Undergraduate Law Review At Auburn University

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OUR MISSION

The Undergraduate Law Review at Auburn University strives to foster intellectual curiosity, critical thinking, and scholarly discourse among Auburn students interested in the field of law. We aim to provide a platform for aspiring law students to engage in legal research and writing while contributing to meaningful scholarship.

We are committed to promoting diversity, equity, and inclusion within our publication, ensuring that a wide range of perspectives and voices are represented. Through our editorial process, we aim to uphold the highest standards of academic integrity and excellence, while also providing valuable opportunities for students to gain practical experience in legal research, writing, and editing.

Furthermore, we seek to serve as a bridge between undergraduate students and the broader legal community, fostering connections and collaborations that enrich both academic and professional development.

In pursuit of these goals, the Undergraduate Law Review at Auburn University is dedicated to publishing high-quality, thought-provoking pieces that advance understanding of the law and its impact on society.

Letter from the Editor

Dear Reader,

It is with great pleasure and enthusiasm that I welcome you to the inaugural issue of the Undergraduate Law Review at Auburn University. As Co-Founder and Editor-in-Chief, I am honored to present this true embodiment of the dedication and ambition found within Auburn students and faculty.

Launching a law review tailored specifically for undergraduate students at Auburn has been a dream of mine for some time, and seeing it come to life is an exciting milestone in the pre law program here. This journey began two years ago when I saw the passion for the law that Auburn students possessed. I had the desire to create a space where my peers could act on this passion while simultaneously contributing to the academic discussion in the field of law.

In addition to providing students an opportunity to conduct research in their field of interest, our Law Review is also a means for raising awareness and providing commentary on legal issues that affect Auburn students everyday. With that said, I encourage you to engage critically with the ideas presented and to join us in celebrating the achievements of our contributing authors.

I would like to extend my sincerest gratitude to my Co-Founder Jack Rafferty and our exceptional executive editorial board, as well as to our faculty advisor Dr. Steven Brown, without whom none of this could be possible. Their time they so graciously gave to us and their unwavering commitment to excellence have been invaluable throughout this process.

To our readers, thank you for joining us on this journey. We hope that our law review will serve as a source of inspiration, knowledge, and intellectual stimulation for years to come. I hope to see this Law Review grow and continue to provide a platform for undergraduate students to explore their interest in the law and make meaningful contributions to the legal community.

Sincerely,

Kate Lakis
Editor in Chief
Undergraduate Law Review at Auburn University


LAW REVIEW

Loper Bright Enterprises

V.

Raimondo

Authored by

Victoria Perry

The National Marine Fisheries Service implemented an Omnibus Amendment in the Magnuson-Stevens Fishery Conservation and Management Act to help prevent the eradication or overfishing of certain ocean life populations. "Congress entrusted decisions regarding fisheries management under the MSA to the Secretary of Commerce, who in turn has delegated these responsibilities to the National Marine Fisheries Service, recognizing that such decisions involve balancing many complex, highly technical factors within the agency's special expertise."[1] In short, Congress delegated the management of fisheries to the Secretary of Commerce, who then delegated management to the National Marine Fisheries Service. This delegation puts the management of these fisheries into the hands of experts on the subject matter. The Magnuson-Stevens Fishery Conservation and Management Act of 1976 was established by Congress under the Carter administration to promote the long-term biological and economic sustainability of marine fisheries. Thus, to ensure conservation is handled correctly, the National Marine Fishery Service ("NMFS") passed the Omnibus Amendment to the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act"). One part of the Magnuson-Stevens Act allows councils to create conservation and management plans to ensure the conservation of ocean life. The Magnuson-Stevens Act outlines the kinds of plans the councils may pass by saying, "plans may include restrictions on fish catch or gear types, [or] establish a limited access system in order to achieve optimum yield."[2] These plans were centered around smaller facets of the fishing industry that could be regulated.

The Omnibus Amendment gives the New England Council ("NEC") the power to require the fishing industry to pay for the costs of additional at-sea monitors. These at-sea monitors would record the number of fish caught, killed, and sold to ensure that these commercial

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[1] *Ocean Conservancy v. Evans*, 260 F. Supp.2d 1162, 1168 (M.D. Fla. 2003).
[2] *Pacific Coast Federation of Fishermen's Associations v. Blank*, 693 F.3d 1084, 1087 (9th Cir. 2012).

fisheries are operating within the constraints placed on them for conservation measures. Commercial fishing companies already have a set quota of fish they can catch, but these at-sea monitors would be permitted to stay on the boat and report back to the government. This acts as a secondary source of confirmation that the fisheries are staying within their quotas.

Payment for the cost of these monitors is estimated to total more than $700 per day. The costs of an additional person on the boat include meals, the bed on the boat being given to someone who isn't helping catch fish, the payment of the salary of the monitor, etc. Thus, this mandate would significantly increase the costs of these companies to remain in the industry, especially smaller businesses. Additionally, the raise in costs associated with catching fish would significantly lower the profit margin of the fishermen. A contributing factor in this case is that the NMFS's budget has been declining for several years now. If the NMFS were to have to pay for the additional monitors they require, then their economic viability would potentially be threatened.

A New Jersey based herring fishing company, Loper Bright Enterprises ("Loper Bright"), operates in the New England waters. Loper Bright brought a suit to the United States District Court for the District of Columbia against Gina Raimondo, the U.S. Secretary of Commerce. In this suit Loper Bright alleges that the Magnuson-Stevens Act does not authorize the NMFS to require the industry to pay for the costs of additional at-sea monitors. The District Court for the District of Columbia applied the Chevron deference to the case and granted the NMFS's motion for summary judgment. The Chevron Deference consists of two steps. "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give

effect to the unambiguously expressed intent of Congress."[3] The District Court concluded that the Magnuson-Stevens Act did unambiguously address the financial issue of at-sea monitoring. Thus, the District Court believed there was no need to move forward. Loper Bright appealed to the United States Court of Appeals for the District of Columbia. The Court of Appeals affirmed the lower court's summary judgment in favor of Raimondo, the Secretary of Commerce. However, in this court opinion, the Court stated that the statutory language in the Magnuson-Stevens Act was not entirely unambiguous. The second step of the Chevron Deference is "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[4] Still, the Court of Appeals stopped its investigation at the second step of the Chevron Deference. When looking at step two of Chevron, the Court of Appeals stated that the NMFS reasonably interpreted the statutory silence of the Magnuson-Stevens Act on whether the industry could be required by the NMFS to fund additional at-sea monitors.

Once again, Loper Bright appealed. The Supreme Court has granted the appellant's (Loper Bright) writ of certiorari. The Supreme Court will be focusing on two questions presented in this case. The first question being whether Chevron has been properly applied to this case. The second being, whether Chevron should be overruled, or limited in its scope of application.

It is the opinion of this Court that the Chevron Deference was not applied correctly in either of the two previous hearings of this case. The Magnuson-Stevens Act is ambiguous as to whether the NMFS could require additional at-sea monitors at the industry's expense. Therefore, the courts need to determine if the NMFS's interpretation of the statute was reasonable. We believe this interpretation was unreasonable because it was too economically significant. Further,

[3] *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984).
[4] *Chevron*, 843.

it is the Court's opinion that the Chevron Deference should not be overruled as it protects the separation of powers that our Constitution and the Framers intended, and that the Chevron doctrine has already been limited in its scope through the Major Questions Doctrine.

When Loper Bright was taken to the District Court for the District of Columbia, the Chevron Deference should not have been stopped at step one. There is a clear silence in the statutory language over funding and costs of at-sea monitoring for the Atlantic Herring Fisheries. In both North Pacific and foreign fisheries, the Magnuson-Stevens Act clearly states that if any "United States observers [are] required…be permitted to be stationed aboard any such vessel and that all of the costs incurred incident to such stationing, including the costs of data editing and entry and observer monitoring, be paid for…by the owner or operator of the vessel."[5] Therefore suggesting that Congress was aware of the issue of at-sea monitoring costs. Furthermore, the fact that Congress was explicitly silent on the subject suggests that the silence was intentional. This argument highlights that there is a question of the Congressional intent behind the statutory silence or ambiguity that needs to be resolved. Therefore, the District Court should have proceeded to step two of the Chevron Deference.

We agree with the Court of Appeals that the language in the statute is ambiguous enough to justify clarification or deference. Firstly, the Court of Appeals argued that the congressional silence clearly indicates deference to the more knowledgeable and experienced agencies. "Deference under Chevron to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill the statutory gaps."[6] This is not necessarily true. The congressional silence in this case could have been used to also suggest that the NMFS explicitly did not have the authority to

[5] 16 U.S.C. §1821 (C)(2)(D).
[6] *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 158 (2000).

require the industry to fund the at-sea monitoring. “Congress’s silence on a given issue does not automatically create such ambiguity or give an agency carte blanche to speak in Congress’s place.”[7] Silence must be interpreted in a reasonable sense. “If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.”[8] The Court believes that Congress may have intended to allow agencies to decide if they wanted to mandate additional at-sea monitoring, “key to the statutory scheme is the promulgation and enforcement of fishery management plan.”[9] However, the Court disagrees that Congress intends for Agencies to regulate the economics of an industry to the extent that the NMFS’s interpretation of the Magnuson-Stevens Act would have allowed. A delegation of authority of this size and economic impact would not have been delegated without proper statutory language. It is the belief of the Court that Congress did not intend for the NMFS to make economic decisions of this significance.

While the Court of Appeals did move forward with step two of the Chevron Deference; We find their conclusion and reasoning to be flawed. Step two of the Chevron Deference requires that “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”[10] Furthermore, while the interpretation that the NMFS could mandate additional at-sea monitors may be reasonable, if the Court were to consider the costs of these charges, as well as the accumulation of such charges, the Court should have found that the economic consequences of this deference would be unreasonable. A reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion,

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[7] *Loper Bright Enterprises v. Raimondo*, 45 F.4th 359, 374 (2022).
[8] *Loper Bright,* 843, 844.
[9] *Loper Bright,* 363.
[10] *Chevron*, 843.

or otherwise not in accordance with the law."[11] Further, "to determine whether the agency's actions were 'arbitrary and capricious,' courts consider whether the agency relied on factors which congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could be ascribed to a difference in view or the product of agency expertise."[12]

Previously, the court has established that "a number of factors are relevant [to determine if an agency's interpretation is reasonable], including: the amount of money involved for regulated and affected parties, the overall impact on the economy, the number of people affected, and the degree of congressional and public attention to the issue."[13] More interpretation needed to be done to understand the financial costs associated with requiring the industry to pay for these additional at-sea monitors. "The Fisheries Service estimates that for the Atlantic Herring Fishery, those monitors will cost more than $700 per day and could reduce financial returns to the fishermen by twenty percent."[14] In fact, when reading the Magnuson-Stevens Act as a whole, Congress spoke on their general concept of financial costs. "Conservation and management measure shall, where practicable, minimize costs and avoid unnecessary duplication."[15] This establishes a base line understanding that when considering congressional silence on the issue of costs, Congress has specifically stated that all costs should be minimized, and that unnecessary costs should be avoided completely. Furthermore, the Magnuson-Stevens Act "grants the

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[11] 5 U.S.C.§706(2)(A).
[12] *New York v. Raimondo*, 594 F. Supp.3d 588, 597 (S.D.N.Y. 2022).
[13] *United States Telecom Association v. FCC*, 855 F.3d 381, 422,423 (D.D.C. 2017).
[14] *Loper Bright*, 373.
[15] 16 U.S.C.§ 1851(a)(7).

[Service] broad authority to issue any regulation deemed 'necessary' to effectuate the underlying purposes of the statute."[16]

When considering the National Marine Fishery Service's argument as to why they should be allowed to require the industry to pay for these additional monitors, we must remember the burden of proof. "When agency action is challenged, it is not the challenger's job to show that Congress has specifically prohibited the challenged action," meaning that the NMFS must "positively demonstrate where Congress has explicitly or implicitly empowered it to act."[17] In this case, the NMFS uses the Chevron Deference to argue that the delegation of authority to mandate the payment of these costs all comes from the congressional silence in the statute.

Integral to the NMFS's argument in this case is the "necessary and appropriate" clause in the Magnuson-Stevens Act. In this clause, the Magnuson-Stevens Act states that regional fishery councils may adopt plans and measures "'necessary and appropriate' for the conservation of the fishery."[18] This is a broad clause which has historically been included in legislation to account for unexpected issues that agencies may need to handle. Not to force an industry to pay major financial costs. Previously, in *Ocean Conservancy v. Evans*, the Magnuson-Stevens Act had been used as justification for establishing quotas for conservation management that would have had significant financial burdens on the fishing industry. The United States District Court in this case ruled that implementing quota management measures that "may result in significant economic effects on a substantial number of fishery participants," was arbitrary and capricious.[19] "The Fisheries Service has identified no other context in which an agency, without express direction

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[16] *Alfa International Seafood v. Ross*, 264 F. Supp.3d 23, 49 (D.D.C. 2017).
[17] *Loper Bright*, 374, 375.
[18] 16 U.S.C.§ 1853(a)(1)(A).
[19] *Ocean Conservancy*, 1171.

from Congress, requires an industry to fund its inspection regime."[20] In this case, for a major economic activity such as this, "an ambiguous grant of statutory authority is not enough."[21] The Court believes that the National Marine Fishery Service has not met the burden for proving that deference of this scale and nature would be permissible. "To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency must instead point to 'clear congressional authorization' for the power it claims."[22] Additionally, this Court does not believe that congress intended for the NMFS to be allowed to regulate the economic activities of an industry to this scale. "Congress must clearly authorize an agency to take such a major regulatory action."[23]

Regarding the secondary question presented to this Court, we do not believe that Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) should be overruled. If Chevron were to be overruled, the responsibility to interpret ambiguous legislation would fall to the courts. "The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches."[24] Deferring to agencies who are more experienced, knowledgeable, and involved, prevents the Courts from stepping into the legislative role by attempting to determine the intent of Congress. "A court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[25] Additionally, the Chevron Deference prevents the Courts from interpreting legislation in such a way that is damaging to all parties. If "the court determines that

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[20] *Loper Bright,* 376.
[21] *United States Telecom* Association, 421.
[22] *West Virginia v. EPA*, 142 S.Ct. 2587, 2609 (2022).
[23] *United States Telecom Association*, 421.
[24] *Chevron*, 866.
[25] *Chevron*, 844.

Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of administrative interpretation."[26] The Constitution clearly establishes a separation of powers to keep the branches of government relatively equal and balanced in power. The branches cannot act outside of what the Constitution and the Framers specifically intended and wrote for them to do. "It is emphatically the province and duty of the judicial department to say what the law is."[27] Were the Courts to begin interpreting congressional intent for every ambiguous legislation, the Court would violate this sacred separation of powers. "It is equally—and emphatically—the exclusive province of the Congress…to formulate legislative policies."[28] Furthermore, any legislation interpreted by the judicial branch would be in violation of the Constitution, the Supreme Law of the Land. In declaring what shall be the supreme law of the land, the Constitution itself is first mentioned; and not the laws of the United States."[29]

Further, the scope of Chevron has already been limited by the Major Questions Doctrine. The Major Questions Doctrine establishes that any question of legislative congressional intent involving Constitutional questions or major economic questions, will be decided by the Court. "While the Chevron doctrine allows an agency to rely on statutory ambiguity to issue ordinary rules, the major rules doctrine prevents an agency from relying on statutory ambiguity to issue major rules."[30] The Major Questions Doctrine was established specifically to prevent agencies from abusing the Chevron Deference. The Major Questions Doctrine "requires that Congress speak clearly if it wishes to assign to an agency decisions of vast economic and political

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[26] *Chevron*, 843.
[27] *Marbury v. Madison*, 5 U.S. 137, 177 (1803).
[28] *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194 (1978).
[29] *Marbury,* 180.
[30] *United States Telecom Association*, 419.

significance."[31] The Court is aware and skeptical of agency interpretations of legislation which are abused under the Chevron Deference. That being said, the scope of the Chevron Deference has been limited, and no clarity can be gained from limiting the scope of Chevron any more. There is still a need for agency interpretation; therefore, the Court believes that Chevron should be upheld in this case.

In *Loper Bright Enterprises v. Raimondo*, the interpretation of the Magnuson-Stevens Act which would have allowed the National Marine Fisheries Service to pass the Omnibus Amendment was not reasonable. No agency can claim to have the authority to pass such an economically significant amendment from ambiguous statutory authority, or clear congressional silence on the given topic. Agencies do have a right to interpret congressional silence, or ambiguous language in their favor, within reason. However, the Omnibus Amendment was unreasonable. There is a boundary of how significant agency interpretations can be, and the National Marine Fishery Service overstepped this line. The Chevron doctrine does not need to be limited in its scope either. The Major Questions doctrine prevents the agencies from using the Chevron doctrine to interpret statutory language in such a way that allows them to make Constitutional decisions, or significant economic decisions. Thus, the Chevron doctrine does not need to be limited in its scope any further than it already has been.

We will not be overruling *Chevron v. Natural Resources Defense Council* as this court decision has provided the framework that allows agencies to reasonably interpret statutory ambiguity. These agencies are expected to be more knowledgeable and expert in the subject matter of the legislation; therefore, protecting the agencies from potential harmful decisions that could be made from specific congressional instructions or from improper or ignorant judicial

[31] *Mayes v. Biden*, 67 F.4th 921, 921 (9th Cir. 2023).

interpretations. The Chevron doctrine allows the courts to approve agency deferrals which in turn protects the fragile balance of powers between the legislative, judicial, and executive branches. When it comes to questions of the balance of powers, the Court is hesitant to make a decision either way which could give one branch an improper power. The Court should never be in the position of interpreting ambiguous legislation, or creating legislation where Congress was silent. "In our Constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our Constitution vest such responsibilities in the political branches."[32]

[32] *Tennessee Valley Authority*, 195.

McElrath

V.

Georgia

Authored by

Emma Rhyne

The petitioner, Damien McElrath, after having stabbed his adoptive mother 50 times within a single episode, was charged with the felony murder and assault, as well as malice murder of his adoptive mother, Diane.[33] In 2017, the trial court found McElrath guilty but mentally ill as to felony murder and assault, and they found him not guilty by reason of insanity as to malice murder.[34] On appeal, the appellate court found that these verdicts were repugnant, due to the impossible nature of McElrath being both sane and insane during the same event. Thus, the verdicts were vacated and the Supreme Court of Georgia remanded McElrath's case for retrial on both accounts.

The petitioner argued that retrial in this instance was unconstitutional and in conflict with his Fifth Amendment right, protection from double jeopardy. McElrath argued that since he was already found not guilty and acquitted with regard to malice murder, he should not have to be retried. The trial court denied his argument, and the Supreme Court of Georgia affirmed their decision.[35] The Supreme Court of the United States has since granted certiorari.

The question before the Court is whether or not the Double Jeopardy Clause of the Fifth Amendment prohibits a second prosecution for a crime of which a defendant was previously acquitted. In this case, the Court's interest is in the contradictory and repugnant nature of the acquittal verdict and whether or not it bars retrial. While this case includes both a guilty and not guilty verdict, the Court's task is not to pass judgment on McElrath's guilt or innocence but rather to address the constitutional implications of retrying an individual for a crime of which they have been acquitted. The crux of the matter lies in the repugnant nature of the initial verdicts, which suggested the implausible scenario that McElrath was both sane and insane during the same episode. Due to the repugnant nature of the previous verdicts, along with the

[33] McElrath v. State, 308 Ga. 104 (Ga. 2020).
[34] McElrath, 104.
[35] McElrath v. State, 315 Ga. 126-127 (Ga. 2022).

urge to forward and protect federalism, the Court should hold that the Double Jeopardy Clause of the Fifth Amendment does not apply in this case, and on that basis, affirm the decision of the Georgia Supreme Court.

The purpose of the Double Jeopardy Clause is to protect individuals from being subjected to multiple prosecutions for the same offense, ensuring finality and preventing government overreach.[36] The Court has long stood by this clause, and should continue to do so long into the future. However, when an acquittal is tainted, in this case through repugnant contradictory verdicts that imply the impossible notion of a conflicting mental state during the same event, the core principles of justice are compromised. The repugnant nature of the original verdicts, therefore, calls for a nuanced interpretation of the Fifth Amendment. McElrath's case does not involve a mere retrial for the same offense; rather, it addresses the need for a fair and just resolution that accurately reflects the defendant's mental state at the time of the crime. Additionally, since both charges are referent to the behavior of McElrath during a singular event, it only makes sense to reevaluate both of them.

To better understand the grounds on which the Court should decide, we must go back to the principle of Dual Sovereignty. By doing so, I hope to provide some more context regarding the government’s ability to try a defendant for the same offense in which they have already been prosecuted. The dual sovereignty doctrine allows for separate state and federal prosecutions for the same conduct, treating state and federal governments as distinct sovereign entities. In other words, a person can be tried for the same criminal act in both state and federal courts without violating the Double Jeopardy Clause because the state and federal governments are considered separate sovereigns.

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[36] USCS Const. Amend. 5 III.

In Heath v. Alabama, the Court was tasked with reviewing a case in which two states wanted to prosecute the same defendant on similar charges regarding the same event. The state of Georgia wanted to prosecute Heath with "malice murder," whereas Alabama wanted to prosecute him for "murder during a kidnapping."[37] When looking at the case, the Court recognized that although they "had not previously so held," they knew that the answer to the question of whether or not the dual sovereignty doctrine permitted successive prosecutions was "inescapable."[38] It is imperative that the Court recognize likewise that the question in this instance regarding acquittal is an unavoidable one, such as in Heath v. Alabama, and that a similar precedent must be set.

In the end, the Court decided in Heath v. Alabama that the dual sovereignty doctrine did in fact apply due to the fact that "successive prosecutions by two States for the same conduct are not barred by the Double Jeopardy Clause."[39] Overall, the precedent established in that case provided that in some instances, "multiple prosecutions therefore are necessary for the satisfaction of the legitimate interests of both entities."[40] Moreover, the dual sovereignty doctrine aligns with the principle that each sovereign has its own legitimate interest in enforcing its laws and preserving public order. While this case does not deal with the doctrine of dual sovereignty, it is helpful in understanding other exceptions or exemptions to claims of double jeopardy. It has been shown previously by the Court that there are instances in which double jeopardy does not apply. The point made in Heath v. Alabama, regarding multiple prosecutions being necessary in some cases, lends itself well to the case at hand.

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[37] Heath v. Alabama, 474 U.S. 82, 87 (1985).
[38] Heath, 88.
[39] Heath, 88.
[40] Heath, 92.

In circumstances similar to those currently being brought before the Court, the interest is in achieving a fair and just outcome mirrors that of Heath v. Alabama. This must prevail over the general rule of finality associated with the double jeopardy clause. An example and precedent of this type of thought can be seen in Wade v. Hunter wherein the Court states that "there may be unforeseeable circumstances that arise during a trial making its completion impossible, such as the failure of a jury to agree on a verdict."[41] The Court has essentially acknowledged previously that the rigidity of double jeopardy shouldn't outweigh the fundamental goal of achieving justice.

The Court moreover brought forth this sentiment in Richardson v. United States and elaborated on the aforementioned unforeseeable circumstances. In Richardson, the Court states that "a retrial following a 'hung jury' does not violate the Double Jeopardy Clause."[42] Their reasoning was that "the failure of the jury to reach a verdict is not an event which terminates jeopardy."[43] This Court should take that sentiment and interpret the repugnant nature of the original verdicts in McElrath's case to follow in a similar manner that was dictated in Wade and Richardson.

By finding the verdicts repugnant, the lower courts subsequently made the acquittal void. When a verdict has been deemed void, jeopardy therefore no longer applies. Precedent supports this general idea as well and states that a "void" acquittal is "no bar to subsequent indictment and trial."[44] Due to the acquittal being void, this case should follow the same procedures as mentioned above in the Wade and Richardson cases. By voiding the verdict, jeopardy no longer applies, and therefore, the double jeopardy clause cannot attach itself in this instance, thus making it possible to retry McElrath for the malice murder charge.

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[41] Wade v. Hunter, 336 U.S. 684, 689 (1949).
[42] Richardson v. United States, 468 U.S. 317, 324 (1984).
[43] Richardson, 325.
[44] United States v. Ball, 163 U.S. 662, 669 (1898).

Those who disagree might argue that the Court would be delving into the mindset of a jury when determining guilt or innocence of the petitioner by arguing for the repugnant nature of the verdicts. That is not what I would consider to be occurring on this occasion. Once again, the Court would not be questioning the guilt of the petitioner, or the mental state of the jurors when deciding the verdict. They would be basing their opinion off of the repugnant, impossibility of the conflicting judgment that McElrath was both sane and insane during the time of the events for which he has been charged.

The lower courts have held that for a verdict to be seen as repugnant, "the jury must make affirmative findings shown on the record that cannot logically or legally exist at the same time."[45] Despite being a lower court opinion, I agree nonetheless as this is a sound point of interest. The key points in a verdict being seen as repugnant are the notions of the illogical and conflicting existence of some fact or finding. It is very clear that a man cannot logically be both sane and insane within the same instance. That would go against basic scientific and psychological facts widely accepted today. Due to this, the lower court's ruling of repugnance stands strong and has a large impact on the validity of the acquittal.

The application of the double jeopardy doctrine should not become an insurmountable barrier preventing the correction of grave legal injustices. Allowing retrial in cases of repugnant acquittals is not a departure from the fundamental protection against double jeopardy as those who disagree might claim. Rather, the Court must acknowledge that the constitutional principles of fairness, due process, and the pursuit of justice must take precedence over the mechanical adherence to a rule that was not intended to shield fundamentally unfair or repugnant outcomes.

[45] McElrath v. State, 308 Ga. 104, 111 (Ga. 2020).

The repugnant nature of the initial verdicts creates a unique circumstance that was not foreseen by the framers of the Constitution. The essence of the double jeopardy clause is to protect individuals from repeated prosecutions for the same offense, but it was not intended to shield them from the consequences of contradictory and logically impossible verdicts. If there has been a grave injustice within the process of deciding an acquittal, enough to cause the verdict to be void, such an injustice should be able to be addressed properly through retrial. The Court should lean in favor of this federalist view as they have done previously with a nod to the aforementioned dual sovereignty doctrine.

During oral arguments, the state of Georgia argued for a federalist interpretation as well and urged the Court to do the same. They contend that the malice murder charge being Georgia specific should be taken into consideration when viewing the question at hand. The charge of malice murder being a Georgia-specific offense highlights the autonomy given to states in defining and prosecuting crimes. The Court should continue to acknowledge the principle that each state possesses the authority to set its own legal standards. This principle was expanded upon in the dual sovereignty doctrine and has demonstrated that states have a right to try a defendant in the way that they see fit. Allowing a retrial aligns with the principles of federalism, permitting Georgia to address the unique aspects of its legal system and uphold its autonomy in the administration of justice.

Additionally, the state of Georgia has had experience with cases on a similar but adjacent level. While normally the Court does not look down to the state level for cases that provide precedent, I feel it necessary in order to adhere to a more federalist and sovereigntist view in this case. In Dumas v. State, the Supreme Court of Georgia reviewed a case in which the petitioner,

Dumas, was faced with multiple charges, two of which being malice murder and vehicular homicide.[46] During his initial trial, Dumas was found guilty on both charges, but the judge sent the jury back for further deliberation due to the conflicting definitions of the charges.

Georgia has defined both of these charges, stating that malice murder is when "a person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being."[47] They defined vehicular homicide as an incident in which "any driver of a motor vehicle who, without malice aforethought, causes an accident which causes the death of another person."[48] There are clear contradictions between these two charges, wherein one explicitly outlines a malice mindset while the other clearly prohibits it. The Georgia Supreme Court found that these verdicts, when handed down together to find Dumas guilty of both, "the two verdicts were mutually exclusive."[49]

In that instance, the state of Georgia has shown its ability to accurately deal with contradicting verdicts. The verdicts required a second review as to their status as mutually exclusive. Mutually exclusive verdicts refer to situations where a defendant can be found guilty of one offense or another, but not both, based on the same set of facts. In the case before us, considering the petitioner McElrath, the verdicts were not seen as mutually exclusive, but rather as repugnant. Repugnant verdicts, on the other hand, occur when two verdicts are logically inconsistent with each other. These verdicts do not have to both be guilty. These two terms of mutually exclusive and repugnant are alike definitions with certain key differences; the sentiment is, however, the same.

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[46] Dumas v. State, 266 Ga. 797, 800 (Ga. 1996).
[47] GA Code § 16-5-1 (2019).
[48] GA Code § 40-6-393 (2020).
[49] Dumas, 800.

Due to this similarity in definitions, the Court should find that the ideas and principles found in Dumas extend to this case. The way in which mutually exclusive verdicts worked in the case of Dumas v. State are solidly bound principles worthy of the Courts consideration. A repugnant verdict of this level in the case of McElrath needs to be reviewed just as the inconsistent mutually exclusive verdict had to be in Dumas v. State.

The main argument of those who disagree with my analysis will center around previous cases that have found acquittals to be a final judgment. In Ashe v. Swenson, the Court ruled that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."[50] They might also cite Green v. United States, which said that "this Court, as well as most others, has taken the position that a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again."[51] They will argue that these show without a doubt that an acquittal is final, and by having the petitioner, McElrath, placed before a jury for the initial trial of malice murder, he has once been placed in jeopardy. Because of this, they will argue that a retrial would go against the Double Jeopardy Clause of the Fifth Amendment.

However, I would counter that argument by bringing up instances in which retrials after a hung jury do not constitute a violation of double jeopardy.[52] These circumstances would contradict, in part, the idea that sitting in front of a jury establishes jeopardy. If what the dissenters argue is true, then any instance of mistrial or hung jury it would bar a second retrial. If

[50] Ashe v. Swenson 397 U.S. 436, 443 (1969).
[51] Green v. United States, 355 U.S. 184, 188 (1957).
[52] Richardson v. United States, 468 U.S. 317, 324 (1984).

we were to follow the rigidness of the rule to that extent, then we would be going against the clear purpose of justice on which our legal system has been established.

Also, the verdicts of the lower courts were regarded as repugnant in the case of McElrath. By doing so, the Georgia Supreme Court has clearly negated the previous verdict of acquittal. Consequently, the court has made this acquittal void. There is, therefore, no valid or final judgment that has taken place, making reference to Ashe v. Swenson inapplicable here. Without a final and valid judgment, prosecution would be able to commence a second time without violating or going against jeopardy.

McElrath might additionally argue that this type of exception could end up weakening the validity of the Double Jeopardy Clause, but to that, I again state that Georgia is only seeking a ruling strictly due to the voidness of the acquittal in this case. It is not a matter of retrying McElrath for the same crime without cause. It is instead an attempt to rectify a legal anomaly resulting from contradictory and repugnant findings that cast doubt on the integrity of the judicial process. By vacating the original verdicts and remanding the case for retrial, the appellate court has recognized the inherent flaws in the initial judgment. I stand by with the lower court and believe that there needs to be a federalist application of double jeopardy in this instance. This would not weaken the double jeopardy clause, but instead, strengthen the ability of the courts to readdress certain wrongs within proceedings to preclude logical fallacies.

A favorable decision by the Court, additionally, could serve as guidance for future cases involving repugnant verdicts, therefore contributing to a more nuanced interpretation of the Double Jeopardy Clause. The repugnant verdicts, in this case, did not accurately provide for a fair and just trial for the petitioner. To go back to a previous case mentioned, the Court has so felt that in events such as this, “the purpose of law to protect society from those guilty of crimes

frequently would be frustrated by denying courts power to put the defendant to trial again."[53] Due to this information, the Court should affirm the previous ruling of the Supreme Court of Georgia and state that the Double Jeopardy Clause of the Fifth Amendment, in this case, does not prohibit a second prosecution for a crime of which a defendant was previously acquitted when that acquittal has been made void.

The arguments made above were a part of an academic exercise to write through the persona of Justice Amy Coney Barrett. To now break character and take a step back from the argument I feel Justice Barrett would put forth, my opinion of this case differs slightly. I struggle with this case because, in my opinion, I feel the lower court verdicts were, in fact, repugnant. Because of this, I do believe that this would cause the acquittal to become void, but there are an overwhelming number of cases and precedent that explicitly state that acquittals are final and to retry them would be considered double jeopardy.

I find this hard to contradict since there are so few precedent cases from the Supreme Court that show anything related to a repugnant verdict, especially that of an acquittal being voided. When reading through McElrath's case, I was drawn more to the concurrence rather than the main opinion. The concurring opinion from the Georgia Supreme Court showed a heavy doubt in the ability to retry the petitioner. There has been a lack of precedent on the Supreme Court level to accurately uphold an affirmative decision, and because of this, I don't feel that there is that strong of a basis for the opinion in which I have argued. In my opinion, I feel that this case should be reversed due to the technical aspect of the acquittal. While I feel there was in fact a procedural error and most definitely a repugnant nature to the two verdicts on the lower levels, I feel that the double jeopardy clause, as well as precedent cases, make it clear that

[53] Wade v. Hunter, 336 U.S. 684, 689 (1949).

acquittals fall under the protection of the double jeopardy clause. While I would like to agree with this opinion, I think I might ultimately agree for a reversal, simply based on the technical precedents that are shown for the dissent of my paper.

Moody

V.

Net Choice, LLC

Authored by

Logan Phelps

Logan Phelps

Moody v. NetChoice, LLC and *NetChoice LLC v. Paxton*

This case concerns the validity of two state laws limiting the ability of social media companies to moderate and delete content from their platforms: Florida law S.B. 7072 and Texas law H.B. 20. H.B. 20 was passed by the Texas state legislature on September 2, 2021, at the urging of Governor Greg Abbott, who signed the bill into law on September 9, 2021.[54] Although the Texas law contains several provisions directed at regulating social media platforms with over 50 million users, the relevant sections are Section 7, which stipulates that " a social media platform may not censor a user, a user's expression, or a user's ability to receive the expression of another person based on: (1) the viewpoint of the user or another person; (2) the viewpoint represented in the user's expression or another person's expression; or (3) a user's geographic location in this state or any part of this state,"[55] and Section 2, which requires platforms to adopt a number of disclosure and transparency requirements. Among the Section 2 provisions, we are chiefly concerned with the individualized explanation provision, which requires that "when a Platform removes user-submitted content, it must generally explain the reason to the user in a written statement issued concurrently with the removal," and that platforms "must permit the user to appeal the removal and provide a response to the appeal within 14 business days."[56]

Petitioner NetChoice, LLC (NetChoice) is an organization that "works to make the Internet safe for free enterprise and free expression" and represents 35 major technology companies, including Google, Meta, and X (collectively referred to as "the Platforms").[57]

[54] *NetChoice, LLC v. Paxton,* 573 F.Supp.3d. 1092 (W.D. Tex. 2021).
[55] *NetChoice L.L.C v. Paxton,* 49 F.4th 439, 445-446 (5th Cir. 2022) (quoting Tex. Civ. Prac. & Rem. Code § 143A.002(a)).
[56] Id. at 446.
[57] NetChoice, *Our Mission,* www.netchoice.org, https://netchoice.org/about/#our-mission (last visited Nov. 17, 2023).

NetChoice sued Texas Attorney General Ken Paxton (Texas) over H.B. 20, and, on December 1, 2021, the U.S. District Court for the Western District of Texas issued a preliminary injunction.[58] Texas appealed the preliminary injunction to the Fifth Circuit Court of Appeals, which granted a motion to stay the injunction on May 11, 2022. The Supreme Court vacated the stay on May 31, 2022.[59] On September 16, 2022, the Fifth Circuit Court of Appeals reversed the district court decision and upheld both Section 7 and Section 2 of H.B. 20 as constitutional.[60] NetChoice appealed the decision to the Supreme Court, and we granted certiorari on September 29, 2023, with respect to the content moderation provisions of Section 7 and the individualized explanation provisions of Section 2 of H.B. 20.[61]

S.B. 7072 was signed into law on May 24, 2021 by Florida Governor Ron DeSantis after being passed by the Florida state legislature.[62] Although the law bears several similarities and differences with the Texas law, we are again only concerned with S.B. 7072's content moderation and individualized explanation provisions, which apply to social media platforms with at least 100 million users and annual gross revenues exceeding $100 million.[63] S.B. 7072 stipulates that social media platforms "may not willingly deplatform candidates for office," "may not apply or use post-prioritization or shadow banning algorithms for content and material posted by or about ... a candidate," "may not "censor, deplatform, or shadow ban a journalistic enterprise based on the content of its publication or broadcast," and that the platforms must "apply censorship, deplatforming, and shadow banning standards in a consistent manner among its users on the platform."[64] Additionally, S.B. 7072's contains individualized explanation requirements that

[58] *NetChoice, LLC v. Paxton*, 573 F.Supp.3d 1092, 1117 (W.D. Tex. 2021).
[59] *Paxton*, 446-447.
[60] Id. at 494.
[61] *NetChoice, LLC v. Paxton*, 596 U. S. ____ (2022).
[62] *NetChoice, LLC v. Attorney General, Florida*, 34 F.4th 1196, 1205 (2022).
[63] Fla. Stat. § 501.2041(1)(g).
[64] *Attorney General, Florida*, 1206 (quoting Fla. Stat. § 501.2041).

require social media platforms to send written explanations to users when their content is removed from the platform and allow them to appeal the decision.[65]

NetChoice challenged S.B. 7072 and sued the Attorney General of Florida (Florida) for a preliminary injunction against the law. On June 30, 2021, the United States District Court for the Northern District of Florida, Tallahassee Division ruled in favor of NetChoice and issued a preliminary injunction against S.B. 7072.[66] Florida appealed the decision to the Eleventh Circuit Court of Appeals, which affirmed the ruling of the district court.[67] Texas appealed again to the Supreme Court, and we granted certiorari on September 29, 2023. Once again, we limited our granting of certiorari to the law's content moderation and individualized explanation provisions. In granting certiorari to both the Texas and Florida cases, we agreed to hear them together.

In this case we are presented with two questions, which correspond to the first two questions presented by the Solicitor General in her brief for the United States as amicus curiae. "The questions presented are:

1. Whether the laws' content-moderation restrictions comply with the First Amendment; and
2. Whether the laws' individualized-explanation requirements comply with the first Amendment."[68]

We turn first to the content-moderation restrictions. We hold that the content moderation restrictions of both H.B. 20 and S.B. 7072 are impermissible because they violate the Platforms' rights under the Free Speech Clause of the First Amendment. In doing so, we reverse the

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[65] Id. at 1207.
[66] *NetChoice v. Attorney General, Florida,* 546 F.Supp.3d 1082, 1096 (N.D. Fla. 2021).
[67] *Attorney General, Florida,* 1231.
[68] Brief for the United States as Amicus Curiae, *Ashley Moody v. NetChoice, LLC*, *NetChoice, LLC v. Ashley Moody*, *NetChoice LLC v. Ken Paxton,* 22-277, 22-393, and 22-555, I (2023).

judgement of the Fifth Circuit Court of Appeals and affirm the judgement of the Eleventh Circuit Court of Appeals.

In the Fifth Circuit Court's opinion, Judge Oldham correctly identifies that "a speech host must make one of two showings to mount a First Amendment challenge. It must show that the challenged law either (a) compels the host to speak or (b) restricts the host's own speech."[69] Before we can determine if either instance is present in this case, we must first determine whether the Platforms are, in their regular operations, speaking. For the most part, the speech with which we are concerned in this case is not the "pure speech" with which the Framers were concerned when drafting the Bill of Rights. One of the most significant evolutions of our understanding of speech within the First Amendment context is the recognition that certain forms of conduct are subject to protection under the First Amendment Free Speech Clause. We have long upheld the notion that conduct, when it is expressive, constitutes speech as understood by the First Amendment.[70] The Platforms' conduct can generally be divided into two categories which supplement one another: *hosting* the speech of third parties and *moderating* that speech. We find that the latter is unquestionably a form of expressive conduct.

When determining what constitutes expressive conduct, we must evaluate the conduct under the criteria first established in *Spence v. State of Washington*, in which we determined that the display of an upside-down American flag was protected by the First Amendment because "[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[71] Our later decisions have relied on this standard when determining whether conduct is expressive.[72] By

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[69] *Paxton,* 459.
[70] *Texas v. Johnson*, 491 U.S. 397, 404 (1989).
[71] *Spence v. State of Washington,* 418 U.S. 405, 410-411 (1974).
[72] *Johnson*, 403.

"hosting" we refer only to the holding of content on a social media platform. We recognize that this almost never occurs on its own, as many of the Platforms employ content-moderation algorithms that curate content from the moment it is uploaded.[73] However, the hypothetical situation of a social media platform engaged only in hosting and not moderation provides a useful example in which to understand how hosting differs from moderation. If there were a social media platform that entirely refrained from any sort of content moderation or curation and instead simply allowed users to post anything they wanted and displayed these posts in chronological order, we could safely say that this platform is engaged only in hosting. In such a situation, the platform would clearly not be engaging in expressive conduct because they would simply be "reflexively transmitting data from point A to point B."[74] However, it is likely that the Platforms intend to communicate a message through their content moderation practices. When a social media platform removes a certain post, the decision to do so inherently communicates that such content is not allowed on the platform. Neither party in this case alleges that the Platforms' content-moderation is done arbitrarily. In fact, the Platforms and NetChoice explicitly argue that their content moderation is expressive.[75] If any doubt remained that the content moderation was meant to communicate a message, the fact that the Platforms themselves explicitly confirm this should be enough to clear things up. Whether this message is likely to be understood is somewhat more difficult to determine, though we believe that there is significant evidence that it would be. It is very likely that the users whose content is removed from a social media platform will understand that the content was removed because it is not allowed on the platform, as there would be no reason for the content to be removed otherwise. Additionally, the available evidence suggests that outside observers perceive content moderation to be expressive as well. H.B. 20

[73] *Paxton,* 460.
[74] *Attorney General, Florida,* 1204.
[75] *Paxton,* 461.

and S.B. 7072 were both championed by their states' respective governors as attempts to fight back against censorship of conservatives by "Big Tech," which they allege harbors a left-wing bias.[76] [77] As Judge Newsom correctly points out in the Eleventh Circuit's opinion "[t]hat observers perceive bias in platforms' content-moderation decisions is compelling evidence that those decisions are indeed expressive."[78] Additionally, data gathered by the Pew Research Center in 2020 which indicates that 73% of Americans believe "that social media sites intentionally censor political viewpoints that they find objectionable."[79] Seeing as the Platforms' content moderation fulfills both requirements, it is a form of expressive conduct.

Additionally, several of our precedent cases provide justification for declaring the platforms' content moderation to be expressive conduct. In *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston*, the Court ruled that the organizers of Boston's annual St. Patrick's Day Parade could not be compelled to include the Irish American Gay, Lesbian, and Bisexual Group of Boston (GLIB) because doing so would violate their right to determine the content of the parade's message.[80] The *Hurley* Court determined that, even though the parade combined a number of different voices, it was a form of expressive conduct.[81] In choosing to allow certain groups and not allow other groups to march in the parade, the organizers tailored the parade to communicate a specific message.[82] *T*he Platforms are doing essentially the same thing that the

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[76] Office of the Texas Governor, *Governor Abbott Signs Law Protecting Texans From Wrongful Social Media Censorship,* gov.texas.gov, https://gov.texas.gov/news/post/governor-abbott-signs-law-protecting-texans-from-wrongful-social-media-censorship (last accessed Nov. 17, 2023).
[77] *Attorney General, Florida*, 1205.
[78] *Attorney General, Florida*, 1214.
[79] Monica Anderson, Andrew Perrin, and Emily Vogels, *Most Americans Think Social Media Sites Censor Political Viewpoints,* pewresearch.org, https://www.pewresearch.org/internet/2020/08/19/most-americans-think-social-media-sites-censor-political-viewpoints/ (last accessed Nov. 17, 2023).
[80] *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 558 (1995).
[81] Id. at 568.
[82] Id. at 571.

parade organizers in *Hurley* did when they engage in content moderation. In doing so, they too are curating the voices of many speakers to communicate a specific message.

Texas and Florida have employed *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* and *PruneYard Shopping Center v. Robins* as evidence against affording constitutional protection to content moderation.[83] However, a closer reading of these cases presents further evidence for considering content moderation to be a form of expressive conduct. In *PruneYard,* the Court ruled that the owner of a shopping center could not prevent a group of students from distributing pamphlets on his property.[84] The *PruneYard* decision further illuminates the expressive nature of content moderation. Although the question of whether the pamphleteers violated the owner's freedom of speech was briefly considered in *PruneYard,* "[n]otably absent from PruneYard was any concern that access to this area might affect the shopping center owner's exercise of his own right to speak: the owner did not even allege that he objected to the content of the pamphlets."[85] The shopping mall owner had not meant to communicate any sort of message with which the pamphleteers interfered or which would be served by excluding them. The Platforms are fundamentally different from the shopping center in *PruneYard* because their content moderation is inherently expressive, which was simply not the case in *PruneYard.* In *Rumsfeld,* we affirmed the constitutionality of the Solomon Amendment, which required law schools to host military recruiters as a necessary condition to receive federal funding.[86] *Rumsfeld,* like *PruneYard*, also only serves to strengthen the claim that content moderation is expressive conduct despite its treatment by the states. Core to our decision in *Rumsfeld* was the idea that law schools, when they hosted or refused to host a military recruiter, were not engaging in expressive

[83] *Attorney General, Florida,* 1208.
[84] *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 88 (1980).
[85] *Attorney General, Florida,* 1215 (quoting *Pacific Gas and Electric Company v. Public Utilities Commission of California*, 475 U.S. 1, 12 (1986)).
[86] *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.,* 547 U.S. 47, 70 (2006).

conduct because the expressive nature of this action was only apparent when the law schools explained that it was expressive.[87] *Rumsfeld*, therefore, only serves as an example of an action failing to meet the standards for expressive conduct. As we have already articulated, the Platforms' content moderation practices clearly *do* meet these standards because, unlike in *Rumsfeld,* there is evidence that the conduct itself is sufficient in conveying the Platforms' message.[88]

Although there are differences in the kinds of speech that Platforms are allowed to moderate under H.B. 20 and S.B. 7072, the content moderation provisions of both laws hinge on prohibiting Platforms from moderating content in some regard. Seeing as this explicitly limits the ability of Platforms to engage in what we have determined to be constitutionally protected expressive conduct, we can safely determine that the laws' content-moderation provision implicates the First Amendment. However, the difference in what sort of content moderation is prohibited by each law is significant in determining standards of scrutiny. As we have held many times before, "government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed," and, in such cases, is subject to strict scrutiny.[89] Although H.B. 20 does substantially limit the Platforms' protected speech, the law precludes them from moderating content based on a poster's viewpoint in general, rather than content relating to any one specific topic.[90] In *Turner Broadcasting Company v. F.C.C.,* the Court held that requirements for cable television providers to carry certain channels was subject to intermediate scrutiny.[91] Due to the similar circumstances of this case to *Turner*, we will also be applying intermediate scrutiny. Per *Turner*, "a content-neutral regulation will be

[87] *Forum for Academic and Institutional Rights, Inc*., 66.
[88] *Attorney General, Florida*, 1214.
[89] *Reed v. Town of Gilbert, Arizona*, 576 U.S. 155, 163-164 (2015).
[90] *Paxton,* 445-446.
[91] *Turner Broadcasting Company v. F.C.C.,* 512 U.S. 622, 642 (1994).

sustained if 'it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'"[92] According to the Fifth Circuit, "HB 20's legislative findings assert that Texas 'has a fundamental interest in protecting the free exchange of ideas and information in this state.'"[93] We agree with the Fifth Circuit that this interest is important and unrelated to the suppression of free speech. However, we are not convinced that the law restricts no more speech "than is essential to the furtherance of that interest."[94] Proof of this lies in this case itself. The only provisions of H.B. that risked implicating the First Amendment are Section 7 and Section 2, as evidenced by our decision not to review the other sections of the law as well as the Solicitor General's brief.[95] The fact that the law itself mostly contains provisions that do not risk implicating the First Amendment suggests that a much less restrictive version of H.B. 20 was possible. Thus, we find that the content moderation provisions do not survive intermediate scrutiny and that the Fifth Circuit erred in determining otherwise.

Although H.B. 20 is not content based, S.B. 7072 likely is. S.B. 7072 is far more limited in the content that may not be moderated than H.B. 20, as it specifically forbids the removal of posts by or about a candidate as well as posts by journalistic enterprises of a certain size.[96] These provisions unquestionably present a content-based restriction on the Platforms' content moderation, as they prevent them from exercising their protected expression only when it comes to certain subjects or speakers. Because of this, S.B. 7072 is subject to strict scrutiny.[97] Under

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[92] *Turner Broadcasting System, Inc.*, 662 (quoting *U.S. v. O'Brien,* 391 U.S. 367, 377 (1968)).
[93] *Paxton,* 483.
[94] *U.S. v. O'Brien,* 391 U.S. 367, 377 (1968).
[95] Brief for the United States as Amicus Curiae, *Ashley Moody v. NetChoice, LLC*, *NetChoice, LLC v. Ashley Moody*, *NetChoice LLC v. Ken Paxton,* 22-277, 22-393, and 22-555, 25 (2023).
[96] Fla. Stat. § 106.072
[97] *Town of Gilbert, Arizona*, 163-164.

strict scrutiny, the State must prove that the law "furthers a compelling interest and is narrowly tailored to achieve that interest."[98] Florida argues that it has a "substantial interest in protecting its residents from inconsistent and unfair actions."[99] This stated interest is not compelling. If there has ever been a case where an entity's speech being "unfair" was a compelling reason to limit that speech, we are unaware of it. The First Amendment is not concerned with fairness by private companies, it is concerned with the limitation of free expression by the government.[100] The right of the Platforms to engage in constitutionally protected expressive conduct does not hinge on fairness. Seeing as Florida has failed to establish a compelling state interest, S.B. 7072 does not survive strict scrutiny and is therefore in violation of the First Amendment.

Although the Platforms' content moderation practices are undoubtedly protected by the First Amendment, Texas and Florida seek to circumvent this fact by declaring that the large social media companies to which H.B. 20 and S.B. 7072 would apply are common carriers. As the Fifth Circuit points out, states have historically been able to declare businesses common carriers under certain circumstances.[101] Whether this practice is constitutional is beyond the purview of this case. We granted certiorari only to the questions of whether the laws' content-moderation and individualized explanation requirements comply with the First Amendment. However, it is a fundamental constitutional principle that states cannot make laws to strip private actors of their constitutionally protected rights.[102] Additionally, the designation of businesses as common carriers has never required them to tolerate bothersome or offensive behavior. Even in the common law era there was an understanding that innkeepers could refuse service to rude and

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[98] *Citizens United v. Federal Election Commission,* 558 U.S. 310, 340 (2010) (quoting *Federal Election Commission v. Wisconsin Right to Life,* 551 U.S. 449, 464).
[99] *Attorney General, Florida,* 1205 (quoting S.B. 7072 § 1(9), (10)).
[100] U.S. Const. amend. I.
[101] *Paxton,* 469.
[102] U.S. Const. art. 6, cl. 2.

disorderly persons.[103] When a Platform removes content that they find objectionable, they are engaging in behavior, suggesting that common carrier status and First Amendment rights are not mutually exclusive. Since the Platforms' content moderation is protected by the First Amendment, the states' designations of the Platforms as common carriers do not preclude the Platforms from continuing to exercise their First Amendment rights in this way.

Next, we turn our attention to the laws' individualized explanation provisions, which require Platforms to send users a detailed written notice whenever their content is removed. We find that the provisions within H.B. 20 are constitutional and the provisions within S.B. 7072 are unconstitutional. In doing so, we affirm both the Fifth Circuit and Eleventh Circuit's decisions on this question. In cases of commercial speech, the standard established in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio* governs laws that compel companies to disclose "purely factual and uncontroversial information" about their business practices.[104] The *Zauderer* Court found that such laws are constitutional "as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers," but noted "that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech."[105] The individual explanation provisions of H.B. 20 and S.B. 7072 are substantially different enough that they should be considered separately. H.B. 20 requires that, "when a Platform removes user-submitted content, it must generally explain the reason to the user in a written statement issued concurrently with the removal," and allow them to appeal.[106] Applying the *Zauderer* standard, this requirement seems to be "reasonably related to

[103] Brief of Amicus Curiae Techfreedom in Support of Appellees and Affirmance, *NetChoice, L.L.C v. Paxton,* 21-51178, 29 (2022).
[104] *Attorney General, Florida*, 1227.
[105] *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).
[106] *Paxton,* 446.

the State's interest in preventing deception of consumers."[107] When a user creates an account with a social media platform, they enter into an agreement with that platform in which, in exchange for following the rules the platform lays out in its terms of service, they are allowed to use it. Requiring a platform to explain their reasoning for removing a post serves to prevent deception by ensuring that the terms of the agreement are being fulfilled. Additionally, we do not find that H.B. 20's individualized explanation provisions are "unjustified or unduly burdensome."[108] NetChoice argues otherwise, alleging that the provisions present an undue burden to platforms like YouTube, which would have to scale up their moderation practices to accommodate the requirement.[109] This may be true, but the requirements H.B. 20 sets are not as restrictive as to constitute and undue burden. Although we refer to it as an "individualized explanation" requirement, H.B. 20 does not actually require that every explanation sent to a user be specially composed for that user. Rather, the law simply requires that an explanation of why the content was removed be sent to the user.[110] Under this provision, there is nothing stopping social media companies from automatically sending a prewritten message for all instances of a specific rule violation. While this would not be the case for the appeals process, most of the Platforms already have some sort of individualized appeals process, so this provision only requires them to continue doing what they are already doing, with minimal expansion.[111] As such, we do not find NetChoice's argument that H.B. 20's individualized explanation fail the *Zauderer* standard to be compelling.

Under S.B. 7072, when a social media platform removes speech that is not obscene, it "must include both a 'thorough rationale explaining the reason' for the 'censor[ship]' and a

[107] *Zauderer,* 651.
[108] Ibid.
[109] *Paxton,* 487.
[110] Id. at 446.
[111] Id. at 486-487.

'precise and thorough explanation of how the social media platform became aware' of the content that triggered its decision."[112] For the same reasons we explained in our analysis of H.B. 20 under *Zauderer,* we find that S.B. 7072's individualized explanation provisions fulfill *Zauderer*'s "reasonable relation" requirement. However, the individualized explanation requirements in S.B. 7072 are far more rigorous than those included in H.B. 20. S.B. 7072 does not simply require an explanation to be sent, but one with a "thorough rationale" and "a precise and thorough explanation."[113] The inclusion of these qualifiers suggests that the Platforms would have to compose written notices specifically for each piece of content removed. Platforms like YouTube would therefore have to write and issue over one billion individual explanations, which is undoubtedly an undue burden under *Zauderer.*[114] As Judge Newsom aptly notes in the opinion of the Eleventh Circuit Court of Appeals, the likely impossible task of complying with S.B. 7072's individualized explanation requirements would certainly chill speech, as "a platform could be slapped with millions, or even billions, of dollars in statutory damages if a Florida court were to determine that it didn't provide sufficiently "thorough" explanations when removing posts."[115] Thus, we conclude that the individualized explanation requirements of S.B. 7072 do not meet the standard set by *Zauderer* and are in violation of the First Amendment because they chill protected speech by imposing an undue burden on the platforms.

In conclusion, the content moderation provisions of both H.B. 20 and S.B. 7072 are unconstitutional because they impermissibly limit the speech of large social media platforms by preventing them from engaging in content moderation, which is a constitutionally protected instance of expressive conduct. Additionally, Texas and Florida may not circumvent the

[112] *Attorney General, Florida,* 1207 (quoting Fla. Stat. § 501.2041(3)).
[113] Ibid.
[114] *Attorney General, Florida,* 1230.
[115] Id. at 1230-1231.

Platforms' constitutional rights by declaring them to be common carriers because common carrier regulations do not bar the Platforms from engaging in content moderation Finally, the individualized explanation standards of H.B. 20 are constitutional because they do not risk chilling speech by imposing an undue burden on the Platforms. However, the individualized explanation standards of S.B. 7072 are unconstitutional because they saddle the Platforms with an obligation that is nearly impossible to satisfy and therefore chill the use of constitutionally protected speech.

On the question of whether the laws' content moderation provisions are consistent with the First Amendment we affirm the decision of the Eleventh Circuit and reverse the decision of the Fifth Circuit. On the question of whether the laws' individualized explanation provisions are consistent with the First Amendment we affirm the decision of the Eleventh Circuit and affirm the decision of the Fifth Circuit. The case of *NetChoice v. Paxton* is hereby remanded to the Fifth Circuit Court of Appeals for proceedings consistent with this opinion.

It is so ordered.

Loper Bright Enterprises

V.

Raimondo

Authored by

Ava Marano, Nyah Jackson, Leah O'Donohue

I. Facts

Since 1976, marine fisheries have been regulated by the Magnuson-Stevens Fishery Conservation and Management Act ("The Act"). The Act purports to advance the objective "to take immediate action to conserve and manage the fishery resources found off the coasts of the United States…"[116] Under the oversight of the National Marine Fisheries Service ("the Service"), the Secretary of Commerce is responsible for executing a thorough fishery management program. This program requires that "fishery management plans" be established and enforced, cultivated by governing bodies of regional fisheries. Pursuant to §1853(a)(1)(A) of the Act, the fishery management plans consist of "conservation and management measures… necessary and appropriate for the conservation and management of the fishery" as per the primary objective. The New England Fishery Management Council (the "Council") oversees nine fisheries, of which the Atlantic herring fishery is incorporated. The Omnibus Amendment and the Final Rule was submitted by the Council and approved by the Service to "set out a standardized process to implement and revise industry-funded monitoring programs in the New England fisheries."[117] Half of all herring trips are supervised by the monitoring program, which is satisfied through funding from the Service itself, as outlined in the fishery management plan. Additional provisions of the monitoring program promulgate that "for the difference between the target and Service-funded monitoring, industry-funded monitoring, with owners of vessels selected by the Service to carry an industry-funded monitor and pay the associated costs (other than administrative costs)."[118] Loper Bright Enterprises are consistent participants in the Atlantic Herring Fishery and filed a lawsuit contending "that the Act did not authorize the Service to create industry-funded monitoring requirements and that the rulemaking process was

[116] 16 U.S.C. §1801(b)(1).
[117] Loper Bright Enterprises v. Raimondo, 45 F.4th 359, 364 (2022).
[118] Raimondo, 364.

procedurally irregular." [119] Petitioner's main contention rests in the Omnibus Amendment's requirement for the industry to bear the costs of the sea-monitoring programs themselves.

II. Legal Question

The central inquiry in this case is the threshold of Congressional specificity necessary for agency action approval. *Utility Air Regulatory Group v. EPA* laid the groundwork for actions delegated by Congress "that will have major and far-reaching economic consequences."[120] Their intention to grant authority must be explicitly communicated as Justice Scalia wrote, "We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[121] This is a well-established precedent, but the issue at question concerns a broad delegation of authority on behalf of Congress to the Service. The former concerns more ambiguous instances of delegated authority of Congress, whereas the case under consideration demonstrates a more expansive apportionment of authority to the Service. The Service's expertise in the field of fishery management is specialized and distinct and the formerly mentioned economic repercussions are industry-specific. The question presented is if Congress provided clear guidance on the issue. If Congress has not succeeded in this task, then is the interpretation set forth by the agency claiming that the industry must bear the costs of the monitoring program justifiable?

III. Chevron Deference

At the heart of this case is the query into whether the Service has the authority to interpret the statute to mean that the industry is burdened with bearing the costs of the monitoring program. This standard adheres to the guidelines set forth by the Supreme Court in *Chevron*

[119] *Id.*
[120] *Id.*
[121] Utility Air Regulatory Group v. EPA, 573 US 302, 324 (2014).

U.S.A, Inc. v Natural Resource Defense Council. Laying out the groundwork for affording deference to agency interpretation, the Court wrote, "if the statute is silent or ambiguous with respect to the specific issue, the question for the Court is whether the agency's answer is based on a permissible construction of the statute."[122] Congress' silence in ambiguous instances of statutory reasoning must be left to the interpretation of the guiding agency. Referring to instances in which Congress intentionally delegates authority to agencies in interpreting statutes that have "major and far-reaching economic consequences,"[123] the Circuit Court wrote, "...that 'major questions doctrine' applies only in those "extraordinary cases' in which the 'history and breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority."[124] In the present case, it is clear that the Service's role in the fishery industry is particular and distinct, so their ramifications on the national economy are essentially nonexistent. In accordance with the facts of the case, appellants' assertion that Congress must clearly assert the Service's authority to effectuate the Final Rule is erroneous. It follows that Congress' delegation of authority to the Service in interpreting the statute was broad and expansive. This principle is further outlined in Chevron: "To the extent any congressional 'intent' can be discerned from this language, it would appear that the listing of overlapping, illustrative terms was intended to enlarge, rather than to confine, the scope of the agency's power to regulate particular sources in order to effectuate the policies of the Act."[125] Appellants' inquiry into overturning Chevron cannot be sustained given that courts cannot assert jurisdictional authority over political questions. Chevron specifies that "the responsibilities for assessing the wisdom of

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[122] Chevron U.S.A, Inc. v Natural Resource Defense Council Inc. 467 US 837, 843 (1984).
[123] Raimondo, 364.
[124] *Id*.
[125] Chevron, 862.

such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'"[126]

Chevron promulgates a two-step framework that establishes whether the agency's interpretation and authority over statutory controversies is reasonable. Chevron Step One requires that "statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."[127] Applying this to Section 1853(b)(8) of the Act, which reads "require(s) that one or more observers be carried on board a vessel of the United States engaged in fishing for species that are subject to the plan, for the purpose of collecting data necessary for the conservation and management of the fishery; except that such a vessel shall not be required to carry an observer on board if the facilities of the vessel for the quartering of an observer, or for carrying out observer functions, are so inadequate or unsafe that the health or safety of the observer or the safe operation of the vessel would be jeopardized."[128] Whether or not the vessels must bear the cost of at-sea monitors remains unresolved. However, Chevron's declared principles provide a solution; that Congress has not provided a clear answer leaves room for the Service to interpret the statute reasonably.

Chevron Step Two "directs courts to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers." [129] Once the agency provides their interpretation, they must also provide a sound rationale for their selection of that interpretation. We agree with the Circuit Court's assertion that the Service's interpretation is reasonable.

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[126] *Id* at 866.
[127] Engine Manufacturers Association v. South Coast Air Quality Management District, 541 US 246, 252 (2004).
[128] 16 USC § 1853(b)(8).
[129] Michigan v. EPA, 576 US 743, 751 (2015).

Pursuant to Chevron's two-step framework, further precedent supports the deferential standard argument. In *Cigar Association of America v. United States FDA*, the District of Columbia Court of Appeals held that,

> Even if the Tobacco Control Act were ambiguous about whether FDA may impose user fees on non-enumerated classes of tobacco products, FDA reasonably explained, in the alternative, that it 'would adopt the same interpretation of the statute in an exercise of its discretion.' Agencies may 'employ bright-line rules for reasons of administrative convenience, so long as those rules . . . are reasonably explained.' [130]

The interpretation must survive scrutiny by the courts; if it is irrational, it does not endure Chevron Step Two. The principles outlined in Chevron are binding on the courts, as underscored in *City of Arlington v. FCC*: "*Chevron* is rooted in a background presumption of congressional intent: namely, 'that Congress, when it left ambiguity in a statute' administered by an agency, 'understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'"[131] This case further clarified a straightforward assessment for Chevron deference in writing, "where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow."[132] In compliance and with respect to Supreme Court precedent, we do not believe that this sound standard of reason should be overruled. The Service, in adherence to historical legal ruling, fulfilled both of Chevron's prongs: Congress did not speak

[130] Cigar Association of America v. United States FDA, 5 F.4TH 68, 80 (2021).
[131] City of Arlington v. FCC, 569 US 290, 296 (2013).
[132] City of Arlington, 307.

directly to the issue in question and the agency provided a clear, reasonable interpretation. We divulge the Service's reasoned interpretation of the Act below.

IV. Features of the Act

Multiple provisions of the Act fill the gap between the Act's ambiguity and Congress' silence and further support the Government's argument that the Service is authorized to obligate the vessels to fund the monitoring program. In sum, "Section 1853(b)(8) grants authority to require that vessels carry at-sea monitors. Sections 1853(a)(1)(A) and (b)(14) grant authority to implement measures 'necessary and appropriate'..."[133] The Service's legislative purpose is revealed through Section 1853's necessary and appropriate clauses and the Act's penalty provisions, which "allow(s) the Service to impose permit sanctions for failure to make 'any payment required for observer services provided to or contracted by an owner or operator." [134] These portions of the Act signify the promulgation of the monitoring programs.

Section 1853a(e) outlines the limited access privilege program in which "...a council may submit, and the secretary may approve, for a fishery under a limited access system, a limited access privilege program to harvest fish if the program meets the requirements of this section."[135] The requirements to harvest fish, contingent on approval, include rebuilding a fishery that has been overfished. Any person who is deemed a U.S. Citizen or eligible for the limited access program must process their fish on vessels in compliance with the limited access protection program. Failure to comply with the requirements stated in this section will result in redaction of the limited access privileges. The adoption of this portion of the Act only strengthens our argument because it does not impose any restrictive stipulations on the Service. Rather, it seemingly broadens the Service's authority to impose industry-funded monitors by not

[133] Raimondo, 366.
[134] *Id*.
[135] 16 USC § 1853a.

specifically addressing that specific authority to do so as outlined in Section 1853(b)(8). Section 1853(b)(8) authorizes the implementation of the monitoring program. Section 1853a(e)'s limited access program covers ways to fund management ventures, but does not mention who or what will fund the monitoring program. This is the same statutory silence delineated in Chevron that gives way to the delegation to an agency's reasonable interpretation. Section 1853a(e) imposes expansive language over management operations. Just because the monitoring program is not specifically addressed is not to say it was expressly omitted. The limited access program leaves room for the Service's reasonable interpretation that the private vessels must fund the monitoring program. Similarly, the fee program as stipulated in Section 1862(b)(2), does not limit the Service's authority to require the industry to pay the monitoring program's fees. The stated portion of the fee program in Section 1862(b)(2) can be distinguished from that on the Omnibus Amendment and Final Rule: "under Section 1862, money collected from regulated parties passes through government coffers, while under the Omnibus Amendment and Final Rule, regulated vessel owners pay third-party monitors directly to supply services required for regulatory compliance."[136] Under the Service's jurisdiction, the fee is not paid through the government. Once more, the Service's authority is not limited by the Act; this detached fee program is not constrained to Congress's implicit sanction of a governmental channel. The Service can require the fees be paid directly to the facilitator.

The foreign fishing monitoring program establishes a surcharge binding to foreign vessels. With the Service enforcing this surcharge, this is how the observers are funded. Section 1821 requires "a surcharge in an amount sufficient to cover all the costs of providing a United States observer aboard that vessel."[137] Outlining the plan for monitoring in the foreign fishing

[136] Raimondo, 367.
[137] 16 USC §1821(D)(4).

vessel context does not preclude the Service's ability to render all other contexts, such as that of the present case, not responsible for bearing the costs. As a result of the ambiguous, broad language of this portion of the Act, this provision can apply to all vessels, not just foreign fishing vessels. We can assume that Congress did not categorically prohibit the application of this provision to private contractors. The penalties provisions of the Act further support this point. The District Court wrote, "If Congress had intended for penalties associated with industry-funded monitoring to apply only in the foreign fishing context, the court would expect that Congress in the penalty provisions would have specifically referenced foreign vessels or included a cross-reference to the foreign fishing provision."[138]

Section 1853 establishes that the contents of any fishery management plan should be created to include measures that "require that one or more observers be carried on board a vessel of the United States engaged in fishing for species that are subject to the plan, for the purpose of collecting data necessary for the conservation and management of the fishery."[139] It can be argued that the presence of a monitor on board of the vessels is a necessary precaution to have in place to ensure every vessel is abiding by the law and not overfishing, or otherwise being destructive to the ecosystem. The Act promulgates that the management plans should account for the natural habitat and "minimize to the extent practicable adverse effects on such habitat caused by fishing, and identify other actions to encourage the conservation and enhancement of such habitat."[140] While the necessary and appropriate clauses provide some guidance as to funding the monitoring program, and authority to implement "'regulations as may be necessary or appropriate' gave it authority to act, as it saw fit, without any other statutory authority to adopt

[138] Raimondo, 368.
[139] 16 USC § 1853(b)(8).
[140] 16 USC § 1853(a)(7).

the" monitoring program, the Service does not wholly rely on it for their grounds of authority.[141] The Service is inherently confined to the specifications put forth by the Act. Its interpretation is permitted with the guidelines put forth in Section 1853(b)(8), which delineates the requirement for at-sea monitors, but the details of the program are unresolved. The details are to be set and enforced with the Service's reasonable interpretation. They are not given free reign to determine the program's elements, but are confined to the Act and its objectives. The Act's objectives, professing to conserve the fisheries, prompt the Service to enact the monitoring program in order to meet that end. Appellants attempt to argue that because the monitoring program was not explicitly mentioned in the Omnibus Amendment, the Service lacks authority to implement the scheme. However, "The *expressio unius* canon is a 'feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved.'" [142]

The basis of the Act includes that a plan shall encompass any "conservation, economic, and social impacts" of the measures that the agency imposes on the "participants in the fisheries and fishing communities affected by the plan."[143] This line within The Act can be reasonably interpreted under Chevron to mean that there could or will be some economic costs that the fishing vessels will be expected to account for. Specifically, in this case, the economic costs would be referring to the regulations imposed on the vessels which require them to pay for the monitors while on a fishing trip.

Appellants' challenge to the Omnibus Amendment and Final Rule suggest that their adoption was arbitrary notwithstanding the Administrative Procedure Act's (APA) decrees against such policy. The court's "review is limited to determining whether the regulations

[141] New York Stock Exchange v. SEC, 962 F.3d 541, 554 (2020).
[142] Adirondack Medical Center v. Sebelius, 740 F.3d 692, 697 (2014).
[143] 16 USC § 1853(b)(8).

promulgated exceeded the Secretary's statutory authority and whether they are arbitrary and capricious."[144] Appellants argue that since Service did not provide a sufficient justification for the costs of the monitoring program, the Omnibus Amendment and Final Rule is unfounded. The supposed problem emerging from this rule was that since the limited access program requires fishermen to process their vessels, it commanded $710 per day, thus resulting in an economic burden. Noting when agency review is deemed unreasonable,

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[145]

Contrary to appellant's claim, the Service considered the economic responsibility the industry would have to bear in compliance with the monitoring program. The Service deliberated extensively on economic factors and took heed to any disagreement or disapproval. Appellant's argument fails to prove that the subsequent adoption of the monitoring program under the Omnibus Amendment and the Final Rule was arbitrary.

Appellants challenge the Act, arguing that both the Omnibus Amendment and the Final Rule deviated from proper procedure. This argument stems from alleged noncompliance of the Service with the agenda put forth by the Act specifically allocated for audit and scrutiny. Section 16 USC 1854 outlines the Secretary's roles in monitoring fishery business. It states that

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[144]Heckler v. Campbell, 461 US 458, 466 (1983).
[145] Motor Vehicle Manufacturers Association v. State Farm Mutual Auto Insurance Co., 463 US 29, 43.

"The Secretary shall approve, disapprove, or partially approve a plan or amendment within 30 days of the end of the comment period under paragraph (1) by written notice to the Council."[146] However, any procedural lapses or delay the Service may have committed are immune from scrutiny as, "Any technical error was therefore harmless and not grounds for vacating or remanding."[147] Appellants neglected the opportunity to submit instances of prejudice that the delay of alerting the Omnibus's Amendment publication may have caused. The Act itself provides no provisions for imposing penalties consequent to delays, and without any corresponding voluntary objections on behalf of the appellants, the Final Rule is valid.

The dispute of the legality of the Omnibus Amendment and the Final Rule was also brought by appellants in stating that the Service formed premature judgements on the legality of the Omnibus Amendment "through its use of overlapping comment periods with the Final Rule.**"**[148] Under the APA notice and comment requirements, the Service retains the authority to enforce their regulations how they see fit. Under the Act, there was a set time of "sixty and forty-five days, respectively, for the Omnibus Amendment and the Final Rule and stated that it would consider comments received on either document in its decision to approve the Amendment."[149] Since the Act did not require publication approval, "The Service could address public comments on the Omnibus Amendment upon promulgation of the Final Rule in view of Congress's expectation that the Service would consider comments on plan amendments and implement."[150] The Court's decision rendered that due to appellant's failure to meet the APA's requirements, the Service's regulation of the Omnibus Amendment is valid. Ultimately, the Final Rule serves to carry out the Act's objective of sustaining conservation and fishery management;

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[146] 16 USC § 1854(3).
[147] International Brotherhood of Teamsters v. United States DOT, 724 F.3d. 206, 217 (2013).
[148] Raimondo, 371.
[149] *Id*, 372.
[150] *Id*.

the industry-funded monitoring program provides a more accurate determination of the fisheries' output. It was expected of the Service, under Congress' guidance, to review the comments during the regular common period and to regulate them at the same time. The Service responded by evaluating the economic impacts, and explained their intentions to minimize those impacts. These responses prove that the monitoring programs created were not capricious or arbitrary. Appellants' argument that the Omnibus Amendment was not given enough notice cannot be supported. The overlapping of the Omnibus Amendment and the Final Rule's comment periods does not equate to prejudging the legality.

V. Conclusion

In summary of the foregoing elements of the case, we believe the Supreme Court should affirm the ruling of the United States Court of Appeals for the District of Columbia Circuit in favor of "the Service based on its reasonable interpretation of its authority and its adoption of the Amendment and the Rule through a process that afforded the requisite notice and opportunity to comment."[151] The Court should pursue application of Chevron v. NRDC and accept that the Service's interpretation of the Magnuson-Stevens Act to mean that the industry is responsible for covering the costs associated with the monitoring program is reasonable. For nearly 40 years the Supreme Court has sustained the principles of Chevron as binding and sound, and we assert that the perpetuation of this doctrine in future case law is crucial. The statute's ambiguity and Congress' silence on the issue of industry-funded monitoring programs is resolved with the support of Chevron's two-step framework. At Chevron Step One, which looks to the conventional understanding of the statute's language, the Service promulgated in the Omnibus Amendment and the Final Rule that the industry must bear the costs of the at-sea monitors. By

[151] *Id*, at 363.

looking into the different features of the Act, we can reasonably conclude the employed language and stipulations support the industry-funded monitors. At Chevron Step Two, the Service's interpretation of the Act must be taken into consideration to determine if it is reasonable. The Act's necessary and proper clauses and the Final Rule justify the Service's interpretation. The Final Rule serves to attain the service's conservation goals and is analogous to other provisions of the Rule that "impose compliance costs on the industry."[152] Appellants' other arguments fall short of asserting the Service is without the authority to promulgate the Omnibus Amendment and Final Rule. Procedural errors cannot sustain grounds for arbitrary or capricious arguments. That the Service provided appellants with ample opportunity to object to and comment on portions of the Omnibus Amendment is indisputable. We urge the Supreme Court to affirm the lower court's decision and garner favorable judgment to the National Marine Fisheries Service.

[152] *Id*, 369.

Pugin
V.
Garland

Authored by
Loren Lindsey

In the year 2014, Mr. Jean Francios Pugin, a permanent resident of the United States since 1985, pleaded guilty in the state of Virginia to being an accessory to a crime after the fact to a crime of a non-homicidal nature.[153] Pugin was sentenced to a year in jail and upon the completion of his sentence, was served a notice to appear in immigration court for a deportation hearing. The Immigration and Nationality Act sets forth provisions in which immigrants may be deported from the United States shall they commit an aggravated felony.[154] Under Virginia state law, accessory to a crime after the fact is considered a misdemeanor, and in the Immigration and Nationality Act, accessory after the fact is not listed as an aggravated felony, but interpreted as "an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year." [155]

Pugin filed a motion to terminate the deportation hearing proceedings but it was then denied. He then appealed to the Fourth Circuit Court of Appeals, where the Court ruled that because the interpretation of the statute is inherently ambiguous, the Board of Immigration Appeals did not err in allowing the Board of Immigration Appeals the freedom to exercise the Chevron Deference.[156]

The Ninth Circuit Court of Appeals held in a case not asymmetrical in fact pattern to this one that "Further, and contrary to the dissent's argument, the fact that Congress defined "aggravated felony" to include not just obstruction of justice offenses but offenses "*relating to* obstruction of justice" does not indicate its intent that the BIA "push the constitutional envelope."[157] The use of the modifier "relating to" broadens the INA's intended reach, but it is not an explicit indication that Congress intended that the BIA approach the constitutional

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[153] Petitioner's Brief at 8. Pugin v. Garland, 19 F. 4th 437 (4th Cir. 2021).
[154] 8 U.S.C. §1101
[155] 8 U.S.C. §1101 (a)(43)(S)
[156] Pugin v. Garland, 19 4th 437, 454 (4th Cir. 2021).
[157] Williams v. Babbitt, 115 F.3d 657, 662 (9th Cir.1997).

boundary, nor is it an excuse for abdicating our role."[158] Because of this holding in the Ninth Circuit in favor of the petitioner and the Fourth Circuit holding in favor of the respondent on a relatively congruent issue, we granted certiorari to this case to let a judicial record of opinion reflect the standard for future proceedings.

With both of these definitions comes a great sense of divergence, which begs the question of which definition should be used as the household standard in proceedings relating to the obstruction of justice and its intersection with immigration in the future. Today we are addressing the question at hand which is if a predicate offense requires a nexus with a pending proceeding, ongoing investigation, or judicial proceeding to qualify as an offense under 8 U.S.C. §1101(a)(43)(S).

The elements of ambiguity that allow for the executive administrative agency to be granted Chevron Deference must be confronted. This doctrine is a product of this Court that has been used to combat ambiguity left in Congressional statutes as it is interpreted by the executive legislative agency to which the policy is tied. This arose out of Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., where it was held that " In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests that Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities."[159]

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[158] Valenzuela Gallardo v. Lynch 818 F. 3rd 808, 824 (9th Cir. 2016).
[159] Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc. 467 US 837, 865-866 (1984).

Garland argues that the Board of Immigration Appeals was granted Chevron Deference at the start due to the discrepancy between the misdemeanor committed by Pugin and the aggravated felony listed for the crime in 8 U.S.C. §1101 (a)(43)(S). The precedent set forth by Mathis v. United States states that a state with a crime that is more loosely defined than that of a federal generic definition of a crime of the same manner cannot qualify as a predicate offense under the Armed Career Criminal Act.[160] Although different in the manner in which the statute is used, it still involves an executive administrative agency and the case of ambiguity that has brought this issue before the Court today.

The state of Virginia classifies accessory after the fact of a crime as a misdemeanor and uses common law to determine the elements of such classification. In determining if someone could be charged with "accessory to a crime after the fact" in Virginia, the Court examined three crucial elements. These elements are that the felony must be complete, the accused must know that the felon is guilty, and the accused must receive, relieve, comfort, or assist the felon.[161] Another formidable element to this distinction is that "the accused, at the time he assists or comforts the felon, has notice, direct or implied, that the felon committed a crime."[162]

The Board of Immigration Appeals has taken the distinction to mean that the accused must have acted with specific intent and that the actus rea is the key to determining whether or not Pugin formally engaged in being an accessory to a crime after the fact.[163] Although this issue is not an element of disputation between the two parties, it is an important examinable piece that leads to a road where Chevron Deference is the objective target.

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[160] Mathis v. US 579 US 500 (2016).
[161] Commonwealth v. Dalton 524 S.E. 2nd 860, 862 (Va. 2000).
[162] Dalton, 862.
[163] Pugin, 450.

In the Fourth Circuit, it was determined that Pugin's crime was a categorical match to the crime listed in §1101(a)(43)(S) under the precedent set forth by *Mathis* due to the Board of Immigration Appeal's broadened definition of "obstruction of justice" that fits a theorized conglomeration of "obstruction of justice offenses."[164] Pugin combats this by stating that the specific intent that is present in the Board's understanding of accessory to a crime after the fact is absent from the Virginia provision and a lower requirement of knowledge is necessary for the federal interpretation to be a categorical match to the state interpretation of the crime he is currently being accused of committing.[165]

The argument made by the Board of Immigration Appeals falls due to the element of specific intent being addressed as a necessary condition. Although specific intent has a small scope of its meaning and what qualifies as intent, it does little to cement the concept of ambiguity that the agency is seeking to benefit from as we believe that it specifies the crime completely. Specific intent used in the obstruction of justice may also render itself applicable to various other crimes written in the code and may shadow the roots of what is considered a crime and what is not.

This would diminish the hold that Pettibone v. United States has in its ruling on crimes relating to the obstruction of justice.[166] It is currently held that one is sufficiently charged with the obstruction of justice unless the "evil intent" to obstruct justice is found that is in relation to the merits of the crime rather than to violate the statute.

If specific intent is the only element creating a line of separation between a person offending justice administration or proceedings, it may push the boundary line to make the

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[164] Pugin, 450-451.
[165] Pugin, 451.
[166] Pettibone v. United States 148 US 197, 207 (1893).

obstruction of justice unrecognizable; putting forth the importance of a proceeding potentially unraveling rather than investigating and adjudicating proceedings that are already in place.

Garland has argued that because of the ambiguity left by Congress in the Immigration and Nationality Act the Board of Immigration Appeals should be able to insert their judgment on its interpretation and that the wording of "relating to" that modifies the obstruction of justice encapsulates the merits of crimes that were not specifically outlined by §1101(a)(43)(S), and believes that crimes that are committed on the auspices of this concept can occur before proceedings begin and can also prevail after the justice proceedings.[167]

Pugin believes that the phrase "obstruction of justice" in 8 U.S.C. §1101 (a)(43)(S) is a byproduct of what was already laid before in 18 U.S. Code Chapter 73[168], which lists various crimes in its subsections which relate to the obstruction of justice. A large portion of these crimes specifically states that a pending proceeding or ongoing investigation must be a condition met for one to be an active participant in the obstruction of justice.[169]

The definition of "obstruction of justice" that the Board of Immigration Appeals has interpreted and its affirmation from the Fourth Circuit does not require a temporal nexus under crimes categorized as "relating to" the obstruction of justice, and this phrasing expands the meaning, therefore making it ambiguous to summate all of the offenses that could relate to this category.[170] We reject this concept.

The phrasing of §1101(a)(43)(S) tightens the provisions of which a crime that "relates to" the obstruction of justice can be considered. As per the statute, "The term "aggravated felony" means . . .an offense relating to obstruction of justice, perjury of subordination of perjury, or

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[167] Respondent's Brief at 24. Pugin v. Garland 19 F. 4th. 437 (4th Cir. 2021).
[168] Petitioner's Brief at 7-8. Pugin v. Garland 19 F. 4th 437 (4th Cir. 2021).
[169] 18 U.S.C. Chapter 73 - Obstruction of Justice
[170] Pugin, 448.

bribery of a witness, for which the term of imprisonment is at least one year. . .".[171] These crimes are specifically laid out following the phrase "relating to", and lack the verbiage as outlined by obstruction of justice crimes in 8 U.S.C. Chapter 73. The ambiguity being used to further broaden this alleged gap only feeds into the dangers of infringing on the confines of when a crime starts and when it ends. United States v. Aguilar shows that a nexus requirement to the obstruction of justice statute outlined in 18 U.S.C. §1503 is required.[172] It is further cemented by stating that "Some courts have phrased this showing as a "nexus" requirement - that the act must have a relationship in time, causation, or logic with the judicial proceedings."[173]

The lack of constraint around when the obstruction of justice can occur poses threats to people unknowingly committing crimes or becoming deterred from reporting crimes or details of crimes for fear of obstructing justice in some manner along the way. In Marinello v. United States, the Court held that "the government must show a nexus between the defendant's conduct and a particular administrative proceeding." [174]

This further perpetuates the idea that in order to qualify as an aggravated felony pertaining to the obstruction of justice from §1101 (a)(43)(S), a nexus related to a current proceeding or ongoing investigation is required. The element of reasonable foreseeability is also addressed in Marinello, which contributed to a standard understanding of reasonable foreseeability being a factor in determining what concludes as "obstruction." Furthermore, the Board of Immigration Appeals has not laid out what exactly "reasonable foreseeability" is meant under their standards, and the frequency of the language used in other areas of law is the minimal standard applied in this circumstance.

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[171] §1101 (a)(43)(S)
[172] United States v. Aguilar 515 US 593, 600 (1995).
[173] Aguilar, 599.
[174] Marinello v. United States 138 S. Ct. 1101, 1110 (2018).

The Fourth Circuit, in examining this element of the Board of Immigration Appeals's definition of "obstruction of justice" and "crimes relating to obstruction of justice" failed to take this into account. While Marinello refers to a tax case in which taxes were not being paid and ultimately resulted in tax fraud in a dispute with the Internal Revenue Service (IRS)[175], we believe that the standard set forth by that case still applies, and is somewhat of a foundational backing to uphold the support of various cases that deal with executive administrative agencies and the ambiguity surrounding the language used by Congress in creating statutes to be interpreted by said agencies.

When is an action assumed to be impending a prosecution, an investigation, or a judicial proceeding? When do these proceedings definitively start? When do they definitely end? How can someone who is unfamiliar with the justice system and all of the schema surrounding it truly be aware if their actions may bring forth judicially administrative action? Is there an objective standard that these proceedings can abide by?

All of these questions have been operating in a space as an esoteric enigma that has yet to be formally decided due to the fine line between the two extremes, which is what the Court has feared, but is being tasked with deciding on today.

As stated before, there is a looming fear in the two conclusory decisions this Court may find for. In the case of preserving the delicate apparatus set forth by the Chevron Deference as granted by this Court in a prior ruling, it further perpetuates the apprehension in allowing such a "hands-off" approach to be inflicted upon courts at both the state and federal levels. It may also provoke an infectious lack of definition in legislation to enable these executive agencies to will their power in policies that may infringe upon the rights of American citizens, immigrants, and permanent residents.

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[175] Marinello, 1104-1106.

Contrasting this postulation, the narrowing of §1101 (a)(43)(S) may kickstart a phenomenon of revision amongst statutes put forth by Congress with adherence to an application by executive administrative agencies, which may fail to encompass heinous crimes because of the precision of the wording. It may also lead to a conglomeration of uncodified precedents set forth by different courts across the nation, and give an unfair advantage to petitioners who are dependent solely on the judge who renders the opinion at the conclusion of the case.

Although both of these scenarios may appear to be unfavorable outcomes at the prima facie level, this Court contends that one may be more progressive and hold the answer to the question being disputed by both parties today. An offense that relates to the obstruction of justice as a predicate must require a nexus with a pending or ongoing investigation or judicial proceeding.

In this decision, we believe that the Board of Immigration Appeals erred in their interpretation of ambiguity that allowed them to operate as a court in the determination of Mr. Pugin's conviction. The ambiguity of the statute is far too broad given the narrow provisions listed by other statutes enforced by other executive administrative agencies. It is also too broad underneath the standard of the subsections of the same statute, §1101 (a)(43)(S), from which the violation was believed to have occurred.

We also reject the confirmation of said ambiguity from the use of "specific intent" as outlined by Garland, as it has been determined that specific intent through the lens of Virginia state law and federal law require different components. The element of specific intent may be a key factor in the determination of whether or not charges can be brought forth under 8 U.S.C. §1101 (a)(43)(S). Had the Board of Immigration Appeals not decided that Virginia law with the codified elements of the completion of a crime, the accused must know that the felon is guilty,

and the accused helping receive, relieve, comfort, or assist the felon, the match would have never been made and Mr. Pugin would not have been facing the possibility of deportation after thirty-seven years spent in the United States as a permanent resident.[176] Because of the discrepancy in specific intent (*Virginia law not making specific intent an enumerated requirement*) and the federal law insisting that specific intent is a requirement[177], the crimes are unequivocal in nature, and its interpretation by the Board of Immigration Appeals is null and void.

Another topic that renders consideration in the decision we will come to today is the cultural sensitivity pertaining to the lack of education about the justice system, the lack of trust in the justice system, and the overall background of the group of people that the Immigration and Naturalization Act affects were never taken into account, and while the Court is not here today to legislate from the bench, bring forth political change, or even ignite social change, it is important to lay down the framework for issues of this nature.

The broadening of this provision allows a diminished possibility for the true functionality of the separation of powers as written by the framers, and constructs a culture of governmental imperialism that foreshadows political policies that wane against the foundation of the Constitution; asking for remedies to be made by a Court whose powers may be overstepped at any moment shall an interpretation be left 'vague' enough by Congress. While there are threats posed to Congress by narrowing statutes so that the lack of mystery surrounding which governmental power may enact its role, maybe the best recommendation considering the loose navigation that the justice system has in issues pertaining to immigration, the true definition of

[176] Commonwealth, 862.
[177] 18 U.S.C. Chapter 73.

the obstruction of justice, and attempting to balance real-world experiences with the Constitution.

We conclude that the judgment issued by the Fourth Circuit Court of Appeals be reversed.