

# Another Dangerous Term Begins at the Supreme Court



# Introduction

Because of the far-right extremists on the Court, we have lost our constitutional right to abortion care. Millions of us have been saddled with crushing student debt. We have lost the benefits of affirmative action in higher education. We've lost environmental protections for wetlands. Laws protecting us from being turned away from businesses by prejudiced owners have been weakened. Our ability to work effectively in labor unions has been undermined.

It is no surprise that the Court's approval level has reached record lows. The constant revelations of unethical conduct by some of the justices adds to the recognition that we have a Court majority that regularly rules for the powerful and against the rest of us.

The Supreme Court's disastrous decisions made headlines. But since the headlines faded, lower federal courts have been interpreting and applying them. Some judges have been finding ways to extend the logic of these rulings to other contexts, to constrict our freedom even more. In contrast, we have already seen numerous decisions by Biden judges who continue to take seriously their obligation to protect the rights of all people before them, consistent with the Constitution, civil rights laws, and basic fairness.

In the term beginning October 2, the Supreme Court will be deciding new cases that lower court judges will eventually have to work with. The current 6-3 far-right majority threatens to continue its efforts to turn back the clock and upend decades of progress. This term, the Court will be hearing cases that threaten to:

- put guns in the hands of domestic abusers;
- uphold laws weakening Black voters' political power;
- make it harder to uncover illegal discrimination;
- block effective protections for our health, safety, and rights; and
- limit our ability to have fair taxation.

## A Pressing Case Not Yet on the Docket

In addition to the cases already docketed, there is an enormously important one involving the right to abortion care. We could see the Court ratify the far-right Fifth Circuit's extreme opinion sharply limiting the availability of mifepristone. The FDA approved it for use many years ago, but anti-abortion activists manufactured a legally bankrupt argument claiming that the FDA hadn't acted legally. They made sure to get Trump judge Matthew Kacsmaryk, who predictably ruled in their favor. The case was appealed to the Fifth Circuit, which upheld several of the restrictions Kacsmaryk imposed and had [a deeply disturbing concurrence by Trump judge James Ho](#).

The Supreme Court has stayed the Kacsmaryk order so mifepristone remains available while the case is in litigation. Ultimately, it will be up to the Court that overturned *Roe v. Wade* to decide whether our access to a safe and reliable abortion medication should be eliminated.

# Cases in the 2023-2024 Term

## Gun Violence (United States v. Rahimi)

The Court will address whether people subject to a domestic violence restraining order have a constitutional right to firearms. Oral arguments are scheduled for November 7.

### What is this case about?

The Supreme Court will address whether people subject to a domestic violence restraining order have a constitutional right to firearms.

The case springs from the far-right majority's dangerous decision in 2022's *New York State Rifle & Pistol Association v. Bruen*. In that case, the Court severely weakened the ability of states and cities to have reasonable restrictions on firearms. The majority created a new type of analysis for all firearms safety laws. Before, judges had balanced the individual's right to own and carry firearms with the urgent need to prevent gun violence. But under *Bruen*, judges can no longer consider public safety interests. Instead, they can only uphold a firearms regulation if a comparable law existed at the time the Second or Fourteenth Amendments were adopted.

After *Bruen*, gun safety laws that had been upheld in the past are now subject to attack. That's what happened in this case.

### What protections are opponents of gun safety measures challenging?



Under the federal Violence Against Women Act, it is illegal for someone subject to a domestic violence restraining order to possess a firearm or ammunition. Zackey Rahimi was subject to a restraining order in 2019, after he assaulted and threatened his girlfriend. In 2020 and 2021, he was involved in five different shootings. When police searched his home, they found firearms. He was convicted for possessing them while subject to a domestic violence restraining order.

Rahimi claimed this violated his Second Amendment rights. Even the far-right Fifth Circuit rejected that claim. But that was before *Bruen*. Afterward, the court reconsidered Rahimi's case under the new *Bruen* standard and ruled in his favor. The Fifth Circuit judges determined that at the time the Second Amendment was adopted, there was no historical analog to the federal law at issue here. Therefore, they concluded, the law is unconstitutional.

The Fifth Circuit opinion itself is an example of why lower court judges are so important. A panel comprising two Trump judges and a Reagan judge took the *Bruen* decision and made it even worse.

## Who could be affected by a bad decision in this case?

The Biden administration is defending the law’s constitutionality, using the “history and tradition” standards set forth in *Bruen*. The administration cites the Court’s own precedents recognizing that Congress can disarm people who are not “law-abiding, responsible” citizens. The administration also cites historical examples to show that people in the Founders’ era did not believe that violent individuals had the right to bear arms.

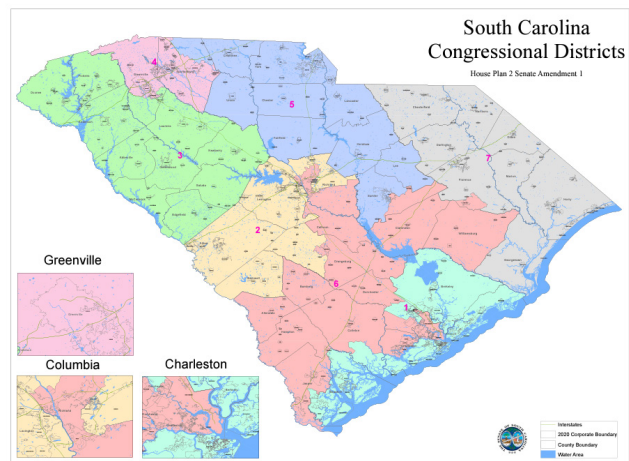
If the Supreme Court upholds the Fifth Circuit’s decision, it would endanger us all. It would especially impact people who have been terrorized by spouses and domestic partners. People who assault or threaten vulnerable members of their families would have a constitutional right to guns, adding to the deadly threat that those family members already live with. In addition, such an extension of *Bruen* would send a signal to lower court judges to interpret it broadly and make it even harder to uphold reasonable gun safety protections.

## Racial Gerrymandering and Weakening Black Electoral Power (Alexander v. South Carolina Conference of the NAACP)

The Court will decide if South Carolina Republicans used an illegal racial gerrymander in drawing congressional districts and whether they intentionally reduced Black voters’ electoral power. Oral arguments are scheduled for October 11.

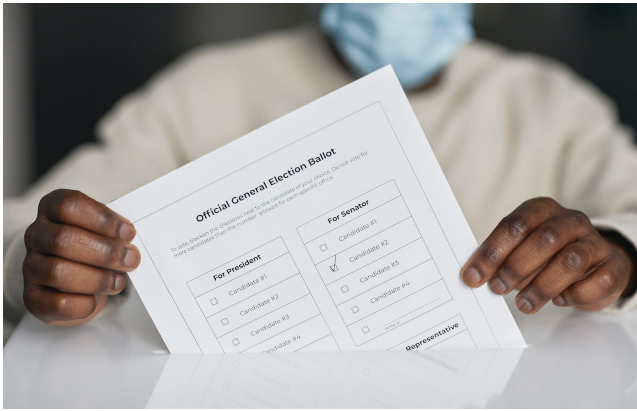
### What is this case about?

This case is about how South Carolina Republicans drew the boundaries for a congressional district long anchored in Charleston County. They moved more than 30,000 Black voters out of the district, which made it whiter and more likely to elect a Republican. The South Carolina NAACP went to court. They say the voters were moved because of their race, which is not legal. But the Republican legislators claim they didn’t take race into consideration at all. Instead, they claim they were engaged in a partisan gerrymander, which is legal.



### What happened at trial?

Redistricting challenges like this are heard by a panel of three judges. In this case, the panel held an eight-day trial and heard from 42 witnesses. The judges weighed testimony and determined which witnesses were credible – and which weren’t. The judges unanimously ruled for the NAACP.



First, the panel ruled that race was the predominant factor in the design of the congressional district. Claims by Republican mapmakers that they didn't consider race rang "hollow" in light of the "striking evidence" to the contrary. Traditional redistricting principles like minimizing the number of people shifted into a new district were subordinated to one goal: to get the Black population of the district down to 17 percent, the level needed to ensure Republican dominance.

The court found that the legislature "ultimately exiled over 30,000 African American citizens from their previous district and created a stark racial gerrymander of Charleston County and the City of Charleston." As a racial gerrymander, it violated the Equal Protection Clause of the Fourteenth Amendment.

The panel also concluded that race wasn't just one of several factors, but was the predominant factor behind the redistricting plan. Therefore, the court held, the legislature acted with a racially discriminatory intent to diminish Black voters' electoral power. That made it violate both the Fourteenth and Fifteenth Amendments. (The Fifteenth Amendment prohibits intentional racial discrimination in voting.)

### **What will the impact of the Supreme Court's decision be?**

If the far-right justices find a way to uphold South Carolina's map, it will open the door to even more gerrymandering that weakens Black voters. This will affect voters not only in South Carolina but in every state with significant numbers of Black voters.

## **Uncovering Illegal Discrimination (Acheson Hotels v. Laufer)**

The Court could undermine the longstanding civil rights practice of using "testers" to uncover illegal discrimination. Oral arguments are scheduled for October 4.

### **What is this case about?**

This case is about whether people uncovering illegal disability discrimination can go to court if they were testing the business without actually planning to use it.

Deborah Laufer has multiple sclerosis and cannot move freely without a wheelchair. She went to the website of Acheson Hotels to learn about their inn in Maine. The website did not identify accessible rooms, give an option for booking an accessible room, or provide her enough information to tell if the inn's rooms and features were accessible to her.



When people with disabilities plan to travel, it is essential to know if a hotel they are considering is going to be accessible. To enforce the Americans with Disabilities Act (ADA), the Justice Department requires hotels to make accessibility information available on their reservations website. That way, a potential guest can determine if the hotel will meet their needs.

Laufer filed a federal lawsuit asking a court to order the hotel to comply with the law. But she hadn't planned to visit the hotel. Instead, she was testing to see if they were following the law.



### **Why are testers important in civil rights laws?**

Testing has long been a common and essential method of rooting out discrimination across a wide variety of situations that implicate civil rights laws. For instance, a White couple and a Black couple may inquire separately about renting a particular apartment, just to see if they are treated differently. They don't actually plan to rent an apartment, just as Laufer didn't actually plan to visit the hotel in Maine. Testing by private individuals and organizations is extremely important, given the limited resources available to the government to uncover illegal discrimination throughout our communities.

### **What does the legal term “standing” mean?**

The hotel claims that Laufer's lawsuit should be dismissed on the basis of something called “standing.” In order to sue in federal court, you have to show that you've suffered some kind of actual injury. That's a constitutional requirement. In this case, the hotel argues that since Laufer never planned to actually visit the hotel even if it had been accessible, she didn't suffer an injury. Therefore, according to the hotel, her case should have been dismissed.

In 1982, however, the Supreme Court ruled that Black testers have standing to sue when they uncover racial discrimination that violates the Fair Housing Act. The hotel claims that Laufer did not experience the same kind of stigma that a Black tester experienced when discriminated against in the 1982 case. As for the injury of being denied information that a business is required to provide, the hotel argues that that is not enough of an injury to give standing under recent Supreme Court precedent.

The Court's far-right majority could undermine the bedrock legal principle that the stigma of illegal discrimination creates enough of an injury to give standing to sue. If so, it will then be up to lower federal court judges to determine the extent to which they will apply the Supreme Court majority's reasoning in other civil rights areas.

### **What will the impact of this case be?**

The Supreme Court majority could make it harder to uncover illegal discrimination through the use of testers.

# Blocking Effective Health and Safety Protections (Loper Bright Enterprises v. Raimondo; SEC v. Jarkesy; CFPB v. CFSA)

Conservatives are looking toward these three cases to advance their longtime quest to undo the New Deal. They would prevent agencies from protecting us and putting reasonable limits on corporate power.

For many decades, the Far Right has sought to undermine our ability to adopt important health and safety protections that get in the way of the corporate bottom line. These three cases could overrule decades of precedent and make it much harder for federal agencies to impose reasonable limits on powerful corporations. The far-right [Heritage Foundation recently published an article](#) saying they could “reshape the foundations” of our government.

## Loper Bright Enterprise v. Raimondo

Conservatives are hoping the Court will overrule its longtime practice of upholding federal agencies’ regulations as long as they are reasonable interpretations of congressional statutes. The alternative would greatly expand judges’ ability to strike down vital health and safety protections. Oral arguments have not been scheduled yet.

### What is this case about?

Several decades ago, the Supreme Court made clear that administrative agencies have great flexibility in how they carry out their missions. This came in an environmental case involving Chevron, so it’s called “the *Chevron* doctrine.” Judges are supposed to uphold an agency’s interpretation of ambiguous congressional statutes that empower it as long as its interpretation is reasonable – even if that judge would have chosen a different interpretation on their own.

### How does the Chevron doctrine help people?

The agency flexibility set out in *Chevron* is critical, since Congress has nowhere near the resources nor the expertise to address all the details of every issue it addresses. That’s why Congress delegates authority to particular agencies.



Sometimes Congress instructs them very specifically on details, but usually it gives them parameters within which to work. For instance, the EPA has been able to interpret the Clean Air Act in a variety of ways to more effectively address advances in scientific knowledge, technology, and popular understanding.

This principle also makes executive agencies more answerable to the popular will. When the people elect a new president, that person is given the flexibility to carry out their agenda. Policies are able to change from administration to administration in response to the votes of the American people, just as they are supposed to. For instance, in areas ranging from environmental safety to telecom regulation to protecting the rights of working people, the Biden administration has mostly been able to carry out the policy changes Americans voted for in the 2020 election.

The agency decision at issue in this litigation is based on a law passed by Congress in 1976 authorizing the creation of a comprehensive fishery management plan by an agency called the National Marine Fisheries Service. Under a 2020 regulation, the cost of monitoring Atlantic herring is paid in part by the government and in part by businesses engaged in fishing for herring. Some of the latter claim that the 1976 law doesn't give the Service the authority to make them contribute financially. But the D.C. Circuit Court of Appeals applied *Chevron* and found that the Service's interpretation of the law was reasonable.



(Then-Judge Ketanji Brown Jackson was on the D.C. Circuit panel that heard oral arguments. Although she was no longer on that court when it issued its decision, she has recused herself from participating in this case at the Supreme Court.)

Weakening or overruling *Chevron* would constitute an aggressive attack on what the Far Right refers to as “the administrative state.” Any agency action opposed by wealthy interests would be much more likely than now to be struck down in court. That’s because judges would be empowered to impose their own interpretations of the law over those of the presidential administration elected by the people.

### **Who will be affected by this ruling?**

If the Court’s majority overturns *Chevron*, agencies would become far less equipped to address the critical issues that they are charged with taking on. The Environmental Protection Agency is perhaps the highest-profile agency that would be severely weakened. In addition, our ability to effectively address workplace safety, workers’ rights, investment abuse, consumer safety, and any number of other issues would also diminish. In turn, the power of Big Business and Wall Street to impose their will on everyday Americans would be greatly enhanced.



## Securities and Exchange Commission v. Jarkesy

The parties in *SEC v. Jarkesy* are taking another route to limiting the ability of administrative agencies to protect the public – in this case, the “nondelegation doctrine.” This attack goes to the heart of Congress’s ability to create effective agencies to carry out its instructions. Oral arguments in this case have not been scheduled yet.

### What is the nondelegation doctrine?

Under the nondelegation doctrine, Congress can’t hand over its ability to make laws to another part of government. In general, under the Constitution, Congress makes laws and the executive branch carries them out. That’s part of the “separation of powers” that is designed to prevent any one branch of government from having too much power.

But the world is far more complex than it was in 1789, and the Constitution gives Congress the flexibility to function in the modern world. Congress can delegate a significant amount of authority to federal agencies with specialized expertise to effectively address particular issues.

The Supreme Court has struck down laws under the nondelegation doctrine only two times in its history, both to invalidate parts of the New Deal in 1935. But since then, the Court has recognized Congress’s power under the Constitution to delegate rulemaking authority to regulatory agencies that—unlike Congress—have the expertise that is best suited to address extremely complex issues. Generally, the Court simply requires that Congress provide some “intelligible principle” to guide the executive branch in exercising the authority delegated to it.

### What happened before the SEC?

The Securities and Exchange Commission (SEC) was created in the 1930s to carry out congressional mandates to protect investors. Beginning in 2011, the SEC investigated George Jarkesy and an investment advisory firm he had created for suspected securities fraud.



Photo courtesy of the US Securities and Exchange Commission

Under the law passed by Congress, the SEC has a choice in how to enforce the prohibition against securities fraud. It can go to a federal court (which provides for trial by jury), or it could hold an agency proceeding (which doesn’t have a jury and is before an administrative law judge). In this case, the SEC opted for the agency proceeding.

After a hearing, an administrative law judge weighed the evidence and concluded that Jarkesy and his firm had committed fraud. So the SEC ordered them to stop violating the law and to pay a penalty. Instead, they sued the SEC.

## What did the lower court do?

A divided panel of the Fifth Circuit ruled that Congress had violated the nondelegation doctrine. According to the two judges in the majority, Congress failed to give the SEC an “intelligible principle” to guide its decision on whether to enforce the law via an agency hearing or through a federal court. Therefore, they concluded, this was an unconstitutional delegation of legislative authority.

In contrast, the dissenting judge wrote that the power to pick a forum for enforcement isn’t a *legislative* decision at all. He concluded that this is the type of decision typically left up to the executive branch, similar to the way in which a prosecutor decides which statutes to prosecute someone for violating.

## What could the impact of the Supreme Court’s decision be?

Several of the far-right justices have signaled openness to bringing back the pre-New Deal conception of a Congress with a weakened ability to delegate authority to federal agencies. A majority could use this case to take a step in that direction. It would then be up to lower court judges to decide how to apply the new standard in lawsuits challenging any number of federal agency health and safety protections.

## Consumer Financial Protection Bureau v. Community Financial Services Association of America

This is a constitutional challenge to the way the Consumer Financial Protection Bureau (CFPB) is funded. The Biden administration predicts that if the lawsuit succeeds, it will call into question “virtually every action the CFPB has taken in the 12 years since its creation.” Oral arguments are scheduled for October 3.

### What is the Consumer Financial Protection Bureau?

Congress created the CFPB in 2010 to protect consumers from fraudulent and abusive practices by banks, mortgage companies, lending agencies, and other services and products. This was part of the landmark 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act. The agency was originally the idea of then-Prof. Elizabeth Warren, before she became a senator. Because of its robust protections for consumers, it has been a target of corporate interests since its creation.



### What happened in this case?

The CFPB adopted a Payday Lending Rule to protect people from unfair and abusive lending practices. Two associations of companies regulated by the rule went to court to have it overturned. The far-right Fifth Circuit ruled that the way the agency was funded was unconstitutional.

Under the Constitution, the executive branch can't spend money that hasn't been authorized by Congress. (That's why budget confrontations can lead to government shutdowns.) When Congress created the CFPB, it also created a system for funding the agency under which the Federal Reserve transfers a portion of its revenue to the CFPB. The amount is capped by statute. So the agency is getting its funding in a way that is mandated by Congress, as the Constitution requires. There are other agencies that Congress funds in a similar way, like the Federal Deposit Insurance Corporation and the Federal Reserve Board.

Nevertheless, the Fifth Circuit ruled that since the funding occurs outside the regular annual appropriations process, it is constitutionally suspect. Therefore, according to the court, the rules adopted under that funding are invalid.

### **What is at stake at the Supreme Court?**

Upholding the Fifth Circuit's fringe theory would threaten the viability of every consumer protection rule adopted by the CFPB. This would achieve a longtime goal of the corporate forces that fought to prevent the agency's creation in the first place.

## **Fair Taxation (Moore v. United States)**

This case could have an enormous impact on whether Congress would ever be able to pass a wealth tax, which some progressives have advocated as a way to address our society's vast wealth inequality. Oral arguments have not been scheduled yet.

### **What is this case about?**

On its surface, this case is about a relatively minor income tax provision that most people have never heard of. But the Court may issue a ruling that would affect all of us. It could nullify numerous actions Congress has taken to crack down on tax avoidance by millionaires and billionaires. It could also bar any future progressive Congress from effectively addressing the growing national wealth inequality through a wealth tax.



### **What does the Constitution say about taxes?**

Under the Constitution before it was amended, Congress was very limited in the types of taxes it could use to fund our national government. There were no income taxes, or progressive taxation of any type. Instead, all federal taxes on individuals were apportioned among the states based on their share of the population. This tied Congress's hands.

By the late 1800s, wealth inequality was becoming a crisis. But Congress was unable to tax the income of the fabulously wealthy.



As the country's needs grew, we were unable to raise the money to pay for the government we wanted. But in 1913, we ratified the Sixteenth Amendment. This reform empowered our elected representatives to tax people's income "from whatever source derived." This did not have to be based on a census or how the population was distributed among the states. At last, those who benefited the most from our system and who could most afford to support it could be fairly taxed.

## What tax provision is being challenged in this case?

This case concerns a one-time "mandatory repatriation tax" adopted by Congress. It affects Americans who own shares of certain foreign corporations that are controlled by Americans. Before 2017, the owners' dividends would be taxed by the IRS. So to avoid paying taxes, they don't take those dividends. Instead, they put that money back into more shares. This let them defer the income (and any tax that would be due).

Congress changed the tax law in 2017. Going forward, dividends would no longer be taxable. But that could have created an unfair windfall, where the foreign corporation could distribute years of income tax-free.



People would end up never paying taxes on those years of deferred dividends. So the 2017 law had them pay a one-time tax on their share of the foreign corporation's 2017 income, regardless of whether it had been given out to them as dividends.

Because of the tax law change, Kathleen and Charles Moore paid nearly \$15,000 in income taxes in 2017. They sued the U.S. to get that money back, claiming that the Sixteenth Amendment does not allow this type of tax. According to the Moores, they did not receive income from the foreign corporation, so this was not an income tax as allowed by the Sixteenth Amendment.

Both the district court and the Ninth Circuit disagreed. They noted that the Sixteenth Amendment gives Congress expansive power to tax income. They cited court cases upholding taxes on income that had not been "realized." In addition, the 2017 provision involved taxable assets that the Moores had avoided paying taxes on earlier by putting it back into the company. The Ninth Circuit noted that striking down this provision would also undermine numerous longstanding similar tax provisions.

## How is a wealth tax involved?

The Moores appealed to the Supreme Court. They warned that if the 2017 tax is upheld, then Congress will be able to tax the net value of people's assets, with no connection to whether they realize any income from those assets. A wealth tax "is no idle threat," their petition states, a framing perhaps designed to get the attention and support of the far-right justices.



In contrast, the Biden administration told the Court that this case has nothing to do with any hypothetical wealth tax, because the 2017 provision didn't tax the value of anything. Instead, it taxed deferred income. The administration also notes that the 2017 provision is similar to other taxes that courts have upheld over the decades.

The fact that the Court agreed to hear the Moores' appeal suggests that the far-right justices want to address this issue. It certainly is possible that a ruling would, [as the New Republic says](#), "make it nearly impossible for Congress to pass a federal wealth tax." It could also make it harder for Congress to fairly tax those who can most afford to pay.

### **How could this case affect us?**

The concentration of wealth among a small portion of the most privileged in our country corrodes our society and our democracy. The Court's ruling in this case could enormously benefit the wealthiest people in the country. Those who fund the right-wing legal movement and shower luxurious gifts on like-minded justices have a strong interest in this case, even if they are not parties themselves.



## **Conclusion**

These are only some of the cases the Court will be hearing this term. In addition to others already on the docket, they will be adding new cases over the next several months.

This is a dangerous time. But we are not powerless.

The current far-right majority is the result of years of work by activists who recognized the importance of the courts in achieving their political goals. But their work has come back to bite them. The Court's harmful rulings have angered and frightened millions of Americans who had previously been unaware of the connection between our courts and our daily lives.

But now people know. That is why courts have become a winning electoral issue for progressives. It is why Republican efforts to keep Biden judges off the courts are failing. It is why we are seeing so much activism around proposals to reform the Court.

And it is why the current far-right majority is temporary.