

Memorandum
National Organization for Women Foundation

To: National Organization for Women Foundation Board Members
From: Jan Erickson, Director, Foundation Programs
Date: July 8, 2024

NOW Foundation Joins Amicus Brief

Johnson, et al v. Grants Pass
Supreme Court of the United States
Issue(s): Homelessness, Use of Public Property
Docket No, 23-175

This case, *Johnson, et al v. Grants Pass*, challenges ordinances in the city of Grants Pass, Oregon that prohibit homeless persons from using blankets, pillows, or cardboard boxes for protection while sleeping within the city limits, a type of “camping ban.” The court took up the question of whether the enforcement of laws regarding camping on public property constitutes “cruel and unusual punishment,” which is prohibited by the Eighth Amendment. The city argues that the ordinances prohibit camping on public property by anyone, while the challengers argue that they criminalize homelessness. The justices ruled in favor of the city, arguing that barring camping on public property by everyone does not violate the ban on cruel and unusual punishment.

The ordinances in question impose a \$295 fine, increasing to over \$500 if unpaid, for the initial citation. After two citations, an order that bans the individual from city property can be issued and a violation of that order can result in conviction on criminal trespass charges, which carry penalties of up to 30 days in jail and a \$1250 fine. The U.S. Court of Appeals for the 9th Circuit ruled, in a case involving Boise, Idaho, that the Eighth Amendment’s ban on cruel and unusual punishment prohibits the imposition of criminal penalties for sleeping outside by those experiencing homelessness and do not have access to shelter. As a result, three homeless individuals in Grants Pass went to court to challenge their city’s ordinances. The lower courts agreed with the challengers that enforcement of the ordinances violates the Eighth Amendment.

The National Women’s Shelter Network, Inc. (NWSN) led this amicus brief effort joined by the National Organization for Women Foundation, and numerous other organizations. The brief discusses how homelessness is rising, especially among women and children, and criticizes the insufficient support for these populations. The brief points out, “domestic violence victims made 13,335 unmet requests for [homeless] services. The majority of the unmet requests (54%) were for emergency shelter and housing.” Furthermore, it elaborates on how women and children are uniquely vulnerable to homelessness due to domestic and gender-based violence. According to the brief, “approximately 6.9 million women have needed housing services in their lifetime as a

result of intimate partner violence, and studies have found that between 22% and 57% of all women experiencing homelessness report that gender-based violence is ‘the immediate cause of their homelessness.’” The brief argues that the Grants Pass ordinance punishes women and children experiencing homelessness in an unusually cruel manner. The brief was filed with the assistance of Alston & Bird LLP and Greenberg Traurig LLP.

Cases of Interest

FDA v. Alliance for Hippocratic Medicine

Supreme Court of the United States

Issues: Medicated Abortion Access

Docket No, 23-35

FDA v. Alliance for Hippocratic Medicine (AHM) discusses the constitutionality of the use of mifepristone for medication abortion. AHM argues that FDA did not act properly regarding their 2016 and 2021 changes to the conditions on the use of mifepristone, which allow the drug to be utilized through the 10th week of pregnancy. Mifepristone is used in about 60% of abortions in the United States.

The challengers include several individual doctors and medical groups who oppose abortion on religious and moral grounds. They brought their case to federal court in Texas, arguing that mifepristone is unsafe and criticizing the process used by the FDA to approve the drug. The District Court judge suspended the FDA’s approval of the drug on the grounds of “legitimate safety concerns.” The FDA and the manufacturer of mifepristone, Danco, appealed to the Fifth Appellate Court, which ruled in their favor.

The Supreme Court unanimously threw out the case on June 13, ruling that the challengers do not have the legal right to sue (standing) and that opposing abortion is not sufficient to bring a case to federal court. However, the justices did not address whether the FDA acted properly in expanding access to mifepristone. According to the opinion, the challengers failed to demonstrate how they would be harmed by the FDA’s mifepristone policies. While this case was thrown out, there is still potential for another case to be made against mifepristone and similar medication abortion drugs.

United States v. Rahimi

Supreme Court of the United States

Issues: Gun Rights, Domestic Violence

Docket No, 22-915

In the *United States v. Rahimi*, the court grappled with the question of whether a federal law, which prohibits the possession of firearms by someone with a domestic violence restraining order, violates the Second Amendment. The Court ruled that when an individual has been found by a court to pose a credible threat to the physical safety of another, that individual may be temporarily disarmed, in alignment with the Second Amendment.

The challenger, Zackery Rahimi, had a civil protective order entered against him at a state court in Texas, following an incident in which he dragged his then-girlfriend and mother of his child to his car following an argument, pushed her inside the vehicle, and hit her head on the dashboard. When he realized that a witness was present, he fired a gun at the bystander. The civil protective order not only prevents him from being within 200 yards of the woman and her family, but also from owning a gun. Rahimi was later arrested for violating the restraining order, charged with using a gun to threaten another woman, and involved in five other shooting incidents. Following his identification as a suspect in the shootings, police searched his home with a warrant and identified a rifle and a pistol. Because Rahimi was explicitly prohibited from owning a gun per the protective order, he was indicted.

Rahimi asked the court to dismiss his indictment on the grounds that the law is unconstitutional, but a federal district court and 5th circuit court rejected his challenge. In March, however, the 5th circuit court issued a new opinion, deeming the law unconstitutional. This case is the first Second Amendment Case since *New York State Rifle & Pistol Association v. Bruen*, in which the Supreme Court struck down New York's handgun-licensing plan. The Supreme Court's opinion stated that the US should uphold gun restrictions only when there is a tradition of such regulation in U.S. history. The Biden administration brought Rahimi to the Supreme Court, arguing that Congress had the power to disarm individuals who are not law-abiding or responsible citizens at the founding of the United States. Furthermore, they argue that the ban only applies to those who are particularly dangerous and represent a credible threat to someone's safety, which is true in Rahimi's case. The Supreme Court upheld the decision to bar those with a domestic violence restraining order from owning guns in a vote of 8-1. To justify their decision, the court pointed to examples of early American law in which courts prevented dangerous individuals from owning and acquiring guns. However, right-wing legal advocacy networks, reportedly, are prepared to take action in the future with more sympathetic plaintiffs.

The restriction of gun ownership is a critical issue for American women and their safety. In the United States, more than half of female homicide victims are killed by a current or former male intimate partner, and 96% of murder-suicide victims are female. Firearms are used in more than 50% of these IPV (Intimate Partner Violence) related homicides. Access to firearms plays a large role in IPV injury and death, as a victim or survivor of IPV is five times more likely to die when an abusive partner has access to a gun. Alarming, the rate of IPV-related firearm homicides in the U.S. is significantly higher than in comparable nations. American women are twenty-one times more likely to be murdered by a firearm than women in other affluent countries. Furthermore, IPV-related firearm homicides have risen dramatically, increasing 58% from 2014 to 2020.

Moyle v. United States (Leaked)
Supreme Court of the United States
Issues: Abortion
Docket No, 23-726

Moyle v. United States deals with the issue of whether the court should stay the order by the Idaho District court prohibiting the enforcement of Idaho's Defense of Life Act, which prohibits

abortion unless necessary to save the life of the mother, on the grounds that the Emergency Medical Treatment and Labor Act (EMTALA) preempts it. An initial draft opinion was leaked, which was quickly followed by the release of an official opinion.

Emergency Medical Treatment and Labor Act (EMTALA) is a 1986 Act of Congress, which requires hospital emergency departments that accept Medicare payments to provide appropriate medical screening examinations and stabilizing treatment for anyone seeking treatment. Because most hospitals accept Medicare, EMTALA applies to most hospitals in the United States. The Idaho Defense of Life Act prohibits nearly all abortion, with exceptions for reported cases of rape or incest or when necessary to prevent the death of the mother. Furthermore, it makes it a crime to provide abortions in prohibited circumstances.

Moyle v. United States deals with the question of whether hospital emergency rooms in Idaho must provide abortions during an emergency. The Biden Administration argues that EMTALA can override state laws that criminalize abortions. Idaho rejects the interpretation of EMTALA, arguing that it does not require physicians to perform specific treatments like abortions. A District Court agreed with the Biden Administration's interpretation of EMTALA and stayed the order before it went into effect. The State of Idaho, joined by Republican supporters, is asking the Supreme Court to put a hold on the District Court's order and rule on the application of EMTALA to the Idaho Defense of Life Act.

On June 26, a draft opinion on the case was leaked from the Supreme Court. The official opinion, released on June 27, sends the case back to the lower courts. For now, it grants pregnant individuals protection under EMTALA, but it is just a temporary reprieve. It did not rule definitively that EMTALA preempts abortion bans and pregnant individuals are still at risk.

Loper Bright Enterprises, Inc. v. Raimondo
Supreme Court of the United States
Issues: Power of Federal Agencies
Docket No, 22-41

Loper Bright Enterprises v. Raimondo concerns the issue of whether the court should overrule *Chevron v. Natural Resources Defense Council*, or further clarify the ruling. The court ruled to cut back on the power of federal agencies, arguing that courts should interpret ambiguous laws. This effectively overturned the Chevron deference principle.

Chevron v. Natural Resources Defense Council is a 1984 Supreme Court Case. It established the extent to which a federal court should defer to the agency's construction of a statute that said agency administers. In this case, the Natural Resource Defense Council sued the Environmental Protection Agency to challenge a regulation related to the Clean Air Act. It aimed to answer the question of whether the EPA's decision to allow states to treat all pollution-emitting devices within the same industrial groups as though they were part of a singular "bubble" based on the "stationary source" should be allowed. The Supreme Court unanimously upheld the EPA regulation, reversing the federal appellate court decision. This case established the Chevron deference principle, defining the extent to which a federal court should refer to individual agencies. According to Chevron, if a statute is ambiguous, agencies can interpret the statute.

When an interpretation is arbitrary, harmful, or contrary to the statute, then the courts can step in to substitute their own interpretation.

In *Loper Bright Enterprises v. Raimondo*, the challengers argue that the current deferential standard is unconstitutional. Many conservatives believe that courts, as opposed to federal agencies, should interpret the law. The Biden administration opposes overturning the doctrine. At the center of this case is a law that grants the Secretary of Commerce and National Marine Fisheries Services the power to implement fishery management programs. In implementing fishery management programs, the agencies require observers aboard certain fishing vessels to collect data and ensure conservation. However, the cost of this is paid by the fishing industry, as opposed to the agencies. Fishing companies, led by Loper Bright Enterprises, opposed this policy and challenged the rule, arguing that the agencies were not authorized to require it. While lower courts initially ruled against Loper Bright Enterprises, they are asking the Supreme Court to review the decision and overrule *Chevron*.

This ruling will radically change the legal system and the way that federal agencies function. The opinion argues that the Administrative Procedure Act “makes clear that agency interpretations of statutes — like agency interpretations of the Constitution — are not entitled to deference... it thus remains the responsibility of the court to decide whether the law means what the agency says.” The ruling takes power out of the hands of agencies, who have the most technical, scientific, and practical knowledge and experience, and into the hands of courts, who may have little background in the subject.

Trump v. United States
Supreme Court of the United States
Issues: Presidential Immunity
Docket No, 12-939

In *Trump v. United States*, the Court decided whether, and if so to what extent, a former president enjoys presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office. The court ruled 6-3 that a former president can never be prosecuted for official actions committed during the presidency.

In August of 2023, former President Trump was indicted on four accounts regarding the January 6 attacks on the US capitol and conspiracy to overturn the results of the 2020 election charges. Trump asked a District court to throw out the charges, arguing that he cannot be held criminally liable for official acts. The District Court denied the request, which was later upheld by a Court of Appeals. Lawyers for the United States emphasized in oral arguments that the Supreme Court has never recognized absolute criminal immunity for any public official, while lawyers for Trump argued that without overarching presidential immunity, the presidential decision-making process would be destroyed. Following the decision, the case will return to the lower courts to determine if Trump’s actions at the center of the case constitute official or unofficial actions.

In the opinion, Justice Roberts argued that Presidents have absolute immunity for official acts relating to powers granted to them by the Constitution. The justices who agree with this ruling

argue that a president should not be penalized for exercising their rights as President. An issue with this ruling is the ambiguity of the term “official acts,” which still requires further clarification, as well as the discernment of which of Trump’s acts constitute official ones.

Justice Sotomayer issued a particularly strong dissent in which she described how the ruling “reshapes the institution of the presidency” and makes it so that “a President’s use of any official power for any purpose, even the most corrupt, is immune from prosecution.” She argues that nothing in the constitution could support this level of presidential immunity. Jackson affirmed Sotomayer’s dissent and lamented how the ruling has “unilaterally altered the balance of power between [the three branches of government]... undermines the constraints of the law as a deterrent for future Presidents who might otherwise abuse their power.” ([Sotomayer's dissent: A president should not be a 'king above the law' | AP News](#) and [Fiery Sotomayer dissent on Trump immunity: 'fear for our democracy' \(usatoday.com\)](#))

Trump v. Anderson
Supreme Court of the United States
Issues: Trump Election Eligibility
Docket No, 23-719

In *Trump v. Anderson*, the Court held that Congress alone could decide whether Section Three of the Fourteenth Amendment disqualifies an individual from running for the office of President. The ruling means that states cannot disqualify former President Trump from the presidential ballot for his role in the January 6 attacks on the capitol.

The case began in a Colorado state court in which a group of voters argued that Trump was ineligible to appear on the ballot because Section 3 states that no one “shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State,” if that person had previously sworn, “as a member of Congress, or as an officer of the United States,” to support the Constitution but then “engaged in insurrection or rebellion” against the federal government. The state court concluded Trump had engaged in insurrection but rejected the request to remove him from the ballot on the grounds that the President is not an “officer” of the United States. Voters appealed to the Colorado Supreme Court which ruled that Trump was ineligible, which Trump then brought to the Supreme Court.

In the opinion, the justices noted that Section 3 was designed to prevent former Confederates from returning to power following the Civil War. They also took issue with the idea that states could be responsible for declaring specific candidates ineligible because it could result in a “patchwork” wherein a candidate was eligible in some states, but not others. The justices held that only Congress and not states can enact section 3. While the ruling was unanimous, three justices, who agreed with the ruling but not the reasoning, argued that the court went too far in defining who can enforce Section 3. The court did not offer an opinion on whether Trump had engaged in insurrection.

Garland v. Cargill
Supreme Court of the United States
Issues: Guns
Docket No, 22-976

In *Garland v. Cargill*, the Court decided that bump stock devices are not a “machine gun” and struck down a rule that banned bump stocks. The justices rejected the federal government’s argument that rifles with bump stocks are machine guns, which are generally prohibited. In the opinion, Justice Thomas argued that Congress could have enacted a law to ban all weapons capable of high rates of fire but did not, and therefore the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) was incorrect in interpreting a federal ban on machine guns to include bump stocks. While most Supreme Court cases regarding guns deal with interpreting the Second Amendment, this case focused on defining machine guns.

A bump stock is an attachment to a semi-automatic rifles that allow it to discharge at a higher rate, of about 100 rounds per minute. The case originated in a Trump administration rule from 2018 banning bump stocks, which followed a mass shooting event at a music festival in Las Vegas. In the shooting, the gunman used a semi-automatic rifle with a bump-stock device, which enabled him to kill 60 people and injured over 500. The rule contradicted prior ATF regulations, which held that only some kinds of bump stocks are machine guns. Following the 2018 rule, anyone owning a bump stock was required to destroy or surrender it.

A gun owner who surrendered two bump stocks went to court to challenge the rule. A US Court of Appeals struck down the ruling, which prompted the Biden administration to bring it to the Supreme Court. The Supreme Court upheld the Court of Appeals ruling.