



Supreme Court Cases to Watch 2023 Briefing Document

INTERACTIVE CONSTITUTION RESOURCES

- Resources for [Article III: The Judicial Branch](#)

303 Creative Case

- [303 Creative LLC v. Elenis](#) (21-476)
- Argued on December 5, 2022
- Related Podcast: [Free Speech, Same-Sex Marriage, and Anti-Discrimination Laws](#)

Overview

Lorie Smith, a Colorado website designer, said that she would not design a website for same-sex marriage ceremonies. Her position conflicted with a state public accommodation law, the Colorado Anti-Discrimination Act (CADA). A federal appeals court ruled against the designer. Smith and her attorneys argue the CADA violates her First Amendment free speech rights as an artist.

Facts of the case

Lorie Smith is the owner and founder of a graphic design firm, 303 Creative LLC. She wants to expand her business to include wedding websites. However, she opposes same-sex marriage on religious grounds so does not want to design websites for same-sex weddings. She wants to post a message on her own website explaining her religious objections to same-sex weddings.

The Colorado Anti-Discrimination Act (“CADA”) prohibits businesses that are open to the public from discriminating on the basis of numerous characteristics, including sexual orientation. The law defines discrimination not only as refusing to provide goods or services, but also publishing any communication that says or implies that an individual’s patronage is unwelcome because of a protected characteristic.

Even before the state sought to enforce CADA against her, Smith and her company challenged the law in federal court, alleging numerous constitutional violations. The district court granted summary judgment for the state, and the U.S. Court of Appeals for the Tenth Circuit affirmed.



Core Constitutional Question

Whether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment.

Arguments

303 Creative:

The Supreme Court has never approved efforts to compel speech that is contrary to the speaker's belief.

Smith "decides what to create based on the message, not who requests it."

Smith is not asking the Supreme Court to create new law. Instead, she is only asking them to apply their existing precedent.

Under the Supreme Court's 1995 decision in *Hurley*, holding that Massachusetts could not require the private organizers of Boston's St. Patrick's Day parade to allow an LGBTQ group to march in the parade, the question before the court is a simple two-part test: Is the good or service involved speech, and – if so – is the message affected by the speech it was required to accommodate?

The answer to both questions is yes.

Colorado:

A ruling in favor of Smith would be the first time that the Supreme Court had ruled that "commercial businesses could refuse to serve a customer based on race, sex, religion, or sexual orientation."

The law at the center of case requires businesses that serve the public to serve everyone. It merely targets discriminatory sales, rather than a speaker's message.

A store could decide that it will only sell Jewish-themed items, but it can't refuse to sell those items to Muslim or Christian customers.

And the exemption that Smith is seeking is "sweeping": It would apply not only to sincere religious beliefs like Smith's, but also to all kinds of racist, sexist, and bigoted claims.

Loan Forgiveness Cases

- [*Biden v. Nebraska*](#) (22-506)
- [*Dept. of Education v. Brown*](#) (22-535)
- Granted on December 1, 2022 and December 12, 2022; arguments on February 28, 2023

The Court has accepted two challenges to the Biden Administration's student loan forgiveness program on an expedited schedule.

Facts of the cases

In 2020, then-presidential candidate Joseph Biden promised to cancel up to \$10,000 of federal student loan debt per borrower. Last August, President Biden announced the debt-relief program, which would forgive up to \$20,000 in loans for qualifying borrowers, last August. At that point, student-loan repayments had already been on hold for nearly two years.

In March 2020, then-Secretary of Education Betsy DeVos suspended both repayments and the accrual of interest on federal student loans because of the COVID-19 pandemic. Both DeVos and the Biden plan relied on the HEROES Act, a law passed after the Sept. 11 attacks that gives the secretary of education the power to respond to a "national emergency" by making changes to the student-loan programs so that borrowers are left not worse off because of the emergency. The Supreme Court is currently considering two challenges to the Biden Administration program.

In the first challenge, Nebraska and five other states want the \$400 million program blocked from going into effect, citing an adverse impact on the states and the Biden administration's lack of a clear grant of power under the Higher Education Relief Opportunities for Students (HEROES) Act of 2003. The second challenge is from two borrowers mostly excluded from the forgiveness program who question whether the program "was statutorily authorized and was adopted in a procedurally proper manner." In both cases, the Court will consider whether the applicants have standing to pursue their cases in court.

The district court dismissed the challenge, finding that the states lacked judicial standing to sue. The U.S. Court of Appeals for the Eighth Circuit blocked the forgiveness program pending the appeal.

Core Constitutional Question(s):

Biden v. Nebraska: (1) Whether six states have Article III standing to challenge the Department of Education's student-debt relief plan; and (2) whether the plan exceeds the secretary of education's statutory authority or is arbitrary and capricious.

Department of Education v. Brown: (1) Whether two student-loan borrowers have Article III standing to challenge the Department of Education's student-debt relief plan; and (2) whether the department's plan is statutorily authorized and was adopted in a procedurally proper manner.

Arguments

Standing: The legal issue of whether the challengers have a right to sue.

The State Challengers

The States' Argument:

The states' primary argument is that Missouri has standing because it created and controls the Missouri Higher Education Loan Authority, one of the largest holders and servicers of student loans in the United States.

The loan-forgiveness program, "threatens to cut MOHELA's" funding by nearly 40%.

Because all funds beyond operating revenues go to support student financial aid in Missouri, a reduction in MOHELA's revenues will mean less money for financial aid in Missouri.

The U.S. Government's Argument:

Even if MOHELA might be harmed by the loan-forgiveness program, that would not be enough for Missouri to bring a lawsuit.

MOHELA is a separate entity, separate from the state.

MOHELA itself hasn't made the decision to sue. Instead, the state is suing on its behalf.

Usually, you can't sue on someone else's behalf, which would preclude a lawsuit by Missouri.

And Missouri has derived substantial benefits from creating MOHELA as an independent entity.

The Individual Challengers:

The Challengers' Argument:

Two student-loan borrowers, Myra Brown and Alexander Taylor. Brown was not eligible for any relief under the Biden program because her loans are held by commercial lenders. Taylor was eligible for \$10,000 in relief but not the full \$20,000 available to some borrowers.

They argue that if the Biden Administration had followed the procedural requirements that normally apply to federal agencies, they would have had a chance to advocate for a different program.

The U.S. Government's Argument:

Neither Brown nor Taylor has standing to challenge program.

If they win, the program would be invalidated and no one – including them – would benefit from the program.

The Court could only find that Brown and Taylor have standing based on what she characterized as a “bank shot” – the idea that, if the current version of the program is struck down, the Department of Education will decide to adopt a new loan-forgiveness program, under a different statute, from which Brown and Taylor will benefit.

The Merits

The Challengers:

Argue that the Biden Administration can’t rely on the HEROES Act to adopt the loan-forgiveness program.

Textual Argument. The Act grants authority to the secretary of education to respond to a national emergency by “waiv[ing] or modify[ing] any statutory or regulatory provision” governing the student-loan programs. Argue that the program isn’t a waiver or, alternatively, a modification of existing student-loan programs.

Major Questions Doctrine. The program also fails under the major questions doctrine. This is a principle of statutory interpretation that rests on the idea that, if Congress wants to give an administrative agency the power to make “decisions of vast economic and political significance,” it must say so clearly. It hasn’t done so here.

The U.S. Government:

The Act’s text is quite clear.

Congress gave the secretary the power to waive or modify existing provisions and to add new ones in their place.

The Act is about what happens to student loans when you have an emergency.

Congress doesn’t get much clearer than that.

Readings:

<https://www.brookings.edu/blog/fixgov/2023/03/01/the-supreme-court-takes-up-student-loan-forgiveness-w-hats-at-stake/>

<https://www.scotusblog.com/2023/02/bidens-student-loan-forgiveness-plan-gets-cold-reception-from-conservative-justices/>

[https://www.oyez.org/cases/2022/22-506#:~:text=Fact%20of%20the%20case&text=After%20winning%20the%20election,%20the,income%20of%20less%20than%20\\$125,000.](https://www.oyez.org/cases/2022/22-506#:~:text=Fact%20of%20the%20case&text=After%20winning%20the%20election,%20the,income%20of%20less%20than%20$125,000.)

https://thehill.com/homenews/nexstar_media_wire/4003995-student-loan-forgiveness-what-to-know-as-the-supreme-court-mulls-case/

Affirmative Action Case(s)

- [*Students for Fair Admissions v. University of North Carolina* \(21-707\)](#)
- [*Students for Fair Admissions Inc. v. President & Fellows of Harvard College* \(20-1199\)](#)
- Argued on October 31, 2022
- Related Podcasts: [Affirmative Action and the 14th Amendment Part 1](#) | [Part 2](#)

Affirmative action was back at the court during five hours of arguments in these two cases in late October. The Justices are reconsidering precedents set in [*Grutter v. Bollinger*](#) (2003). In *Grutter*, a divided court concluded that race-sensitive college admissions programs were permitted if they were narrowly tailored and considered race as one among many factors in the admissions process. Students for Fair Admissions argues that affirmative action runs afoul of the 14th Amendment's Equal Protection Clause and the nation's civil rights laws.

Facts of the Cases

The Supreme Court is considering two cases addressing the constitutionality of affirmative action—one involving Harvard and the other involving the University of North Carolina.

UNC Case. Petitioner Students for Fair Admissions (SFFA) sued the University of North Carolina (UNC) over its admissions process, alleging that the process violates the Fourteenth Amendment by using race as a factor in admissions. UNC admits that it uses race as one of many factors in its admissions process but argues that its process adheres to the requirements for race-based admissions outlined in the Supreme Court's decision in *Grutter*.

After an eight-day bench trial and litigation that spanned nearly seven years, the district court ruled that UNC's admissions policy survived strict scrutiny and was consistent with *Grutter*. SFFA appealed, and the U.S. Court of Appeals for the Fourth Circuit agreed to hold the case after the U.S. Supreme Court granted review.

Harvard Case. Petitioner Students for Fair Admissions (SFFA) sued Harvard College over its admissions process, alleging that the process violates Title VI of the Civil Rights Act of 1964 by discriminating against Asian American applicants in favor of white applicants. Harvard admits that it uses race as one of many factors in its

admissions process but argues that its process adheres to the requirements for race-based admissions outlined in the Supreme Court's decision in *Grutter*.

After a 15-day bench trial, the district court issued a detailed opinion in favor of Harvard. SFFA appealed, and the U.S. Court of Appeals for the First Circuit affirmed.

The case was originally consolidated for oral argument with a similar case challenging the admissions policies at the University of North Carolina under the Fourteenth Amendment of the Constitution, but the Court severed the cases—in part, because Justice Jackson was recused from the Harvard case

Core Constitutional Question(s):

Students for Fair Admissions v. University of North Carolina: (1) Whether the Supreme Court should overrule *Grutter* and hold that institutions of higher education cannot use race as a factor in admissions; and (2) whether a university can reject a race-neutral alternative because it would change the composition of the student body, without proving that the alternative would cause a dramatic sacrifice in academic quality or the educational benefits of overall student-body diversity.

Students for Fair Admissions v. President & Fellows of Harvard College: (1) whether the Supreme Court should overrule *Grutter* and hold that institutions of education cannot use race as a factor in admissions; and (2) whether Harvard College is violating Title VI of the Civil Rights Act by penalizing Asian American applicants, engaging in racial balancing, overemphasizing race, and rejecting workable race-neutral alternatives.

Overview of Cases

In 2003, a divided Supreme Court ruled in *Grutter v. Bollinger* that the University of Michigan Law School could consider race in its admissions process as part of its efforts to assemble a diverse student body. In her opinion for the majority, now-retired Justice Sandra Day O'Connor suggested that, in 25 years, "the use of racial preferences will no longer be necessary to further the interest approved today." The Harvard and UNC cases will help decide whether the Court is ready now, 19 years after *Grutter*, to end the use of race in college admissions.

The lawsuits at the center of the dispute before the court on Monday were filed in 2014 against Harvard and UNC by a group called Students for Fair Admissions. The group maintains that Harvard violates Title VI of the Civil Rights Act, which bars entities that receive federal funding from discriminating based on race, because Asian American applicants are less likely to be admitted than similarly qualified white, Black, or Hispanic applicants. The group also argues that UNC violates the 14th Amendment's Equal Protection Clause, which bars racial discrimination by government entities, by considering race in its admissions process when the university does not need to do so to achieve a diverse student body.

Arguments

Students for Fair Admissions:

"[R]acial classifications are wrong." They violate the Fourteenth Amendment's Equal Protection Clause and its promise of a colorblind Constitution. *Brown v. Board of Education* "finally and firmly" rejected the idea that racial classifications should be allowed to influence educational opportunities.

And the Justices should overrule *Grutter* and *Bakke*, the Court's 1978 decision upholding the consideration of race in higher education.

UNC, Harvard, and the U.S. Government:

The Supreme Court should reaffirm *Grutter*, *Bakke*, and the value of diversity in university admissions. On this view, universities should be able to use race as one factor among many in assembling their classes. They argued that affirmative action is consistent with the Fourteenth Amendment's original meaning. And they warned of the consequences of eliminating race in university admissions.

Moore v. Harper

- [Moore v. Harper](#) (21-1271)
- Argued on December 7, 2022
- Related Podcast: [The Supreme Court Considers the Independent State Legislature Theory](#)

This case involves redistricting and presents an important question: Do state lawmakers alone have the power to determine election maps and election rules, or is there a role for state courts in reviewing whether legislative decisions comport with the requirements of state constitutions and federal law? In 2022, the North Carolina supreme court rejected a new election map drawn by the state's Republican-controlled legislature.

The lawmakers argue that the Constitution's [Elections Clause](#) gives them the exclusive power to regulate federal elections held within the state, with their decisions not reviewable by the state court—an argument known as the Independent State Legislature Theory.

Facts of the case

After the 2020 Census, in which North Carolina gained an additional seat in the U.S. House of Representatives and required redistricting of the state, North Carolina's Republican-majority state legislature passed a partisan gerrymander.

The map was challenged in state court, and in February 2022, the North Carolina Supreme Court struck down the map for violating the state constitution's "free elections clause" and other provisions. The legislature proposed a second gerrymandered map, so the court ordered a special master to create a map for the 2022

congressional elections. The legislators asked the U.S. Supreme Court to review based on an argument that the Elections Clause of the U.S. Constitution gives state legislatures alone the authority to regulate federal elections—the so-called Independent State Legislature theory.

Following Supreme Court Oral Argument in the Case: Following a change in the composition of the North Carolina Supreme Court, a newly elected Republican majority on the court reversed course in April 2023 and said that it had no authority to block the map drawn by the state legislature. The practical effect is to enable the Republican-controlled General Assembly to scrap the court-ordered State House, Senate and congressional district boundaries that were used in elections last November, and draw new maps for elections in 2024.

Possible Fallout for SCOTUS—Per NYT Story: Legal scholars said the ruling also seemed likely to derail *Moore v. Harper*, a challenge that involved the same maps. In that case, leaders of the Republican-run legislature have argued that the U.S. Constitution gives state lawmakers the sole authority to set rules for state elections and political maps, and that state courts have no role in overseeing them. Now that the North Carolina Supreme Court has sided with the legislature and thrown out its predecessor’s ruling, there appears to be no dispute for the federal justices to decide, the scholars said.

Core Constitutional Question(s)

Whether a state’s judicial branch may nullify the regulations governing the “Manner of holding Elections for Senators and Representatives ... prescribed ... by the Legislature thereof,” and replace them with regulations of the state courts’ own devising, based on vague state constitutional provisions purportedly vesting the state judiciary with power to prescribe whatever rules it deems appropriate to ensure a “fair” or “free” election.

Overall Frame:

The case began in state court as a challenge to a new congressional map adopted by North Carolina’s Republican-controlled legislature in November 2021. Democratic voters and non-profits argued that the map violated the state’s constitution because it was a partisan gerrymander – that is, drawn to favor one party at another’s expense. Here, they said, although the state is roughly divided between Democrats, Republicans, and unaffiliated voters, the new map likely would have given Republican 10 of the state’s 14 seats in the U.S. House of Representatives.

In February 2022, the North Carolina Supreme Court (which at the time had a 4-3 Democratic majority) agreed that the new map violated a provision in the state constitution that guarantees free elections, and it barred the state from using the map in the 2022 elections. The trial court adopted a new map, drawn by three court-appointed experts.

North Carolina’s Republican legislators came to the Supreme Court, asking the justices to weigh in. They argued that the state supreme court’s decision setting aside the legislature’s map overstepped its authority under the U.S. Constitution’s elections clause, which provides that the time, place, and manner of congressional elections “shall be prescribed in each State by the Legislature thereof.”

Arguments:

Petitioners:

Stake their independent state legislature theory on the text of the Elections Clause, which confers power not on the state, as prior drafts did, but on a state's "Legislature." Petitioners argue that "Legislature" was defined at the time of the framing, as it is now, as the representative body that makes the law. That understanding, petitioners argue, leaves no room for state courts to enforce state constitutional constraints. Courts interpret the law; they are not a representative body that makes it. Petitioners argue that the Elections Clause prohibits a state court from invalidating a state legislature's regulation governing federal elections on the ground that it violates constitution. Under the text of the Election Clause, petitioners contend, only Congress may set aside a state legislature's regulation. Petitioners acknowledge establishes that another branch of state government may that Supreme Court precedent override the legislature when it has a role in the making of state laws, and that the state judiciary may enforce federal constitutional guarantees. They contend, however, that neither of those lines of authority applies here. Even if a state court may enforce a specific state constitutional limitation like compactness, petitioners argue, it may not enforce an open-ended guarantee of fairness to resolve the inherently political question of the permissible degree of partisan gerrymandering.

Respondents:

Counter that a state legislature was defined at the time of framing as an entity created and constrained by its state constitution. And they argue it was widely understood at the time of the framing that state courts had authority to enforce those constraints. It therefore makes no difference, respondents argue, that courts are not legislatures. The critical point is that the Elections Clause incorporates the background understanding that a legislature, properly defined, has no authority to legislate in a way that transgresses the state's constitution, and state courts have authority to enforce that constraint. Just as the Elections Clause confers power on Congress subject to the constraints of the Federal Constitution, respondents argue, it confers power on state legislatures subject to the constraints of their state constitutions.

Citations:

- "Moore v. Harper." Oyez, www.oyez.org/cases/2022/21-1271. Accessed 30 May. 2023.
- Full transcript located [here](#)
- <https://www.scotusblog.com/2023/03/justices-order-new-briefing-in-moore-v-harper-as-n-c-court-prepares-to-rehear-underlying-dispute/>