No. 14-114

In The
Supreme Court of the United States

DAVID KING, et al.,

Petitioners,

v.

SYLVIA BURWELL, Secretary of Health and Human Services, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF TEXAS BLACK AMERICANS FOR LIFE AND THE LIFE EDUCATION AND RESOURCE NETWORK (LEARN) AS AMICI CURIAE IN SUPPORT OF DAVID KING, ET AL.

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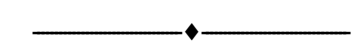
INTEREST OF THE AMICI

This Court's *amici*, Texas Black Americans for Life and the Life Education And Resource Network (LEARN), are organizations which seek to educate the public to the fact that both abortion and contraception have been used, and continue to be used, as a tool by some who wish to target the African-American community.[1] See http://www.learninc.org. In addition, neither your *amici* themselves, nor the individual members thereof, wish to be forced to do things which violate their basic tenets.



SUMMARY OF ARGUMENT

The gist of this brief is simply this: some of this Honorable Court's precedents point to the conclusion that statutes must be read narrowly to ensure that it is Congress alone which determines the substantive rights and duties of persons under federal statutory law; simultaneously, some might think that a certain line of this Court's precedents – the *Chevron*[2] line of cases, which the Fourth Circuit relied on – might allow a court to permit federal agencies to construe

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[1] Counsel of record on this brief is the sole author of this brief, and no person or entity other than your *amici* and counsel of record for the *amici* made a monetary contribution intended to fund the preparation or submission of this brief. This brief is filed with the consent of all parties.

[2] *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

the scope of a statute more broadly than the other precedents would seem to allow. We do agree with the Petitioners that the Fourth Circuit misapplied the *Chevron* line of cases, and that the Fourth Circuit would have ruled in favor of the Petitioners if the Fourth Circuit had applied the *Chevron* line correctly. But if this Court finds instead that the Fourth Circuit did in fact properly apply those cases, we submit that there would then be a conflict within this Court's precedents on statutory construction, and that this conflict (if this Court does find one at all) should be resolved by modifying the *Chevron* line.

Any possible disparity between this Court's precedents cannot be resolved simply by saying that the Administrative Law cases pertaining to statutory construction – the *Chevron* line – deal with a different issue than those cases in which no agency is involved. That is because the line of cases in Administrative Law has a two-part test; and the cases in statutory construction outside of Administrative Law deal as much with the same issue as the first prong of the *Chevron* test as does *Chevron* and its progeny. Furthermore, allowing administrative agencies to have more power to construe a statute than this Court does would stand *Marbury v. Madison*, 5 U.S. 137 (1803) on its head. It could also lead to peculiar results in this Court's jurisprudence bases solely on who got to the courthouse first.

Your *amici* believe that the reason for any disparity which this Court might find between these two lines of precedents would lie in the way legal topics are researched. Those cases which fall within the

Chevron line deal principally with judicial deference to an administrative interpretation of a statute, whereas the other cases, which some might believe would require a more narrow reading of a statute, lie outside of the topic of Administrative Law. Consequently, in the cases pertaining to administrative agencies, neither the Keynotes of West Publishing nor those found in Lawyers Second Edition direct one to the cases outside of the topic of Administrative Law, even though the two separate lines of cases do equally deal with the topic of statutory construction. The result of all this is that much is missed, and this may be the reason that the Fourth Circuit reached the result that it did.

ARGUMENT

I. If this Court finds that the Fourth Circuit correctly applied the *Chevron* line of cases, this Honorable Court should bring the *Chevron* line of cases in line with this Court's precedents in *Martin v. Wilks*, *N.O.W. v. Scheidler*, and *Michigan v. Bay Mills Indian Cmty.*

At least some of this Court's precedents require a very narrow reading of a statute in order to ascertain its meaning. For example, in 1989, in *Martin v. Wilks*,[3] this Court addressed the legality of the

[3] *Martin v. Wilks*, 490 U.S. 755 (1989) (Note: as was noted by this Court, the result reached in *Martin* was modified by

(Continued on following page)

so-called "Impermissible Collateral Attack" doctrine. This judicial doctrine provided for mandatory intervention, requiring any person who knew of ongoing litigation to intervene or else take the risk of losing one's rights.[4]

By the time *Martin* reached this Court, eight circuits had ruled on the Impermissible Collateral Attack doctrine. Six circuits upheld this doctrine, while only two rejected it, including the Eleventh Circuit in *Martin* itself.[5] Yet this Court struck down the doctrine on the grounds that it was not provided for in the Federal Rules of Civil Procedure by Congress itself, and that it was improper for the judicial branch to go beyond interpreting a statute and read into it a new substantive element by implication.[6]

Five years later, in *N.O.W. v. Scheidler*,[7] this Court was faced with the question of whether it was proper for the Seventh Circuit to read into the Racketeer Influenced and Corrupt Organizations Act (RICO) an implied profit motive in order for one to maintain a private cause of action.[8] This Court again rejected the notion that it would be proper for courts

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statute for later cases in 1991; see *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994)).

[4] *Martin*, 490 U.S. at 760-765.

[5] *Martin*, 490 U.S. at 762, n. 3.

[6] *Martin*, 490 U.S. at 756, 769.

[7] *N.O.W. v. Scheidler*, 510 U.S. 249 (1994).

[8] *N.O.W.*, 510 U.S. at 254.

to add to a statute something which Congress itself had omitted.[9]

Most recently, in *Michigan v. Bay Mills Indian Cmty.*,[10] a case to which the Fourth Circuit cited,[11] this Court took an approach to statutory construction which in fact is strikingly similar to that which this Court took in *Martin* and *N.O.W.*,[12] though apparently neither this Court nor the Fourth Circuit were aware of *Martin* and *N.O.W.* specifically.

In the case at bar, in order for the Fourth Circuit to have given permissible deference to the interpretation of the statute which the Respondent suggests, it first would have to have been the case that the Patient Protection and Affordable Care Act (ACA) could possibly be construed at all to have the substantive scope which the IRS deemed it to have. This is the first part of the *Chevron* test.[13] In order for the Fourth Circuit to have reached the result that it did, however, then under *Chevron*, federal courts would have to have the authority to allow an administrative agency to add to the ACA something which Congress itself did not put there. Given that *Martin*, *N.O.W.*, and

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[9] *N.O.W.*, 510 U.S. at 260-261.

[10] *Michigan v. Bay Mills Indian Cmty.*, No. 12-515, 572 U.S. ___, slip op. at 10 (May 27, 2014).

[11] *King v. Burwell*, 759 F.3d 358, 371 (4th Cir. 2014).

[12] *Michigan v. Bay Mills Indian Cmty.*, No. 12-515, 572 U.S. at ___, slip op. at 10 (May 27, 2014).

[13] *Chevron*, 467 U.S. at 842-843.

Bay Mills do not allow federal courts to give themselves leave to do any such thing, we do not see how a court could allow a federal agency to do such a thing. But is this Court of the opinion, however, that the *Chevron* line of cases by themselves would allow such a thing? If so, clarification is needed.

Granted, academically, one might postulate that the *Chevron* line of cases, as well as the cases which might require a narrower reading of a statute, could be equally valid simultaneously on the grounds that in the *Chevron* line, one is considering how an administrative agency, one charged by Congress with the responsibility of construing a statute, might construe the statute in question. But this simply assumes that one even gets past the first prong of the *Chevron* test. This Court must consider, then, whether its current jurisprudence concerning the first prong of the *Chevron* line – *Scialabba v. Cuellar de Osorio*[14] – has a different standard for statutory construction within that first prong than the means of statutory construction which is called for in the other line of cases.

We also ask this Court to consider that if an administrative agency may do what this Court itself may not do, then what are we to do with *Marbury v. Madison*? In that case this Court so famously said,

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[14] *Scialabba v. Cuellar de Osorio*, No. 12-930, ___ U.S. ___, slip op. (June 9, 2014).

> It is emphatically the province and duty of the judicial department to say what the law is.[15]

However, if this Court finds that an administrative agency may do what even this Court itself may not do, it would be incumbent upon this Court to modify *Marbury* as follows:

> It is emphatically the province and duty of the judicial department to say what the law is, and this is even more so the case for the Commissioner of the IRS.

Your *amici* pray this may never be the case.

Also of importance here is the strange way that statutory construction could develop if all these cases are good law simultaneously. For instance, let us say that Congress passes a statute giving an agency the responsibility of ensuring the security of emails. Someone then files suit alleging a violation of rights pertaining to the new federal provision for the security of emails. At issue is whether the particular communication (perhaps, for this hypothetical, an Instant Message) fits the statutory definition of an email.

In the absence of action by an agency, under *Martin*, *N.O.W.*, and *Bay Mills*, the District Court would be required to construe the definition of "email" strictly according to the wording of the statute. But would the same result obtain if a federal

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[15] *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

agency, one tasked by Congress with carrying out the mandate of the statute, construed the statute more broadly, something which the Fourth Circuit, in the case at bar, would seem to allow?

One would think – one would hope – that *Martin*, *N.O.W.*, and *Bay Mills* are all consistent with the first prong of this Court's test in *Chevron*. And so no different result would obtain, regardless of whether the suit came first and the administrative action second, or *vice versa*. But if your *amici* understand things correctly, if this Court finds that the Fourth Circuit is correct about the application of *Chevron* in the case at bar, then your *amici* must conclude that the first prong of *Chevron* is inconsistent with *Martin*, *N.O.W.*, and *Bay Mills*. And so different results could obtain based on the chronological development of the order of things.

This could mean that even if this Court would be willing, hypothetically, to accept an agency's broad definition of "email" on a clean slate, it could nonetheless be the case that if there had first been a precedent of this Court regarding the definition of "email" outside of Administrative Law, a definition which would be narrower than an agency might later come up with, then the administrative agency would be stopped ahead of time from adopting the definition of "email" which it otherwise would be free to adopt, and thus the whole question of what a statute means would depend on who gets to the courthouse first. Shades of "notice" vs. "race-notice" jurisdictions in the Law of Property.

In fact, if this type of thing has happened in the past, how would this Court know it? For if an agency has ever been precluded this way from reaching its own conclusions about a statute's meaning based on a more broad construction than this Court has used, there would be no case that would show this, for the agency then would never have made a contrary determination. And if such a thing ever does happen in the future, likewise, how would we know it?

Now, your *amici* do agree with the Petitioners that the Fourth Circuit did not follow the *Chevron* line of cases properly; yet even if this Court finds that the Fourth Circuit did follow those cases properly, we submit that the Fourth Circuit nonetheless undermined *Martin*, *N.O.W.*, and *Bay Mills* because it did not give due consideration to those cases.

Your *amici* believe that if this Court does find that the *Chevron* line is in conflict with its other decisions, such a breakdown in the development of this Court's jurisprudence would probably be due to the way that legal topics are researched. *Chevron* was decided in 1984. It was followed by other cases pertaining to judicial deference to an agency's interpretation of a statute. Some examples are *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.* in 1985,[16] *Bd. of Governors of the Fed. Reserve*

[16] *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 473 n. 27 (1985).

Sys. v. Dimension Fin. Corp. in 1986,[17] *Babbitt v. Sweet Home Chapter* in 1995,[18] *FDA v. Brown & Williamson* in 2000,[19] *Duncan v. Walker* in 2001,[20] *Dept. of Transp. v. Public Citizen* in 2004,[21] and *National Assoc. of Homebuilders v. Defenders of Wildlife* in 2007.[22] Most recently, in this same genre, this Court decided *Scialabba v. Cuellar de Osorio*[23] within this past year. Interspersed among these cases were *Martin* (1989), *N.O.W.* (1994), and *Bay Mills* (2014), none of which had anything to do with deference to an administrative agency's interpretation of a statute.

In the *Chevron* line of cases, on the topic of statutory construction, neither the Keynotes of West Publishing nor those found in Lawyers Second Edition match up with those found in *Martin* or *N.O.W.* See Appendix A. Thus, those researching one line of cases on statutory construction could easily overlook precedents of this Court on that very point from

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[17] *Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986).

[18] *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 708 (1995).

[19] *FDA v. Brown & Williamson*, 529 U.S. 120, 132-133 (2000).

[20] *Duncan v. Walker*, 533 U.S. 167, 172 (2001).

[21] *Dept. of Transp. v. Public Citizen*, 541 U.S. 752 (2004).

[22] *National Assoc. of Homebuilders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007).

[23] *Scialabba v. Cuellar de Osorio*, No. 12-930, ___ U.S. ___, slip op. (June 9, 2014).

another line of cases; and apparently, this is what did in fact take place.

Consider what happened: in *Martin*, *Chevron* would have been on point at least with respect to the norms and procedure of statutory construction. Yet there was not even one mention of *Chevron* in *Martin*.

Babbitt, decided in 1995, made no reference to either *Martin* or *N.O.W.* (decided in 1994). Likewise, in later years, neither did *Brown & Williamson*, *Public Citizen*, *Natl. Assoc. of Homebuilders*, nor *Scialabba*; likewise, neither did *Scialabba* make reference to *Bay Mills*, though those two cases were decided just weeks apart. Yet one might wonder whether this Court, if it were to have addressed *Martin*, *N.O.W.*, and *Bay Mills* squarely in the Administrative Law cases, would have deemed them all to be reconcilable with each other on the one hand, or whether, on the other hand, this Court would have had to modify one or more of them to make them fit together. In fact, even outside of the field of Administrative Law, *Martin* would have been pertinent to *N.O.W.* with respect to statutory construction, and would have even been highly supportive of this Court's holding in *N.O.W.* One would think that on this basis, this Court would have cited to *Martin* in *N.O.W.* Yet *Martin* is nowhere mentioned in *N.O.W.*; again, this is apparently due to the way that Keynotes are organized and the way research is done. The discovery of the hidden precedents of the Supreme Court, then, depends instead upon the ability of the researcher to look at issues from new

angles, and to explore along lines of concepts not previously considered.

We have seen this before. In 1992, in *Planned Parenthood v. Casey*,[24] this Court went to great lengths to explain that it would not overrule *Roe v. Wade*[25] on the supposed grounds that doing so in *Casey* would have satisfied none of this Court's established criteria for overruling precedent instead of following *stare decisis*.[26] Yet already present in this Court's jurisprudence was *Edelman v. Jordan*[27] from 1974, in which this Court said that the very fact that a precedent pertains to constitutional law is itself a criterion which warrants reconsideration of precedent.[28] *Edelman* was completely missed in *Casey*, both by the Court itself and by the dissenting opinions, which could have made use of it.

Again, your *amici* believe that this is a matter of the Keynotes not matching up. There is little overlap between *Edelman* and *Casey* in the Keynotes pertaining to upholding *stare decisis* as opposed to overruling precedent in Lawyers Second Edition, and there is no overlap for those using the Supreme Court Reporter. See Appendix B. It is apparently for this reason that the precedent of *Edelman* got lost in this Court's

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[24] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

[25] *Roe v. Wade*, 410 U.S. 113 (1973).

[26] *Casey*, 505 U.S. at 864.

[27] *Edelman v. Jordan*, 415 U.S. 651 (1974).

[28] *Edelman*, 415 U.S. at 671, n. 14.

adjudication of *Casey*. And in like manner, this Court's precedents in *Martin* and *N.O.W.* apparently were lost in the case at bar for what is essentially the same reason; and apparently, because this Court's precedents might not always be deemed by some courts to be one consistent, all-inclusive line of precedents on statutory construction, the Fourth Circuit in the case at bar had incomplete guidance from this Court on statutory construction, even though the Fourth Circuit did cite to both *Bay Mills* and *Scialabba*.[29]

It is with all this in mind, then, that we do humbly and earnestly beseech this Honorable Court to be consistent, at least, and to adhere to that principle which it followed in *Martin*, *N.O.W.*, and *Bay Mills*: it is for Congress to establish the substantive rights and duties of persons under federal statutory law.

[29] *King*, 759 F.3d at 371, 373.

CONCLUSION

Accordingly, the judgment of the Court of Appeals should be reversed, and this case should be remanded to the Fourth Circuit with an order to enter judgment for the Petitioners.

Respectfully submitted,

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APPENDIX A

I. Keynotes for cases on statutory construction in Administrative Law (*i.e.*, the *Chevron* line of cases)

1. *Babbitt v. Sweet Home Chapter*, 515 U.S. 687 (1995)

West (see 115 S.Ct. 2407):

Administrative Law & Procedure 760

Fish 12

Game 3 ½

Statutes 179, 193, 241(1)

Lawyers Second Edition (see 132 L.Ed.2d 597):

Environmental Law § 38

Statutes § 136

2. *Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361 (1986)

West (see 106 S.Ct. 681):

Banks and Banking 522

Lawyers Second Edition (see 88 L.Ed.2d 691):

Banks § 110

Statutes §§ 145.4, 160.2, 164

3. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984)

West (see 104 S.Ct. 2778):

Health and Environment 25.6(3)

Statutes 219(1), 219(2), 219(4)

Lawyers Second Edition (see 81 L.Ed.2d 694):

Administrative Law §§ 14, 23, 74, 85, 276

Environmental Law §§ 24, 26

4. *Dept. of Transp. v. Public Citizen*, 541 U.S. 752 (2004)

West (see 124 S.Ct. 2204):

Automobiles 78

Environmental Law 254, 273, 583, 586

Statutes 220

Lawyers Second Edition (see 159 L.Ed.2d 60):

Environmental Law § 3

5. *Duncan v. Walker*, 533 U.S. 167 (2001)

West Keynotes on statutory construction (see 121 S.Ct. 2120):

Statutes 188, 195, 202, 206

Lawyers Second Edition Keynotes on statutory construction (see 150 L.Ed.2d 251):

Statutes §§ 108.2, 110.5, 164

6. *FDA v. Brown & Williamson*, 529 U.S. 120 (2000)

West Keynotes on statutory construction (see 120 S.Ct. 1291):

Administrative Law & Procedure 305

Drugs & Narcotics 2.1, 3

Lawyers Second Edition Keynotes on statutory construction (see 146 L.Ed.2d 121):

Administrative Law §§ 89, 276

Drugs, Narcotics, and Poisons §§ 1, 2, 10

Statutes §§ 113, 128, 153, 155.5, 157

7. *National Assoc. of Homebuilders v. Defenders of Wildlife*, 551 U.S. 644 (2007)

West (see 127 S.Ct. 2518):

Administrative Law & Procedure 330, 413, 763

Environmental Law 220, 537, 688, 693

Statutes 158, 159, 206, 208, 219(2), 219(6.1), 223.4

Lawyers Second Edition (see 168 L.Ed.2d 467):

Environmental Law § 38

Statutes §§ 182.3, 229, 230, 232, 234

8. *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451 (1985)

West (see 105 S.Ct. 441):

Constitutional Law 48(4), 113

Railroads 5.51

Statutes 233

Lawyers Second Edition (see 84 L.Ed.2d 432):

Constitutional Law §§ 125, 127, 212, 614

Railroads § 6

II. Keynotes for cases on statutory construction outside of Administrative Law (*i.e.*, cases outside of the *Chevron* line of cases)

1. *Martin v. Wilks*, 490 U.S. 755 (1989)

West (see 109 S.Ct. 2180):

Judgment 651, 707

Lawyers Second Edition (see 104 L.Ed.2d 837):

Civil Rights §§ 14, 63

Courts § 538.12

Judgment §§ 95, 206, 207, 316

Parties §§ 31, 80, 99

2. *N.O.W. v. Scheidler*, 510 U.S. 249 (1994)

West (see 114 S.Ct. 788):

R.I.C.O. 5, 34

Lawyers Second Edition (see 127 L.Ed.2d 99):

Extortion, Blackmail, and Racketeering § 1

APPENDIX B

Keynotes for *Edelman v. Jordan* and *Planned Parenthood v. Casey*

1. *Edelman v. Jordan*, 415 U.S. 651 (1974)

West (see 94 S.Ct. 1347):

Courts 303(7) (updated as Federal Courts 272)

Lawyers Second Edition (see 39 L.Ed.2d 662):

Courts §§ 771, 775, 776

2. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)

West (see 112 S.Ct. 2791):

Abortion and Birth Control .50

Courts 90(1)

Lawyers Second Edition (see 120 L.Ed.2d 674):

Courts § 775