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### Hot Legal Issues in Dynamic Times

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## HOT LEGAL ISSUES IN DYNAMIC TIMES

This summer the United States Supreme Court issued opinions on socially and politically polarizing issues, including reproductive rights, gun control, climate change, and immigration. In today's more interconnected and often more demanding society, your customers and the public frequently expect – and many times demand – your business express much more than neutral statements regarding these charged issues. Opinion leaders across the moral and political spectrum use social media, the voracious news cycle, and polarized opinions to force businesses to have an opinion or state a position on social and moral issues such as those highlighted by this summer's Supreme Court rulings. Moreover, issues such as these also often require company policy actions based on the needs or desires of employees, prospective employees, and business partners, as well as customers and the public.

Below are summaries of this summer's cases for quick reference to help you in addressing company policy decisions and positions which may be necessitated by these Supreme Court opinions and the divergent sentiments these opinions engender. These summaries do not attempt or intend to offer an analysis of the legal validity or lack thereof of the reasoning set forth in these Supreme Court opinions or the opinions themselves. Instead, the summaries just provide you a substantive yet relatively short summary of the longer opinions, concurrence, and dissent.

In *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), the Court held New York's statute requiring a person seeking an unrestricted license to carry a concealed "pistol or revolver" outside the home to show "proper cause". New York case law had concluded that such proper cause had to be "a special need for self-protection distinguishable from that of the general community. *Justice Thomas writing for the majority held New York's law imposing such a proper cause requirement to carry a conceal handgun was unconstitutional.* The Court held that the Second Amendment's plain text thus presumptively guarantees petitioners a right to "bear" arms in public for self-defense. The Court stated that for the government to justify a regulation of firearms, the government "must affirmatively prove that its firearm regulation" is consistent with this Nation's historical tradition that "delimits the outer bounds of the right to keep and bear arms."

In *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022) the Court overturned *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791 (1992). The Court's opinion, the separate concurrences and dissent, plus the Westlaw headnotes and syllabus opinions, results in this opinion spanning 112 pages. Justice Alito writing for the majority concluded *stare decisis* did not require adherence to *Roe* or *Planned Parenthood*, and in fact was critical of *Planned Parenthood's* application on that doctrine. In overruling *Roe* and *Planned Parenthood*, the Court stated the Constitution makes no reference to the right to obtain an abortion. Further, the Court found improper any reliance on the Fourteenth Amendment's reference to "liberty", "Due Process Clause", or "Equal Protection Clause", or on the right to privacy that springs First, Fourth, Fifth, Ninth, and Fourteenth Amendments. The Court rejected conclusions the right to abortion was "deeply rooted" in Nation's "history and traditions"; that it was essential to our "scheme of ordered liberty"; or a broader right of autonomy. Instead, the Court cited common law decisions and statutes finding that harming an unborn child was odious or a crime. Finally, the Court concludes that it falls to voters to balance the boundary between competing interests of a woman and the "potential life".

In *Biden v. Texas*, 142 S.Ct. 2528 (2022) the Supreme Court considered whether the Biden Administration's termination of the Migrant Protection Protocols ("MPP"), previously enacted by the Trump Administration, violated the Immigration and Nationality Act ("INA"). Under the MPP, individuals who arrived by land from Mexico were to be returned to Mexico to await the results of their removal proceedings under the INA. The MPP was implemented pursuant to the INA that applies to certain non-citizens "arriving on land...from a foreign territory contiguous to the United States" and provides that the Secretary of Homeland Security "may return the alien to that territory pending

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a proceeding...” Justice Roberts, writing for the majority, held that the INA does not require the Government to continue implementing the MPP. The Court reasoned that the word “may” clearly confers a discretionary authority to return non-citizens to Mexico.

Lastly, in *West Virginia v. Environmental Protection Agency*, 142 S.Ct. 2587 (2022) the Supreme Court considered the EPA’s recent change of its scope of authority. The EPA had used the Clean Air Act to regulate power plants by setting performance standards for 50 years. Yet in 2015 the EPA issued the Clean Power Plan which required existing coal-fired power plants to reduce their production of electricity, or subsidize increased generation by natural gas, wind, or solar sources. The Trump administration repealed the Clean Power Plan asserting it exceeded the statutory authority granted by the Clean Air Act. The Court held that the “major questions doctrine” controlled and as such the EPA was required to identify “clear congressional authorization” for the expansion of authority under the Clean Power Plan, but that the EPA could identify no such authorization. Therefore, the agency lacked authority to implement the Clean Power Plan under the Clean Air Act.

### **NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC. V. BRUEN**

#### **The Underlying Bruen Case**

The state of New York penal statute required individuals to be licensed to possess a firearm inside or outside the home. Further, it required a person seeking an unrestricted license allowing carrying a concealed “pistol or revolver” outside the home to show “proper cause” pursuant to the statute. New York Courts had held such proper cause was shown only if person seeking the unrestricted license can “demonstrate a special need for self-protection distinguishable from that of the general community.”

Robert Nash and Brandon Koch relied upon their generalized interest in self-defense in seeking an unrestricted license, but New York rejected their concealed-carry applications based on failure to show “proper cause.” Nash and Koch, as members of a Petitioner public interest group, filed a declaratory action alleging violation of their Second and Fourteenth Amendment rights and thereby challenged the New York law.

The district court dismissed their claims, and the U.S. Court of Appeals for the Second Circuit affirmed, each of which relied upon previous case law concluding that proper cause requirement was “substantially related to the achievement of an important government interest.” The Supreme Court granted Certiorari.

#### **The Supreme Court’s Bruen Opinion**

Justice Thomas wrote the opinion which led off with citation to *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. Chicago*, 561 U.S. 742 (2010) which “recognized that the Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense.” The Court held explicitly that the “Second and Fourteenth Amendments [also] protect an individual’s right to carry a handgun for self-defense outside the home” which was found “consistent with *Heller* and *McDonald*”.

The opinion’s second paragraph acknowledges 49 States have government licensing requirements to carry handguns, but New York’s licensing statute (and 5 other state’s licensing statute) condition “a license to carry on...some additional special need.” The Court held that conditioning a public carry license on demonstration of “a special need for self-defense... violated the Constitution.”

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Additionally, the Court declined to adopt the two-step approach adopted by many Courts of Appeal because that approach was “one step too many.” Instead, the Court held that when the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The Court explained that for the government to justify a regulation, the government “must affirmatively prove that its firearm regulation” is consistent with this Nation’s historical tradition that “delimits the outer bounds of the right to keep and bear arms.”

The Court explained that the test they now apply requires courts to assess whether modern firearms regulations are consistent with the Second Amendment’s text and historical understanding reasoning that the right to carry a firearm in public for self-defense is deeply rooted in history, and that no other constitutional right requires a showing of “special need” to exercise it.

The Court acknowledged it was well settled that sensitive locations, such as schools and government buildings, are places where arms carrying could be prohibited consistent with the Second Amendment. However, while some “sensitive places” restrictions might be appropriate, Manhattan is not a “sensitive place.” Gun restrictions are constitutional only if there is a tradition of such regulation in U.S. history.

The Court further reasoned that nothing in the Second Amendment draws a home versus public distinction with respect to the right to bear arms. The definition of “bear” encompasses public carry. “To confine the right to ‘bear’ arms to the home would nullify half of the Second Amendment’s operative protections.” The Court held that the Second Amendment’s plain text thus presumptively guarantees petitioners a right to “bear” arms in public for self-defense.

Ultimately, the Court held that none of the historical limitations on the right to bears arms approach New York’s proper-cause requirement because none operated to prevent law-abiding citizens with ordinary self-defense needs from carrying arms in public for that purpose. Thus, the Court held that the Respondents failed to meet their burden to identify an American traditional justifying New York’s proper-cause requirement.

### Concurrence (Alito, J.)

Addressed the dissenting opinion, by stating that *Heller’s* “key point...was...that ‘the people,’ not just members of the ‘militia,’ have the right to use firearms to defend themselves.” Further, since “many people face a serious risk of lethal violence when they venture outside their homes” a statute cannot “prevent[ ] law-abiding residents from carrying a gun for this purpose.” Justice Alito then states “[t]hat is all we decide” and asserts the dissents assertions was largely irrelevant to the Court’s holding.

### Concurrence (Kavanaugh, J. joined by Chief Justice Roberts)

Justice Kavanaugh highlighted that the “Court’s decision does not prohibit States from imposing licensing requirements for carrying a handgun for self-defense”, including explicitly “the existing licensing regimes -- known as ‘shall-issue’ regimes -- that are employed in 43 States”. The shall-issue State appropriately “require a license applicant to undergo fingerprinting, a background check, a mental health records check, and training of firearms handling and in laws regarding the use of force, among other possible requirements.” Justice Kavanaugh quoted *Heller and McDonald*: “[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms... [which] list does not purport to be exhaustive... recognize another important limitation on the right to keep and carry arms...that the sorts of weapons protected were those in common use at the time.”

### Concurrence (Bartlett, J.)

This portion of the opinion address the esoteric issues of the limits on the permissible use of history as applied by different analytical frameworks. These are important issues for constitutional analysis, yet a bit outside the scope of our review.

### Dissent (Bryer, J. joined by Justices Sotomayor and Kagan)

The dissent frames the issue as being “the extent to which the Second Amendment prevents democratically elected officials from enacting laws to address the serious problem of gun violence.” A litany of studies and statics are cited in support. The dissent asserts that absent discovery in the underlying case the decision is premature because how the statute was actually applied is pertinent. Further, the dissenting Justice state that the Court focus was far too heavily dependent “on history”, and then selective history, rather than on the government’s compelling interest in regulation of guns given the gun violence cited. It is elected officials who should balance the competing interest of lawful use of firearms against the dangers of firearms.

## *DOBBS V. JACKSON WOMEN’S HEALTH ORGANIZATION*

### The Underlying *Dobbs* Case

In *Dobbs*, a Mississippi federal District Court granted summary judgment in favor of Plaintiffs, Jackson Women’s Health Organization (a Mississippi abortion clinic) and one of its doctors (collectively, “Jackson Women’s”). Further, the District Court permanently enjoined the Mississippi’s enforcement of the statute. In granting summary judgment to Jackson Women’s, the District Court held that a state has a constitutionally adequate interest in banning nontherapeutic abortions, but only at the point of fetal viability, and 15 weeks was pre-viability.

Mississippi’s Statute generally prohibited abortion of fetuses with a gestational age of more than 15 weeks. In enacting the Mississippi statute, Mississippi’s legislature asserted the State’s interest in “protecting the life of the unborn.” Miss. Code Ann. §2(b)(i).

Jackson Women’s sued Mississippi’s health officer, Defendant Thomas Dobbs, seeking a ruling that Mississippi’s 2018 Gestation Age Act (“Mississippi’s Statute”) was unconstitutional because it limited a women’s right to an abortion. Jackson Women’s alleged that pursuant to the 1973 decision in *Roe v. Wade* and the 1992 decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Act violated the Supreme Court’s precepts establishing a constitutional right to abortion.

In defending the law, the State’s primary argument was that the Court should reconsider and overrule *Roe* and *Casey* and that the Act is constitutional because it satisfies rational basis review.

In 1973, the Supreme Court’s decision in *Roe v. Wade* found that there was a constitutional right of privacy to obtain an abortion prior to fetal viability. The Court concluded this constitutional right to privacy stemmed from, among other Amendments, the Due Process Clause of the Fourteenth Amendment. Based on these findings the *Roe v. Wade* decision held that Substantive Due Process, in large part, guaranteed the constitutional right to obtain an abortion until the point of **fetal viability**, i.e. the ability to survive outside the womb.

Subsequently, in 1992, the Supreme Court’s decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*

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held that states could not impose an **undue burden** on the right to obtain an abortion. Further, Casey clarified that the right to abortion is an aspect of the “liberty” protected by the Due Process Clause of the Fourteenth Amendment.

The United States Court of Appeals for the Fifth Circuit affirmed the District Court’s summary judgment in favor of Jackson Women’s and maintained the injunction against enforcement of Mississippi’s Statute largely relying on the holding of *Casey*.

Mississippi asked the Supreme Court to overrule *Roe* and *Casey* and return regulation of abortion to the individual states. Jackson Women’s, along with the United States Solicitor General, asked the Supreme Court to reaffirm *Roe* and *Casey* as well as find the Mississippi statute unconstitutional. The United States Supreme Court granted certiorari.

### The Supreme Court’s *Dobbs* Opinion

The Supreme Court overruled the Fifth Circuit’s affirmance of the Mississippi’s District Court’s ruling and remanded the matter. Justice Samuel Alito wrote the majority opinion for the Court in *Dobbs* wherein the Court expressly overruled *Roe* and *Casey*. The Court’s majority held that the United States Constitution does not confer a right to an abortion. Further, the Court reaffirmed that the Court may overrule its previous decisions which were wrongly decided constitutional decisions.

The majority opinion reasoned that since the Constitution does not expressly mention or confer a right to abortion, the question became whether such right is implied by the Constitution’s language. Justice Alito reviewed *Roe*, which held that the right to abortion was found in the right to privacy conferred by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. He also reviewed *Casey*, which subsequently focused on the Fourteenth Amendment Due Process Clause’s protection of liberty as the source of the abortion right.

In determining what the Fourteenth Amendment means by liberty, and thus, whether a right is constitutionally protected, Justice Alito stated that the substantive-due-process analysis examines whether the right at issue is “deeply rooted” in American “history and tradition” and essential to the American “scheme of ordered liberty.”

In arriving at the majority’s conclusion that the right to abortion is not deeply rooted in American history and tradition, the opinion reasoned that (a) prior to *Roe*, abortion had been prohibited and criminalized, historically at common law and subsequently by statute; (b) abortion is distinct from other rights rooted in privacy and autonomy because of the moral questions raised by ending fetal life; and (c) allowing people to act however they want based on their own conceptions of the universe is not ordered liberty.

The majority opinion stated that proponents of *Roe* and *Casey* attempt to avoid the earlier common law and statutory history regarding abortion by claiming that the abortion right is part of a right to privacy or the right to make personal choices essential to a person’s autonomy and how the person defines life, existence, and the universe. However, the majority’s opinion rejected this reasoning by asserting that ordered liberty allows states to regulate conduct based on how the state’s voters have balanced the competing interests at stake. Thus, since the Constitution does not confer an abortion right, power must be returned to the states for the people, through their elected representatives, to determine how abortion should be regulated.

Moreover, going forward, constitutional challenges to state abortion regulations must be evaluated under rational-basis review. Regulations will be entitled to a strong presumption of validity and will be upheld if they are rationally related to a legitimate state interest, including an interest in preserving fetal life. Under this standard, the Court held, Mississippi’s statute is constitutional.

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Additionally, the Supreme Court held that it may overrule a wrongly decided constitutional decision. *Stare decisis* (i.e., adherence to past judicial precedent) is not an absolute requirement. This is particularly true in constitutional cases, in which it is critical to ensure that important matters are decided correctly.

However, deciding to overrule a constitutional decision is serious and requires examining factors including: (1) the nature of the error in the prior decision; (2) the quality of the decision's reasoning; (3) the workability of the rule announced by the decision; (4) the disruptive effect of the decision on other areas of law; and (5) the absence of concrete reliance on the decision. Here, the Court held, these factors weigh in favor of overruling *Roe* and *Casey*.

The Court reasoned that *Roe* relied on weak and improper analysis to take the important issue of abortion regulation away from the people, where it rightly belonged. Further, the Court noted that *Casey* failed to remedy *Roe*'s errors and imposed a largely unworkable and ambiguous undue-burden test on abortion regulation. Moreover, the Court stated that *Roe* and *Casey* have had negative impacts on other legal doctrines and areas of the law, including third-party standing, *res judicata*, severability, and the standard for facial constitutional challenges. Finally, there are no concrete reliance interests at stake on *Roe* and *Casey* according to the Court.

Accordingly, the Court overruled *Roe* and *Casey*. However, the Justice Alito qualified the Opinion by stating that it "should not be read to cast doubt on precedents that do not involve abortion."

### Concurrence (Roberts, C.J.)

The judgment is correct, but the Court should have decided the constitutionality of the Mississippi statute simply by discarding the viability rule established by *Roe* and *Casey*. The Court did not need to go further and eliminate the abortion right entirely. The Court's decision to overrule *Roe* and *Casey* violates principles of judicial restraint that caution against deciding more than is necessary to resolve a case.

### Concurrence (Kavanaugh, J.)

Abortion is a hotly contested issue involving an irreconcilable conflict between the protection of fetal life and a woman's right to make choices that affect her life and health. This Court is concerned not with the morality of abortion, but rather with the constitutionality of abortion. The Constitution itself neither prohibits nor permits abortion. Nevertheless, the *Roe* Court erroneously interpreted the Constitution as supporting a pre-viability abortion right. *Roe* was wrongly decided. Justice Kavanaugh explicitly stated that this decision does not threaten other precedent involving contraception or marriage. Nor does this decision allow states to bar residents from traveling to other states to obtain an abortion or to retroactively punish someone who previously obtained an abortion. This decision simply means that this Court is no longer the decision maker about when abortion should be legal. That choice has rightfully been restored to the states.

### Concurrence (Thomas, J.)

The Court correctly holds that there is no constitutional right to abortion. In addition to the reasoning set forth by the Court, the Due Process Clause does not guarantee an abortion right because the Due Process Clause guarantees only process, i.e., procedures that must be followed before depriving someone of life, liberty, or property. The Constitution contains no broader substantive-due-process guarantee that prevents the government from infringing on fundamental liberty interests. Instead, substantive due process is a dangerous legal fiction that has improperly allowed judges to make policy and negatively impacted the Court's constitutional-law jurisprudence. As such, any previous decision purportedly based on substantive due process is erroneous and the Court must correct those decisions in the future. This includes decisions recognizing the right of married people to obtain contraceptives, the

right to engage in private consensual sexual acts, and the right to same-sex marriage.

### Dissent (Breyer, J.)

*Roe* and *Casey* protected women's rights to exercise control over their lives and bodies. The balance struck in these decisions respected women's autonomy and advanced women's equality, while recognizing states' legitimate interests in protecting fetal life. In overruling *Roe* and *Casey*, the Court has deprived women of their rights and subjected them to government control over their pregnancies. States have already been enacting strict abortion restrictions in anticipation of this decision. Now, in light of the decision and the Court's conclusion that abortion regulations need only survive rational-basis review, states will enact more and further restrictions. The full scope of the coming restrictions remains to be seen, but the impact of this decision on women's rights and status as equal citizens is already apparent. Furthermore, despite the majority's assurances, there is no reason to feel confident that the Court is done eliminating rights once thought to be settled. The rights recognized in *Roe* and *Casey* are linked to other rights involving bodily integrity, family relationships, and procreation. These rights are all rooted in the American tradition of allowing individuals the freedom to make private choices for their lives, and all have been recognized based on the understanding that the Constitution cannot be read as frozen in time at the moment of its drafting. Rather, constitutional protections must evolve over time as the world evolves. The Court's decision to overrule *Roe* and *Casey* shows no respect for precedent and is not grounded in new legal or factual developments that cast doubt on those cases. Overruling *Roe* and *Casey* and eliminating the right to abortion will alter people's lives in drastic ways, undermine the Court's legitimacy, and break public trust in the rule of law.

## BIDEN V. TEXAS

### The Underlying Texas Case

In 2018, the Trump administration announced the Migrant Protection Protocols (MPP), under which policy certain noncitizens arriving at the southwest border of the United States were returned to Mexico during their immigration proceedings. Known as the "remain in Mexico" policy, the MPP faced legal challenges shortly after their enactment, but the Supreme Court allowed the Trump administration to enforce it.

The MPP was implemented pursuant to express congressional authorization in the Immigration and Nationality Act (INA) which provides that "[i]n the case of an alien who is arriving on land from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding..."

In June 2021, the Biden administration sought to end the policy citing, among other reasons, that the "MPP does not adequately or sustainably enhance border management in such a way as to justify the program's extensive operational burdens and other short falls", but Texas and Missouri challenged that effort, arguing that rescinding the policy violated the INA and that the policy change violated the Administrative Procedure Act (APA).

A federal district court agreed with the challengers and ordered the Biden administration to implement the MPP in good faith or initiate new agency action in compliance with the APA. The U.S. Court of Appeals for the Fifth Circuit declined to block the lower court's ruling, as did the Supreme Court.

In October 2021, the Department of Homeland Security issued a new decision ending the policy supported by a memorandum explaining the decision, specifically detailing DHS' lack of capacity to detain all noncitizens encountered at the border. A district court again ordered DHS to continue the MPP, and the Fifth Circuit upheld the order. The Biden administration sought expedited review as to whether federal immigration law requires it to maintain the policy and whether the October decision to end the policy has any legal effect.



The Supreme Court granted certiorari to determine whether the Government’s rescission of the MPP violated the Immigration and Nationality Act and whether the Government’s second termination of the policy was a valid final agency action.

### The Supreme Court’s *Texas* Opinion

The Court explained that by using the word “may,” Section 1225(b)(2)(C) confers a discretionary authority to return nonresidents to Mexico. Historical context confirms this understanding. Section 1225(b)(2)(C) was added to the statute more than 90 years after the mandatory language that appears in a nearby provision. And since its enactment, every presidential administration has interpreted section 1225(b)(2)(C) as purely discretionary. Interpreting the provision as mandatory would impose a significant burden upon the Executive’s ability to conduct diplomatic relations with Mexico, which Congress likely did not intend.

Once the district court vacated the original attempt to rescind the policy, the Supreme Court held that DHS properly “issue[d] a new rescission bolstered by new reasons” absent from the original rescission. Accordingly, the Supreme Court held that the Government’s rescission of Migrant Protection Protocols did not violate section 1225 of the Immigration and Nationality Act, and the then-Secretary of Homeland Security’s October 29 Memoranda constituted valid final agency action.

### Concurrence (Kavanaugh, J.)

Just Kavanaugh wrote that under the INA, when the Department of Homeland Security lacks sufficient capacity to detain noncitizens at the southern border pending their immigration proceedings, the DHS has two options: (1) grant noncitizens parole into the US if parole provides a “significant public benefit” or (2) return noncitizens to Mexico. When there is insufficient detention capacity, both options are legally permissible and different Presidents may exercise their discretion differently.

### Dissent (Alito, J. joined by Thomas, J. and Gorsuch, J.)

Under the INA, Just Alito explained, if a noncitizen is “not clearly and beyond a doubt entitled to be admitted” then the noncitizen “shall be detained for a [removal proceeding].” Further, if a non-citizen asserts a credible fear of prosecution, they “shall be detained for further consideration of the application for asylum.” Such requirements are mandatory. Congress has afforded the Executive two alternatives to detention: (1) the DHS may return the noncitizen pending a proceeding and (2) DHS may release non-citizens “on parole” but “only on a case-by-case basis for urgent humanitarian reasons or a significant public benefit.” Alito explains that the DHS does not have the capacity to detain all non-citizens encountered at the border. Alito wrote for the dissent that “rather than avail itself of Congress’s clear statutory alternative to return” non-citizens to Mexico while the away proceedings, “DHS has concluded that it may forgo that option altogether and instead simply release into this country untold numbers of aliens who are very likely to be removed if they show up for their removal hearings.” This practice, Alito wrote, “violates the clear terms of the law, but the Court looks the other way.”

### Dissent (Barrett, J. joined by Thomas, J., Alito, J., and Gorsuch, J. as to all but the first sentence)

Justice Barrett writes that although she agrees with the Court’s analysis of the merits, she would vacate and remand for the lower courts to reconsider their assertion of jurisdiction in light of recently decided *Garland v. Aleman Gonzalez*.

## WEST VIRGINIA V. ENVIRONMENTAL PROTECTION AGENCY

### The Underlying *West Virginia* Case

The Clean Air Act authorizes the EPA to regulate power plants by setting a “standard of performance” for their emission of certain pollutants into the air. Since the passage of the Act 50 years ago, the EPA has exercised this authority by setting performance standards based on measures that would reduce pollution by causing power plants to operate more cleanly.

In 2015, the EPA issued a new rule, called the Clear Power Plan, concluding that the “best system of emission reduction” for existing coal-fired power plants included a requirement that such facilities reduce their own production of electricity, or subsidize increased generation by natural gas, wind, or solar sources.

The Trump administration repealed the 2015 Clean Power Plan, concluding that the Clean Power Plan had been “in excess of its statutory authority” under Section 111(d) of the Clean Air Act, and issued in its place the Affordable Clean Energy (ACE) Rule, which eliminated or deferred the guidelines. However, the U.S. Court of Appeals for the D.C. Circuit vacated the ACE Rule as arbitrary and capricious.

One of the challengers, North American Coal Corporation, challenged the Environmental Protection Agency’s authority to so broadly regulate greenhouse gas emissions. The Supreme Court granted certiorari to determine whether this broader conception of EPA’s authority is within the power granted to it by the Clean Air Act.

### The Supreme Court’s *West Virginia* Opinion

The Court began by noting that in devising emissions limits for power plants, EPA first determines the “best system of emission reduction” (“BSER”) that taking into account cost, health, and other factors – it finds “has been adequately demonstrated.” The EPA then quantifies “the degree of emission limitation achievable” if that best system were applied to the covered source. The BSER, therefore, “is the central determination that the EPA must make in formulation guidelines” under Section 111.

Where the statute at issue is one that confers authority upon an administrative agency, the inquiry must be whether Congress in fact meant to confer the power the agency has asserted. In the ordinary case, the context does not have an impact on the analysis. There are “extraordinary cases” that call for a different approach – cases in which the “history and the breadth of the authority” that the EPA 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.

In those extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us “reluctant to read into ambiguous statutory text” the delegation claimed to be lurking there. To convince us otherwise, the Court explained, the agency must point to “clear congressional authorization” for the power it claims. This is known as the “Major Questions Doctrine.”

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The Court held that this is a **major questions case**. The court noted that the EPA claimed to have discovered a power, which represented an expansion in its regulatory authority, in the vague language of an ancillary provision of the Act. Such discovery, the Court noted, allowed the EPA to adopt a regulatory program that Congress had repeatedly declined to enact itself. Given these circumstances, the Court went on to hold, there is every reason to “hesitate before concluding that Congress” meant to confer on EPA the authority it claims under Section 111(d).

In sum, the Court held that under the “major questions doctrine,” there are “extraordinary cases” in which the “history and the 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. This is one such case, so the EPA must point to “clear congressional authorization” for the authority it claims. But it the EPA failed to do this.

The Court held Congress did not grant the Environmental Protection Agency in Section 111(d) of the Clean Air Act the authority to devise emissions caps based on the generation shifting approach the Agency took in the Clean Power Plan. The Court further reasoned, that the EPA has admitted that issues of electricity transmission, distribution, and storage are not within its traditional expertise, yet it claims that Congress implicitly tasked it with the regulation of how Americans get their energy.

The Court ultimately held, without “clear congressional authorization” for the EPA to regulate in such a manner, **the agency lacks authority to implement the Clean Power Plan under the Clean Air Act.**