At issue in this case is to what extent a public official can block viewers from a social media page that contains public as well as private information. James Freed created a private Facebook profile originally intended for use with his friends and family. The account eventually reached Facebook's 5,000-friend limit, so Freed converted the profile to a "page," which can have an unlimited number of followers. In 2014, when Freed was appointed city manager for Port Huron, Michigan, he updated his Facebook page and designated it in the "public figure" category. He used the page to share both personal and professional information. Kevin Lindke viewed Freed's Facebook page and posted criticism on the page of how Freed was handling the COVID-19 pandemic. Freed deleted the post and blocked Lindke. Lindke sued Freed under 42 U.S.C. Sec. 1983 for violating his First Amendment rights to speak on a matter of public concern. The federal district court and the U.S. Court of Appeals for the 6th Circuit ruled in favor of Freed, determining that he managed his page in his private capacity.

Holding/Judgment – In a 9-0 opinion by Justice Barrett, the Court vacated and remanded the case for further consideration, saying: "The state-action doctrine requires Lindke to show that Freed (1) had actual authority to speak on behalf of the state on a particular matter, and (2) purported to exercise that authority in the relevant posts."

Moody v. NetChoice/ NetChoice v. Paxton (SCOTUS Decided: TBD)

Facts/Issue – At issue in this case is Florida Bill S.B. 7072-Social Media Platforms, which states that a social media platform may not willfully deplatform a candidate for office and cannot use post-prioritization or shadow-banning algorithms for content posted by or about the candidate. The bill also states that social media platforms cannot censor, deplatform, or shadow-ban a "journalistic enterprise" based on the content of its publication. NetChoice and the Computer & Communications Industry Association, trade associations representing internet and social media companies like Meta, X, Google, and TikTok, sued the Florida officials that enforced S.B. 7072 under 42 U.S.C. Sec. 1983. The suit argued that the law's provisions violate the social media companies' right to free speech under the First Amendment and that the law is preempted by Sec. 230 of the federal Communications Decency Act.

The district court granted NetChoice's motion for a preliminary injunction, concluding that the provisions of the Act that make platforms liable for removing or deprioritizing content are likely preempted by federal law. The court also ruled that the Act's provisions infringe on platforms' First Amendment rights by restricting their "editorial judgment." The State appealed, and the U.S. Court of Appeals for the 11th Circuit affirmed these conclusions.

Holding/Judgment – As of June 27, the Supreme Court decision is still pending.

ADL Amicus Brief – ADL filed an amicus brief to the Supreme Court of the United States in the linked cases *Moody v. NetChoice* and *NetChoice v. Paxton*. This amicus brief, filed in support of neither party, emphasizes the importance of upholding social media companies' right to moderate hate and harassment on their platforms and underscores the potential harm to online safety and historically marginalized communities if an alternative holding is adopted. The brief also highlights the active role that social media companies must play in combating hate, harassment, and extremism on their platforms and explores possible avenues by which governmental figures can combat various forms of online hate that escalate into offline violence. Lastly, the brief reminds the Court that Florida's S.B. 7072 is inconsistent with Section 230 of the Communications Decency Act and reiterates the need for updated legislation that addresses the current landscape of the internet and online harm.

Murthy v. Missouri (SCOTUS Decided: June 26, 2024)

Facts/Issue – At issue in this case is what the line is between the government's communication of concern and suppression of expression in violation of the First Amendment. Plaintiffs, the states of Missouri and Louisiana joined by a group of epidemiologists, consumer and human rights advocates, academic scholars, and media operators, have claimed that various defendants have participated in censorship targeting conservative-leaning speech regarding topics such as the 2020 presidential election, COVID-19 origins, mask and vaccine mandates, and alleged election-rigging linked to former President Donald Trump. The plaintiffs contend that the defendants used public statements and threats of regulatory action, such as amending Section 230 of the Communications Decency Act, to pressure social media platforms to suppress content, thereby violating the plaintiffs' First Amendment rights. Missouri and Louisiana also allege harm due to the infringement of the free speech rights of their citizens.

Holding/Judgment – On June 26, 2024, the Supreme Court reversed and remanded the decision, stating that "Neither the individual nor the state plaintiffs have established Article III standing to seek an injunction against any defendant."

Food and Drug Administration v. Alliance for Hippocratic Medicine (SCOTUS Decided: June 13, 2024)

Facts – The two medications commonly used for medical abortion in the U.S. are mifepristone and misoprostol. Mifepristone was approved by the FDA in September 2000. The use of mifepristone was restricted under the Risk Evaluation and Mitigation Strategies (REMS), enacted in 2007. In 2016, the FDA expanded access, allowing medical practitioners to prescribe it and extending its use. In

April 2021, the FDA permitted mail distribution of the drug in response to COVID-19. In January 2023, approved pharmacies began distributing it.

After the Supreme Court's reversal of *Dobbs v. Jackson Women's Health Organization* in June 2022, which overturned the constitutional right to abortion, several states and groups, including Alliance for Hippocratic Medicine, sought to restrict mifepristone's sale to make abortion even more difficult. At issue in this case is whether these parties have Article III standing to challenge the FDA's 2016 and 2021 actions with respect to mifepristone's approved use; whether the FDA's actions were arbitrary and capricious; and whether the district court properly granted preliminary relief.

In April 2023, a federal district court judge sided with the plaintiffs, suspending the FDA's approval. After a hearing on the merits, in August 2023, the Fifth Circuit upheld the ban on changes made in 2016.

Judgment/Holding – The Supreme Court ruled unanimously that plaintiffs lacked Article III standing to challenge FDA's actions regarding the regulation of mifepristone because they could not show they had been directly harmed.

Moyle v. U.S. (SCOTUS Decided: June 27, 2024)

Facts – At issue in this case is whether federal law overrides a state law that criminalizes most abortions in that state. In August 2022, after the constitutional right to abortion was overruled by *Dobbs*, the Biden administration brought a legal challenge against a restrictive Idaho state law, which criminalized abortion except for a few narrow exceptions, was preempted by a federal law, the Emergency Medical Treatment and Labor Act. EMTALA makes it mandatory for hospitals receiving Medicare funding to offer "necessary stabilizing treatment" to anyone suffering an emergency medical condition, including pregnant people.

The district court ruled in favor of the Biden administration and prohibited Idaho from enforcing its law to the extent that it conflicted with EMTALA. The U.S. Court of Appeals for the 9th Circuit declined to stay the district court's ruling while the state appealed.

Holding /Judgment – On June 27, 2024, the Supreme Court dismissed the writ of certiorari as "improvidently granted." This means that for now, doctors in Idaho will continue to be able to provide abortions in response to medical emergencies.

Presidential Elections and Immunity

Trump v. Anderson (SCOTUS Decided: March 4, 2024)

Facts/Issue – At issue in this case is whether Donald Trump should be barred from appearing on Colorado's 2024 primary ballot. On January 6, 2021, the day that the U.S. Congress was scheduled to confirm Joseph Biden's election as the 46th President of the U.S., opponent Donald J. Trump held a rally at the Ellipse in Washington D.C., which led to a large group of protesters forcibly entering the Capitol. On September 6, 2023, a group of Colorado voters filed a petition against the Colorado Secretary of State, Jena Griswold, in State Court in Denver. The petitioners stated that Colorado's Election Code prohibits Colorado election officials from "committing... a breach or neglect of duty or other wrongful act." Therefore, Griswold should not include Trump on the 2024 election ballot in Colorado, as he was disqualified from public office under Sec. 3 of the 14th Amendment. That amendment states that former government officials who engaged in an insurrection are barred from holding office.

The lower court denied the petition. On appeal, the Colorado Supreme Court reversed in part, stating that Sec. 3 disqualified Trump from holding the office of President of the U.S., therefore making it unlawful under Colorado law to have him on the ballot.

Holding/Judgment – The Supreme Court reversed the Colorado Supreme Court in a per curiam decision, ruling that states cannot determine eligibility for federal office based on Sec. 3 of the 14th Amendment.

Trump v. U.S. (SCOTUS Decided: TBD)

Facts/Issue – At issue in this case is whether a former president has presidential immunity from criminal prosecution for conduct alleged to involve official acts during his time in office and, if so, to what extent. In August 2023, former President Donald Trump was indicted on four counts arising from Special Counsel Jack Smith's investigation of the January 6, 2021 attack on the Capitol. Trump contended that he cannot be prosecuted for his official acts as president and that a former president cannot be prosecuted unless he has first been impeached by the House and convicted by the Senate. The original date of Trump's trial was set for March 4, 2024 by U.S. District Court Judge Tanya Chutkan, but the trial was postponed pending resolution of Trump's immunity claims. On February 6. 2024, the D.C. Circuit upheld the judge's decision, and Trump requested a stay of the D.C. Circuit's ruling.

Holding/Judgment – As of June 27, the case is awaiting Supreme Court judgment.

FIGHTING HATE FOR GOOD

In the Courts:

ADL'S AMICUS DOCKET 2022-24

June 2024

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Contrary to ADL


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Settled


Removed from court calendar

THE U.S. SUPREME COURT

Pending Before the U.S. Supreme Court

Civil Liberties

Moody v. NetChoice, LLC. and NetChoice, LLC. v. Paxton
(U.S. Supreme Court, 2023)

The Anti-Defamation League (ADL) has recently filed an amicus brief to the Supreme Court of the United States in Moody v. NetChoice, LLC. and NetChoice, LLC. v. Paxton. These cases concern two state statutes enacted in 2021 to regulate large social media platforms like Facebook, Instagram, and X (formerly Twitter). Florida's S.B. 7072 and Texas' H.B. 20 each include provisions restricting social media companies' ability to moderate harmful content on their platforms and infringing on the constitutional right of private actors to exercise editorial discretion in choosing the content they host. This amicus brief, filed in support of neither party, emphasizes the importance of upholding social media companies' right to moderate hate and harassment on their platforms and underscores the potential harm to online safety and historically marginalized communities if an alternative holding is adopted. However, it also acknowledges the active role that social media companies must play in combating hate, harassment, and extremism on their platforms and explores permissible avenues by which governmental actors can combat the forms of online hate that escalate into offline violence. Finally, this brief reminds the Court that Florida's S.B. 7072 and Texas' H.B. 20 are inconsistent with Section 230 of the Communications Decency Act, while acknowledging the need for updates to this legislation to align with the current landscape of the internet and online harms.

Decided by the U.S. Supreme Court

Civil Liberties

Bartlett v. Baasiri
(cert. denied, U.S. Supreme Court, 2023)

In this case, ADL joined with Agudath Israel of America, the Orthodox Union, and One Israel Fund urging the U.S. Supreme Court to review and overturn a decision by the U.S. Court of Appeals for the Second Circuit involving a lawsuit filed by families of dozens of U.S. servicemembers who were killed or injured by Hezbollah attacks. The lawsuit, relying on the Justice Against Sponsors of Terrorism Act (JASTA), seeks compensation from the Jammal Trust Bank (JTB), which provided financing to Hezbollah. JTB claimed in its defense that when Banque du Liban, Lebanon's central bank, liquidated JTB and acquired its assets—after the litigation commenced— JTB was then shielded by another statute, the Foreign Sovereign Immunities Act. Although the district court

rejected JTB's sovereign immunity defense, the Second Circuit reversed and held that JTB had become immune. As the brief drafted for us by the law firm Haynes and Boone, LLP, points out, the Second Circuit's decision shielding JTB from liability imperils the "framework of anti-terrorism legislation aimed at deterring terror financing and compensating terror victims," a framework "that has been critical to the fight against international terrorism."

Immigration

Asylum

Arizona v. Mayorkas
(U.S. Supreme Court, 2023)

Title 42 is a public health law that was invoked by the Trump Administration at the onset of the COVID-19 pandemic as a pretext to turn away asylum seekers, contrary to the expertise of public health professionals and U.S. obligations under national and international law. President Biden continued and expanded its use, long after other pandemic measures ended. In *Huisha-Huisha v. Mayorkas*, the D.C. Circuit Court of Appeals ruled that the Administration must end its use of Title 42 to expel migrants. Arizona and 18 other Republican-led states then asked the Supreme Court for permission to belatedly intervene on appeal. ADL joined 59 other civil rights organizations in an *amicus* brief led by Human Rights First and Justice Action Center opposing the states' request to intervene. The brief focuses on the harms of continuing Title 42, including the violence that migrants and asylum seekers face in Mexico, the disproportionate harm to Black and Indigenous asylum seekers, and the ways in which LGBTQ+ people, women, girls, and people with disabilities face compounded dangers due to this policy.

Note: On Feb. 16, 2023, after the amicus brief was filed, the Court removed the case from its argument calendar.

Social Media Liability

Twitter v. Taamneh
(U.S. Supreme Court, 2023)

In this case, relatives of a victim of a 2017 ISIS terror attack allege that Twitter and other social media platforms aided and abetted an act of international terrorism and are secondarily liable under the Anti-Terrorism Act (ATA) because the platforms allowed ISIS to use their platforms to recruit members, issue terrorist threats, spread propaganda, fundraise, and intimidate civilian populations. ADL's brief highlights how terrorists and terrorist organizations use social media to advance their agendas and commit acts of terror and cites our expertise on countering hate and extremism, as well as our research on the role platform algorithms and recommendation engines play in exacerbating extremism, leading to offline harm and even mass violence. We ask the Court

to affirm the Ninth's Circuit's interpretation of aiding-and-abetting liability and reject an overly narrow interpretation of the ATA that would prevent victims of terror from seeking any redress from social media companies that aid and abet terrorism unless they can demonstrate that a foreign terrorist organization (FTO) used particular support and resources to commit a specific terrorist attack. The extremely narrow interpretation proposed by social media platforms would render the ATA dead letter because it is rarely possible to meet this exceedingly high standard. We take no position as to the legal sufficiency of the allegations against Twitter, or the ultimate merit of the claims. Still, liability under the ATA for aiding-and-abetting terrorism should not be so narrowly construed as to eliminate any possibility of holding social media platforms, or other global businesses, accountable if they are found to have knowingly provided substantial assistance to FTOs.

Civil Liberties

Free Exercise

Groff v. DeJoy
(U.S. Supreme Court, 2023)

In *Trans World Airlines, Inc. v. Hardison* (1977), the Supreme Court held that an employer is required to allow a religious accommodation for an employee under Title VII of the Civil Rights Act of 1964 unless doing so would constitute an "undue hardship" for the business. However, the Court defined an "undue hardship" as anything that imposes "more than a de minimis cost" for the employer — a very low standard that has made it difficult over the years for people of faith to obtain religious accommodations in the workplace. In this case, the Supreme Court is asked to revisit that standard. ADL joined 5 other faith-based organizations in an amicus brief arguing that the standard needs to be changed. The brief provides a workable alternative to the de minimis standard by suggesting that "undue hardship" be defined in the same way as it is in the Americans with Disabilities Act. It also highlights that the burden of religious discrimination falls disproportionately on religious minorities and people who are economically vulnerable. Finally, the brief argues that the Court should declare that — extreme situations aside — an employer cannot establish "an undue hardship" merely because it would affect an employee's coworkers.

Discrimination

First Amendment

303 Creative LLC v. Aubrey Elenis
(U.S. Supreme Court, 2022)

At issue in this case is a business that seeks a religious exemption from a state anti-discrimination law for the purpose of denying wedding-related services to LGBTQ+ couples. It, however, does not currently sell such services and there is no allegation that the business violated the law. ADL joined 7 other civil rights organizations in an amicus brief led by the Lawyers' Committee for Civil Rights Under Law arguing that upholding public accommodation laws is essential

to ensuring that people of color can access publicly available goods and services. The argument focuses on the ongoing importance of having strong public accommodation laws in light of continuing discrimination, the state's compelling interest in preventing discrimination, and the case law supporting public accommodation laws against First Amendment challenges. The brief underscores that historically marginalized groups, including people of color, LGBTQ+ individuals, and other groups continue to experience discrimination and need the protection provided by strong public accommodation laws.

Civil Liberties

Voting Rights

Moore v. Harper
(U.S. Supreme Court 2022)

This case, directly relevant to ADL's Democracy Initiatives, involves a claim by the North Carolina General Assembly that under the oft-discredited "independent state legislature theory" it has the sole power to set the state's congressional map, and this power cannot be challenged under the state's constitution in state courts. ADL's brief, joined by The Sikh Coalition, The Union for Reform Judaism, Central Conference of American Rabbis, Women of Reform Judaism, and Men of Reform Judaism, rebuts this narrow interpretation of the U.S. Constitution and asserts that "providing unchecked power over fundamental rights to a state legislature risks serious harm to all vulnerable marginalized and minority populations that have — throughout history — relied on the balance of powers to protect them from the potential tyranny of the majority."

Affirmative Action

Students for Fair Admissions, Inc., Petitioner, v. President and Fellows of Harvard College, Respondent
(U.S. Supreme Court, 2022)

This case involves a legal challenge to Harvard College's race-conscious admissions policy, pursuant to which race is considered as one factor among many as part of a holistic evaluation of each individual applicant. Consistent with ADL's prior positions on affirmative action, we filed a brief in support of Harvard in the Supreme Court following up on our brief filed previously with the First Circuit Court of Appeals. Both briefs support the trial court's ruling that Harvard's policies do not impose quotas, assign people to categories based on their race, or use race as a determinative factor in making admissions decisions. ADL's brief to the Supreme Court makes three points — first, that diversity in higher education is a compelling government interest; second, that race must never be used as a determinative factor; and third, that Harvard's current admissions practices (which are intended to promote rather than inhibit diversity) are clearly distinguishable from Harvard's admissions practices in the 1920s and 1930s, which were motivated by antisemitism, were explicitly designed to decrease Jewish enrollment, and imposed a quota on Jews.

Civil Liberties

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Gonzalez v. Google
(U.S. Supreme Court, 2022)

This is the first time the Supreme Court is hearing a case regarding the scope of Section 230 of the Communications Decency Act, the key law that has been interpreted to provide near-total protection from liability to internet platforms for harm caused by user-generated content. The case, brought by the family of an American murdered by ISIS, alleges that YouTube knowingly hosted and recommended terrorist content, thus aiding and abetting terrorism. The lower court would not even let the case go forward, ruling that Section 230 preemptively immunized Google, which owns YouTube. ADL's brief, which supported neither party, cites our expertise on countering hate and extremism, as well as our research on the role platform algorithms and recommendation engines play in exacerbating extremism, leading to offline harm and even mass violence. We ask the Court to make clear that the overbroad misinterpretation of Section 230 by lower courts is wrong as a matter of law. More specifically, the brief urges the Court to look at what Congress had in mind when it passed the law more than 25 years ago, before the advent of social media and their use of algorithms designed to maximize advertising revenue by keeping users online as long as possible, increasingly feeding them incendiary content and connecting them to extremist communities. The brief also asserts that the Court should not get rid of Section 230 entirely because a portion of it is what makes it possible for platforms to engage in responsible content moderation and remove those who spread hate and extremism online.

Immigration

Asylum

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Biden v. Texas
(U.S. Supreme Court, 2022)

Under the Trump Administration's "Remain in Mexico" policy, also known as the Migrant Protection Protocols (MPP), most asylum seekers arriving at the U.S./Mexico border were forced to return to Mexico to await their U.S. asylum hearing. The Biden Administration attempted to terminate the program. Texas and Missouri sued to stop termination of the program. The district court entered a nationwide permanent injunction requiring the Department of Homeland Security to reinstate and maintain MPP; the 5th Circuit affirmed. ADL joined 60 other civil rights, immigration advocacy, and service provider organizations in an *amicus* brief to the Supreme Court led by RAICES and Justice Action Center highlighting the inhumane impacts of this policy. The brief argues that the Fifth Circuit misconstrued the claim being brought in order to reach its own desired conclusion, that it ignored precedent regarding procedural law, and that it invented its own procedural standard. The brief further argues that MPP harms children and separates families, enables human trafficking, heightens risks to the

most vulnerable migrants, endangers Black migrants, disadvantages Indigenous language speakers, and impedes fair hearings. Throughout, the brief highlights the stories of people who have been affected by MPP and the effects that this policy has had on people at the border.

Discrimination

Free Exercise Clause

Kennedy v. Bremerton School District
(U.S. Supreme Court, 2022)

This case involves a public high school football coach who filed a lawsuit claiming religious discrimination under the Free Exercise Clause and employment discrimination laws after he was fired for refusing to stop kneeling in prayer at the football field's 50-yard line immediately following every game. This practice started after the school district directed him to stop leading his team in pre- and post-game prayer, which the coach had done for eight years prior. The lower courts repeatedly ruled in favor of the school district. ADL joined 33 religious' organizations, religious denominations, and local clergy in an amicus brief in support of the school district. The brief argues that allowing the football coach to lead the team in prayers at football games undermines the freedom of conscience of student athletes — who may wish to refrain from joining the prayer but who may feel overwhelming pressure to please their coach. It also argues that those student athletes who are able to resist the coach's pressure are at increased risk of harassment and bullying, from both students and teachers. Moreover, religious minorities are likely to bear the brunt of that bullying, which causes short-term and long-term harms.

Civil Liberties

NetChoice v. Paxton
(U.S. Supreme Court, 2022)

This case involves a challenge to a Texas law that that seeks to stop social media censorship and would effectively eviscerate the ability of major platforms to engage in meaningful content moderation. ADL joined a coalition amicus brief urging the Supreme Court to prevent the law from going into effect, arguing that the law "decimates platforms' efforts to effectively and usefully curate content" and "forces disgraceful and wasteful speech onto platform users." For example, platforms "could not moderate pro-Nazi speech — that is unless they also moderated all content pertaining to political ideologies. They could not moderate speech denying the Holocaust — at least not without banning all content remembering or educating about the Holocaust. They could not remove speech glorifying terrorist attacks against the United States — unless they also remove speech decrying, memorializing, or educating about terrorist attacks against the United States." As the brief observes, by broadly rejecting "censorship," this law

would render platforms “powerless to stop their private spaces from being used as breeding grounds for radicalization and recruiting of those who will engage in the most terrifying and destructive of acts.”

Civil Liability for Sponsors of Terrorism

Weiss v. National Westminster Bank PLC
(cert. denied, U.S. Supreme Court, 2022)

In this case brought by families of dozens of American victims of Hamas terrorist attacks, the U.S. Court of Appeals granted summary judgment in favor of a British-based bank that provides banking services to a company, Interpal, that has been designated as a “Specially Designated Global Terrorist” (SDGT) by the U.S. Treasury Department. The issue is whether a bank that is “generally aware” of Interpal’s connection to Hamas can be held liable under U.S. anti-terrorism laws for aiding and abetting terrorist activity. The coalition brief ADL joined asks the Supreme Court to grant certiorari and allow the families to amend their complaint so that a jury can consider the bank’s potential liability.

THE FEDERAL AND STATE COURTS

Decided by the Federal and State Courts

Civil Liberties

Discrimination

B.P.J. v. West Virginia
(U.S.C.A. 4th Circuit, 2023)

B.P.J. is a transgender girl in middle school who challenged her exclusion from participating in school sports by West Virginia's anti-transgender sports ban. A district court found that Title IX does not protect a transgender student's right to participate in school sports consistent with the student's gender identity. In a brief led by the National Women's Law Center, ADL joined 51 organizations committed to gender justice to support B.P.J.'s appeal of this district court decision. The brief specifically highlights the ways that Title IX protects all girls, women, and LGBTQIA+ athletes from sex discrimination that's tied to overbroad and harmful stereotypes. It points out that targeting transgender women and girls for discrimination threatens opportunities for all women and girls, and is dangerous and creates harm for transgender, gender non-conforming, and intersex women and girls. The brief also addresses how policing who is and isn't a girl or a woman is especially harmful for Black and brown women and girls.

Note: Subsequent to the filing of this brief, the U.S. Supreme Court denied West Virginia's request to stay the preliminary injunction in this case. Consequently, B.P.J. was able to continue to run with her team while the merits case proceeded.

Discrimination

Free Exercise

Chelsey Nelson Photography, LLC v. Louisville/Jefferson County Metro Government
(U.S.C.A., 6th Circuit, 2023)

At issue in this case is a wedding photographer who seeks a religious exemption to Louisville's anti-discrimination ordinance for the purpose of denying wedding-related services to same-sex couples. ADL joined 14 other faith-based organizations in a brief led by Americans United for Separation of Church and State. The brief argues that the Free Exercise Clause of the First Amendment does not require granting the photographer a religious exemption to this neutral, generally applicable anti-discrimination ordinance. Furthermore, it argues that exempting businesses from anti-discrimination laws to enable them to deny service to LGBTQ+ people based on the businesses' religious views actually "would undermine, not advance, religious freedom." The brief illustrates how anti-discrimination laws protect religious freedom and that granting a religious exemption here would undermine religious freedom. It argues that rewriting

free-exercise law to require an exemption here would create a sharp, slippery slope toward limitless forms of discrimination – including discrimination based on religion.

Civil Liberties

Discrimination

A.M. v. Indiana
(U.S.C.A. 7th Circuit, 2022)

This case involves a challenge to Indiana's 2022 sports ban targeting transgender girls and young women. The ACLU brought the case on behalf of A.M., a 10-year-old transgender girl who was forced to leave her elementary school softball team as a result of the ban. A.M. won a preliminary injunction finding that the ban likely violates Title IX, and Indiana appealed. ADL joined 58 other organizations in an amicus brief led by the National Women's Law Center in support of A.M. The brief highlights how sports bans like Indiana's are based on debunked sex stereotypes and undermine opportunities for all girls and women seeking to play team sports at school. These laws harm transgender and cisgender girls and women by reinforcing sexist, racist stereotypes about femininity, with women and girls of color disproportionately targeted and harmed. Such bans actually force schools to violate Title IX and the Equal Protection clause by imposing sex discrimination on school teams.

Civil Liberties

Members of the Medical Licensing Board of Indiana v. Anonymous Plaintiff
(Indiana Court of Appeals, 2023)

In August 2022, Indiana passed a law banning abortion in the state under almost all circumstances. ADL joined a large interfaith coalition in this amicus brief, drafted by Americans United for the Separation of State, opposing the abortion ban, asserting that it "runs roughshod" over religious pluralism protected by the Indiana Constitution. The brief contends that Indiana's new law, reflecting the intent of those legislators supporting it, "imposes one religion-based view of abortion on all Hoosiers" and that in so doing, it runs afoul of the Indiana Religious Freedom Restoration Act. It refers to how different religions, including those represented on the brief, have different answers to when life begins, which is "quintessentially a concern of religion, and one that each person must resolve in accordance with individual conscience." The brief also tells the court that "keeping the most bitterly divisive religious disputes outside the reach of politics as much as possible is not only critical to religious freedom and social stability but also is a singularly appropriate application of judicial power."

Discrimination

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Ateres Bais Yaakov Academy of Rockland v. Town of Clarkstown
(U.S.C.A. 2nd Circuit, 2022)

This case alleges a pattern of discriminatory conduct by the Town of Clarkstown, in coordination with a group called Citizens United to Protect Our Neighborhood ("CUPON"), to block the purchase of property by an Orthodox Jewish school – Ateres Bais Yaakov Academy ("ABY") — by any means necessary. ADL's proposed brief, prepared by the law firm Stroock & Stroock & Lavan LLP in support of ABY, sets forth a history of the Religious Land Use and Institutionalized Persons Act ("RLUIPA") and its intended purpose, summarizes the troubling pattern of anti-Orthodox exclusionary policy practices in New York and New Jersey localities, which have required intervention by the Department of Justice and State Attorneys General, and examines how the disturbing allegations in Clarkstown mirror the land-use actions taken by other municipalities in this region that were the subject of those enforcement actions.

Civil Liberties

Discrimination

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Billard v. Charlotte Catholic High School
(U.S.C.A. 4th Circuit, 2022)

Lonnie Billard, a former drama teacher and substitute teacher at Charlotte Catholic High School, was fired after posting on Facebook that he was planning to marry a man. ADL joined 47 organizations committed to gender justice and LGBTQ+ rights in an amicus brief supporting Mr. Billard. The brief, filed before the Fourth Circuit, was led by the National Women's Law Center. It points out that Title VII provides necessary workplace civil rights protections for nearly one million employees of religious employers, including against sex discrimination. It argues that improperly expanding the limited exceptions that Congress created in Title VII would undermine the crucial protections that Congress sought to safeguard, leaving many workers vulnerable to wholesale employment discrimination based on sex — including sexual orientation or gender identity — or any other basis. The brief further explains the harms that would result if the school's arguments were accepted, including any aspect of an employee's life being reinterpreted as violating an employer's religious views.

Discrimination

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Fellowship of Christian Athletes v. San Jose Unified School District Board of Education
(9th Circuit, 2022)

At issue, in this case, is whether a school district may deny a student club official recognition if the club conditioned students' full participation on signing a "Statement of Faith and Purity" that discriminated against LGBTQ+ students in violation of the district's nondiscrimination policy. ADL joined a coalition of 22 organizations in an amicus brief in support of the school district and its nondiscrimination policy that prohibits officially recognized student organizations from excluding students based on protected characteristics, such as race, gender identity, or sexual orientation.

Discrimination

Equal Protection

Carolina Youth Action Project v. Wilson
(U.S.C.A. 4th Circuit, 2022)

South Carolina's "disturbing schools" and "disorderly conduct" laws are vague, punitive, and intensely subjective laws that have been vehicles for channeling students — disproportionately BIPOC students and students with disabilities — into the criminal legal system. Plaintiffs are public-school students in South Carolina challenging these laws. ADL joined 23 other civil rights and public interest organizations in an amicus brief led by the National Women's Law Center, the NAACP, the National Disability Rights Network, and the National Center for Youth Law, to the U.S. Court of Appeals for the Fourth Circuit supporting the students and highlighting the discriminatory impact of vague school discipline laws and school policing, particularly on Black students including Black girls, who make up the core of the plaintiffs. The brief also discusses the ways in which these harms caused by interactions with law enforcement are exacerbated for other students of color, students with disabilities, LGBTQ+ students, and students at the intersection of these identities.

Equal Protection

Sixth Amendment Right

Commonwealth of Massachusetts v. Jacobson
(Massachusetts Superior Court, 2022)

This case seeks to cure a decades-old injustice arising from a criminal trial in the early 1980s that was tainted by antisemitism. In ADL's letter amicus brief supporting defendant Barry Jacobson's motion for post-conviction relief, ADL explained how one of the most prominent and persistent stereotypes about Jews is that they "are greedy and avaricious, hoping to make themselves rich by any means possible." ADL argued that the prosecution's suggestion at trial that these traits where inherent in Mr. Jacobson was not only improper, but fed directly into the preexisting antisemitic prejudices held by at least one of the jurors, whose comments ("All those rich, New York Jews come up here and think they can do anything and get away with it") revealed that she believed Mr. Jacobson had these characteristics because he was Jewish, and was guilty for this reason alone. ADL's letter *amicus* highlighted the ways in which this was quintessential juror bias — and directly contrary to a "basic premise of our criminal justice system" that the "law punishes people for what they do, not who they are."

Authored by Today’s Speakers

Social media content moderation laws come before Supreme Court

Sb scotusblog.com/2024/02/social-media-content-moderation-laws-come-before-supreme-court/

February 23, 2024

CASE PREVIEW

By Amy Howe
on Feb 23, 2024 at 4:14 pm

The justices ruled 6-3 in *Garland v. Cargill* on Friday. (Trekandshoot via Shutterstock)

Once again, the relationship between the government and social media will headline arguments at the Supreme Court on Monday. *NetChoice v. Paxton* and *Moody v. NetChoice* are just the second of three social media disputes the court will hear this

term. The justices on Monday will consider the constitutionality of controversial laws in Texas and Florida that would regulate how large social media companies like Facebook and X (formerly known as Twitter) control content posted on their sites.

Defending the laws, Texas and Florida characterize them as simply efforts to "address discrimination by social-media platforms." But the tech groups challenging the laws counter that the laws are "an extraordinary assertion of governmental power over expression that violates the First Amendment in multiple ways."

The legislatures in Texas and Florida passed the laws in 2021 in response to a belief that social media companies were censoring their users, especially those with conservative views. As they are drafted, the laws do not apply to conservative social media platforms like Parler, Gab, and Truth Social.

The Florida law originally created an exception for theme parks and entertainment so that the law did not apply to Disney and Universal Studios, which operate in the state. But the state's legislature stripped that protection in 2022 after Disney officials criticized the state's "Don't Say Gay" law.

Although the two states' laws are not identical, there are themes that are common to both. Both contain, for example, provisions that limit the choices that social media platforms can make about which user-generated content to present to the public and how. For example, the Florida law bars social media platforms from banning candidates for political office, as well as from limiting the exposure of those candidates' posts. Both laws also contain provisions requiring social media platforms to provide individualized explanations to users about the platforms' editorial decisions.

Two trade groups representing social media platforms – including Google, which owns YouTube, X (formerly known as Twitter), and Meta, which owns Facebook – went to federal court to challenge the laws.

A federal district judge in Tallahassee, Florida, barred the state from enforcing most of the law. The U.S. Court of Appeals for the 11th Circuit left that ruling in effect, agreeing that the main provisions of the Florida law likely violate the First Amendment. The state then came to the Supreme Court in 2022, asking the justices to weigh in.

A federal judge in Austin, Texas put that state's law on hold before it could go into effect, but the U.S. Court of Appeals for the 5th Circuit disagreed. That prompted the tech groups to come to the Supreme Court, which in May 2022 temporarily blocked the law while the tech groups' appeal continued.

After the 5th Circuit ultimately upheld the law, the tech groups returned to the Supreme Court, which agreed last fall to review both states' laws.

Defending the laws, the states describe social media platforms as the new "digital public square," with enormous control over news that members of the public see and communicate. States, they say, have historically had the power to protect their residents' access to that information. And what social media platforms are ultimately seeking, the states contend, is to avoid any regulation whatsoever – an argument, Florida says, that "if accepted, threatens to neuter the authority of the people's representatives to prevent the platforms from abusing their power over the channels of discourse."

The states maintain that their laws do not implicate the First Amendment at all, because they simply require social media platforms to *host* speech, which is not itself speech but instead conduct that states can regulate to protect the public. The business model for these platforms, the states say, hinges on having billions of other people post their speech on the platforms – something very different from, say, a newspaper that creates its own content and publishes it.

To support this argument that they are merely regulating the platforms' conduct, the states point to Supreme Court cases holding, for example, that shopping malls must allow high school students to solicit signatures for a political petition, and that a federal law requiring law schools to choose between providing military recruiters with access to their campuses and forfeiting federal funding does not violate the First Amendment.

The states also assert that the First Amendment does not apply to the laws because the states are just treating the platforms like "common carriers," such as telephone and telegraph companies. The state laws simply impose a basic requirement that the platforms, as common carriers, not discriminate in providing their services, "which is how common-carrier regulation has functioned for centuries."

But even if the laws do regulate speech, the states continue, they are subject to a less exacting standard of review because they do not target specific content on any platform, and they merely ensure that speakers continue to have access to the "modern public square."

Finally, the states insist that provisions requiring the social media platforms to provide individual explanations about their content-moderation decisions are consistent with the Supreme Court's 1985 decision holding that states can require companies to disclose "purely factual and uncontroversial information" about their services. Indeed, Texas suggests, the SMPs can use an automated process to fulfill their obligations under these provisions.

The tech groups push back against the states' suggestion that the Texas and Florida laws do not implicate the First Amendment at all. The First Amendment, the groups write, protects the right of private social-media platforms, rather than the government, to

decide what messages they will or will not disseminate. "Just as Florida may not tell the NYT what opinion pieces to publish or Fox News what interviews to air, it may not tell Facebook or YouTube what content to disseminate," they emphasize.

The tech groups explain that there is a "cacophony of voices on the Internet engaged in everything from incitement and obscenity to political discourse and friendly banter." As a result, they say, social media platforms must make billions of editorial decisions per day. These decisions take on two forms, they observe. First, there are judgments about what content they will remove. Facebook, for example, restricts hate speech, bullying, and harassment, while YouTube bars pornography and violent content. Second, they continue, there are judgments about how the remaining content appears on their sites for individual users.

The Texas and Florida laws interfere with platforms' speech, the tech groups say, because they interfere with the platforms' right to exercise their editorial discretion. In particular, the groups emphasize, the laws require large social media platforms to disseminate virtually all speech by the state's preferred speakers, no matter how blatantly or repeatedly the speaker violates the website's terms of use."

And while the states rely on the line of cases indicating that there is no First Amendment right not to host someone else's speech, the tech groups point to a different line of cases, in which the Supreme Court has recognized that the First Amendment protects a right to editorial judgment – so that, for example, a state cannot require a newspaper to give a political candidate a right to respond to criticism, nor can it mandate that the private organizers of a parade allow a group to participate when the organizers do not approve of the group's message.

Because "countermanding the editorial judgments of 'Big Tech' about what speech to allow on their websites" is the "raison d'être" of the state laws, the tech groups conclude, the laws are therefore subject to the most stringent form of review, known as strict scrutiny. And the laws fail this test, the groups contend, because even if states had an interest in having their residents have access to a wide range of views on social media, that still wouldn't justify requiring private social media platforms to publish content with which they disagree.

The states also cannot justify regulating social media platforms on the theory that they are common carriers, the tech groups continue. There is no tradition of treating a private party, like a social media platform, that publishes speech as a common carrier, they say. But even if there were, the laws at issue in these cases are not traditional common-carrier regulations, because (among other things) they only regulate some social media platforms.

Finally, the tech groups tell the justices that the provisions requiring social media platforms to provide individualized explanations and disclosures when they exercise their editorial discretion are also unconstitutional because (among other things) they require the platforms to speak and, by imposing "massive burdens," make it less likely that the platforms will exercise that discretion. They are, the tech groups suggested, "akin to requiring a newspaper to explain every decision not to publish any one of a million letters to the editor."

The Biden administration filed a "friend of the court" brief supporting the tech groups. It stresses that although the First Amendment protects the social media platforms' efforts to moderate the content on their sites, that does not mean that the platforms can never be regulated. But in these cases, it says, the states cannot show that their regulations survive under even a more lenient form of First Amendment scrutiny. And in particular, U.S. Solicitor General Elizabeth Prelogar wrote, the Supreme Court "has repeatedly rejected" the premise of the states' argument – the idea that "the government has a valid interest in increasing the diversity of views presented by a particular private speaker — even if that speaker controls a powerful or dominant platform."

The Biden administration will be back before the court in March in another case involving its own relationship with social media. In *Murthy v. Missouri*, slated for argument on March 18, the justices will consider whether and to what extent government officials can communicate with social media companies about their content-moderation policies.

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Posted in Merits Cases

Cases: Moody v. NetChoice, LLC, NetChoice, LLC v. Paxton

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Supreme Court appears poised to overturn precedent that protects public health, safety | Opinion

By Erwin Chemerinsky Special to The Sacramento Bee January 31, 2024 6:00 AM

The Supreme Court is reconsidering a seemingly technical legal doctrine, called Chevron deference, but its decision will have profound effects on the legal system and people's lives.

In 1984, in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., the Supreme Court unanimously ruled that federal courts should defer to administrative agencies when they interpret the statutes they act under.

To give a simple example: The federal Clean Air Act authorizes the Environmental Protection Agency to set standards for the amount of pollutants that can be put into the air. The EPA has adopted many regulations specifying the amount, in parts per million, of specific pollutants that particular types of businesses can emit. Chevron deference provides that federal courts should give deference to the EPA's judgment.

The EPA has expertise on air pollution and is in the best position to assess what is best for public health relative to the costs of imposing restrictions. Congress cannot legislate with sufficient specificity to adopt laws as to every type of pollutant. The federal courts are not in a position to make better decisions than the EPA on these technical, scientific issues. Chevron deference is not judicial abdication: The courts still review agency decisions to be sure that they are not "arbitrary, capricious or an abuse of discretion."

But those regulated by the government, especially businesses, have long objected to Chevron deference. Simply put, they want to make it much easier to challenge federal regulations and have them overturned by the courts. Conservatives who generally oppose government regulation and favor business interests have likewise long lamented Chevron deference.

On January 17, the Supreme Court heard oral arguments in two cases that expressly pose the question of whether Chevron deference should be eliminated and the 40-year-old precedent overturned. The cases — Loper Bright Enterprises v. Raimundo and Relentless v. Department of Commerce — involve a federal law regulating the fishing industry.

The Magnuson-Stevens Act gives the Secretary of Commerce and the National Marine Fisheries Service the power to "implement a comprehensive fishery management program." The law also requires that fishery-management plans "may require that one or more observers be carried on board a vessel ... for the purpose of collecting data necessary for the conservation and management of the fishery." The statute, however, does not specify who pays the costs of these monitors. The National Marine Fisheries Service adopted a rule requiring that the fishing industry bear these costs, and the federal courts of appeals found that this was a reasonable interpretation of the statute and, therefore, that courts should defer to the agency's determination.

I wrote a brief to the Supreme Court in these cases on behalf of Sens. Sheldon Whitehouse, Mazie Hirono, the late Dianne Feinstein and Elizabeth Warren urging the court to affirm the lower courts and not overrule Chevron. Our central argument is that Chevron is vital to Congress' ability to

protect Americans through efficient and expertise-based regulation. We argue that Congress doesn't have the time nor ability to respond as quickly and nimbly as federal agencies.

If Chevron is overturned, the country will face particular difficulty in responding to "emerging environmental dangers and evolving remedial processes." During the first nine months of 2023, Congress passed only 30 bills, "only thirteen of which have been signed into law."

The oral arguments on January 17 lasted three-and-a-half hours and left little doubt that the court's decision will be 6-3, as the conservative justices were unequivocal in their criticism of Chevron deference and the liberal justices were emphatic in defending it.

In large part, this reflects the differences between liberal and conservatives on the importance of government regulation to protect health, safety and the environment. Also underlying the case is the issue of respect for precedent, with the Roberts Court having repeatedly shown little regard for precedent, most dramatically in overruling Roe v. Wade and 45 years of decisions that had allowed colleges and universities to engage in affirmative action.

As Solicitor General Elizabeth Prelogar argued to the court, overruling Chevron would be tremendously disruptive to the legal system and open the door to countless challenges to every type of administrative regulation. But here, as with so many other areas, the court's decision is much more likely to follow the conservative political agenda than to adhere to long-standing precedents.

When regulations to protect the health and safety of Americans are much more often overturned by courts, we all lose.

Erwin Chemerinsky is dean of and a professor of law at the UC Berkeley School of Law.

Read more at: https://www.sacbee.com/opinion/op-ed/article284544930.html#storylink=cpy

HEALTH, JUSTICE & LAW, NATIONAL

Idaho's EMTALA Challenge Has Got Women Dead to Rights

4/19/2024 by **MARY ANNE FRANKS**

Update Wednesday, April 24, at 3:40 p.m. PT: Even in the cruel landscape of our post-*Dobbs* world, the oral arguments in *Moyle v. U.S.* were jarring.

Several of the conservative justices—in particular, Justice Samuel Alito—made clear that they had no interest in hearing about the ruptured membranes, failing kidneys, and uncontrollable hemorrhages of pregnant women and girls denied essential emergency medical care. Alito's questioning treated these catastrophic injuries to the bodies of pregnant women as if they were mere distractions from the true subject at hand: "the unborn child," which he invoked as though the embryo or fetus inside a woman's body were a free-floating, independent being,

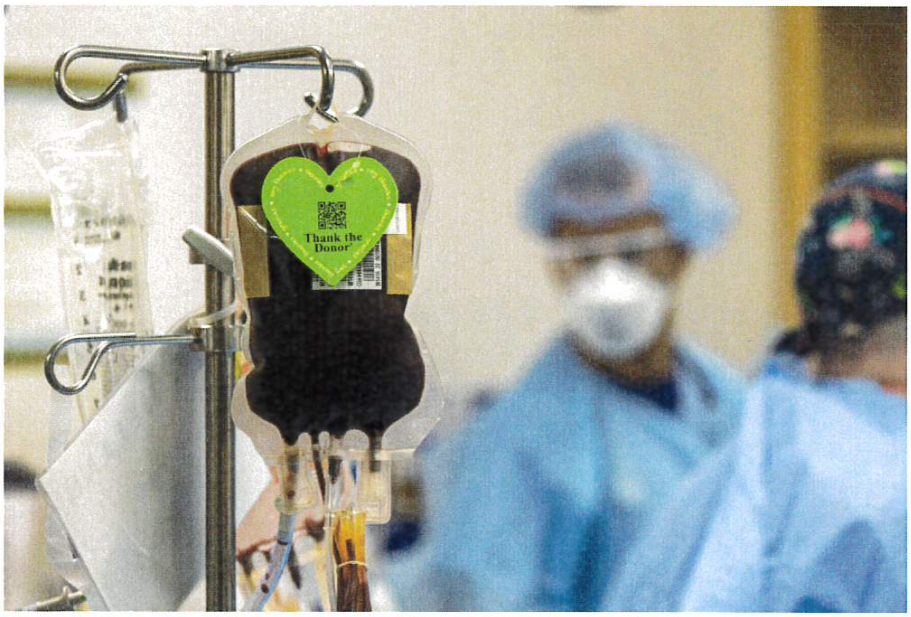
FEMINIST DAILY NEWS

Supreme Court Upholds Federal Law Protecting Victims of Domestic Violence

Louisiana Passes Law Requiring Public Schools

Solicitor General Elizabeth Prelogar's pointed reminder that EMTALA's primary focus is on the individual in need of emergency care hit its target so squarely that Alito immediately attempted to backtrack, shouting defensively that "no one is suggesting a woman is not an individual and she does not deserve stabilization. Nobody is."

Of course, this is exactly what the state of Idaho, and Alito himself, is suggesting. The only question is whether the rest of the Court will agree.



The emergency room of the Harborview Medical Center on March 9, 2022 in Seattle. In 1986, Congress enacted the Emergency Medical Treatment & Labor Act (EMTALA) to ensure public access to emergency services, regardless of ability to pay. (John Moore / Getty Images)

The state of Idaho claims it has the right to forbid pregnant women and girls—and *only* pregnant women

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and girls—from receiving emergency care that could save their lives.

People end up in emergency rooms for a variety of reasons. They're having trouble breathing. They've suddenly developed chest pains. They're bleeding uncontrollably. They've fallen off a roof, they've crashed their car, they've overdosed, they're suicidal, they got stabbed in a fight, they got shot by police.

Some people who need emergency services are poor, or have no insurance, or are in the country illegally, or have committed a crime. Under the federal Emergency Medical Treatment and Labor Act (EMTALA), they are all entitled to receive emergency care. This law is based on a simple principle: Hospitals shouldn't be allowed to let people die based on who they are, how much they can pay, or what they have done.

On April 24, the Supreme Court will hear oral arguments in *Moyle v. U.S.*, a case that will determine whether individual states are allowed to exclude a single group from this basic protection: pregnant women. The state of Idaho claims that it has the right to forbid pregnant women and girls—and *only* pregnant women and girls—from receiving emergency care that could save their lives.

How, and why, would a state want to do this?

First, the how: In 2022, the Supreme Court ruled in *Dobbs* that forced childbirth does not violate the Constitution. This allowed Idaho's 2020 "Defense of Life Act," a draconian anti-abortion law, to go into effect. According to the law, anyone who performs an abortion faces imprisonment of up to five years in prison. Healthcare professionals who perform abortions will also have their professional licenses suspended or revoked permanently.

This puts the state law directly in conflict with federal emergency

treatment to any patient with an "emergency medical condition." An emergency medical condition is one that, in the absence of immediate medical attention, is likely to cause "serious impairment to bodily functions," "serious dysfunction of any bodily organ," or otherwise puts the health of the patient "in serious jeopardy."

> *"A more accurate title for Idaho's abortion law would be the 'Let Women Die Act.'*

Pregnancy complications are a common reason for emergency care visits, and the medically necessary stabilizing treatment necessary to prevent serious injury or death to women and girls experiencing those complications sometimes includes the termination of the pregnancy.

Given that an abortion is sometimes the only medical treatment that will prevent death or serious bodily injury to women, a more accurate title for Idaho's abortion law would be the "Let Women Die Act." But as seen in the majority decision in *Dobbs* and the arguments propounded recently by the Alliance Defending Freedom in the mifepristone access case, forced birth proponents are rarely candid about their necropolitical agenda. Defenders of Idaho's law instead feign outrage at the suggestion that the law will kill women, pointing to the law's exception for abortions performed by a physician who "determined, in his good faith medical judgment and based on the facts known to the physician at the time, that the abortion was necessary to prevent the death of the pregnant woman."

Idaho insists that the law's exception for abortions necessary to save the life of the mother means that there is no conflict between it and federal law. But as the Department of Justice pointed out when it sued to stop the Idaho law from being

injury, not just death. The federal law does not authorize the withholding of essential medical treatment to patients who are only close to, but have not yet arrived, at death's door.

What is more, as countless medical professionals have attested, the line between serious bodily injury or death is rarely precise. It is often difficult, if not impossible, to predict the exact moment that a serious medical condition becomes a life-threatening one.

As the National Women's Law Center detailed in its amicus brief in the case, "No clinical bright line defines when a patient's condition crosses the lines of this continuum. At what point does the condition of a pregnant woman with a uterine hemorrhage deteriorate from health-threatening to the point that an abortion is 'necessary' to prevent death? When is it certain she will die but for medical intervention? How many blood units does she have to lose? One? Two? Five? How fast does she have to be bleeding?"

> *"The line between serious bodily injury or death is rarely precise.*

The recognition that serious bodily injury and death are so closely related as to be nearly indistinguishable has long been reflected in U.S. law. At common law, a person could be convicted of murder not only if he intended to kill but also if he intended to inflict "grievous bodily injury." The law of self-defense generally allows a person to use deadly force when facing an imminent threat of death *or* serious bodily harm, not only to herself but to others.

Significantly, Idaho's self-defense law specifies that a person is not required to wait for the danger to become fully apparent

danger is apparent or real. A person confronted with such danger has a clear right to act upon appearances such as would influence the action of a reasonable person."

Unless, of course, the person in danger is a pregnant woman.

Up next:

Advocates Ask Supreme Court to Overturn Dobbs, Citing 'Tragic Consequences'

On March 29, the Pennsylvania-based Women's Law Project filed the first-ever amicus brief urging the U.S. Supreme Court to overturn *Dobbs v. Jackson Women's Health Organization*, the case that reversed *Roe v. Wade*. The brief argued that Dobbs is "unworkable" because the decision has "subjected people in need of reproductive healthcare to immense suffering and grave danger" and has "ushered in an era of unprecedented legal and doctrinal chaos."
"It is vitally important to challenge Dobbs at every turn and send a signal that it is not set in stone," said David Cohen, a constitutional law professor at Drexel Kline School of Law and co-author of the brief. "We will not rest until this terrible decision is overturned."

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