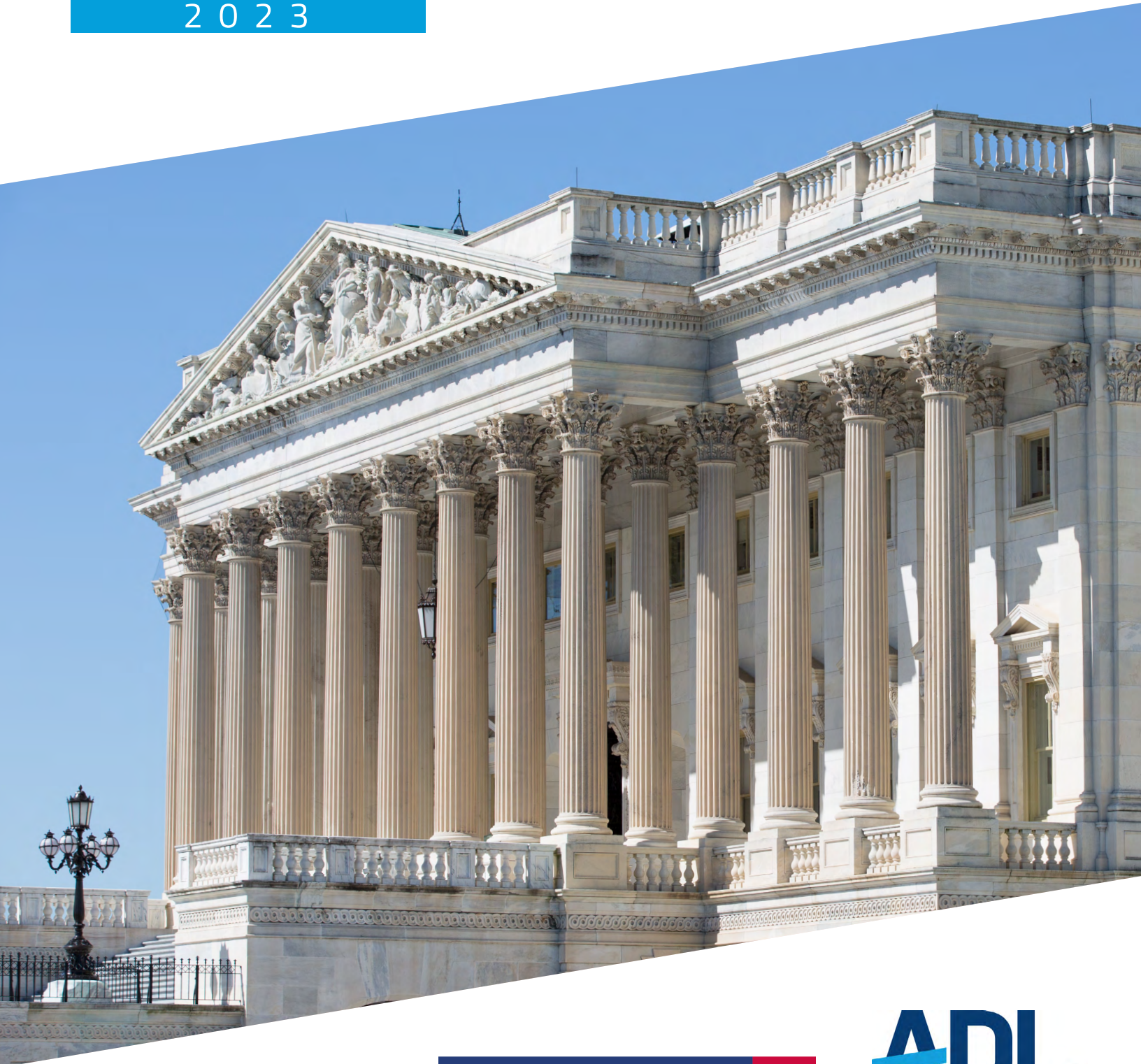


SUPREME COURT REVIEW

2023

JULY 2023

Written Materials and Resources



2023 Supreme Court Review

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24th Annual Supreme Court Review Agenda

A Joint Virtual Presentation by ADL and the National Constitution Center

Thursday, July 13, 2023

12:00-1:30pm ET | 11:00-12:30pm CT
10:00-11:30am MT | 9:00-10:30am PT

1. National Constitution Center Introduction
2. ADL Welcome
3. Supreme Court – Oct. 2022 Term
 - Term Overview & Trends
 - Free Speech and Religion
 - [303 Creative LLC v. Aubrey Elenis](#)
 - [Groff v. DeJoy](#)
 - Affirmative Action
 - [Students for Fair Admissions, Inc. v. President and Fellows of Harvard College](#)
 - [Students for Fair Admissions, Inc. v. University of North Carolina](#)
 - Voting Rights
 - [Moore v. Harper](#)
 - [Allen v. Milligan](#)
 - Online Statements, Regulation and Liability
 - [Counterman v. Colorado](#)
 - [Gonzalez v. Google](#)
 - [Twitter v. Taamneh](#)
 - Student Loans
 - [Biden v. Nebraska](#)
 - [Department of Education v. Brown](#)
 - Immigration
 - [Arizona v. Mayorkas](#)
 - [United States v. Texas](#)
 - Native American Rights
 - [Haaland v. Brackeen](#)
 - [Arizona v. Navajo Nation](#)
 - Labor Rights
 - [Glacier Northwest, Inc. v. International Brotherhood of Teamsters Local Union 174](#)
4. Looking Ahead - Oct. 2023 Cases & Trends
5. Q&A

24th Annual Supreme Court Review

A Joint Virtual Presentation by ADL and the National Constitution Center

Thursday, July 13, 2023

Speaker Biographies



Photo of Erwin Chemerinsky

Erwin Chemerinsky

Erwin Chemerinsky became the 13th Dean of Berkeley Law on July 1, 2017, when he joined the faculty as the Jesse H. Choper Distinguished Professor of Law.

Prior to assuming this position, from 2008-2017, he was the founding Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law, at University of California, Irvine School of Law.

Before that he was the Alston and Bird Professor of Law and Political Science at Duke University from 2004-2008, and from 1983-2004 was a professor at the University of Southern California Law School, including as the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science. From 1980-1983, he was an assistant professor at DePaul College of Law.

He is the author of sixteen books, including leading casebooks and treatises about constitutional law, criminal procedure, and federal jurisdiction. His most recent books are *Worse than Nothing: The Dangerous Fallacy of Originalism* (2022) and *Presumed Guilty: How the Supreme Court Empowered the Police and Subverted Civil Rights* (2021).

He also is the author of more than 200 law review articles. He is a contributing writer for the Opinion section of the Los Angeles Times, and writes regular columns for the Sacramento Bee, the ABA Journal and the Daily Journal, and frequent op-eds in newspapers across the country. He frequently argues appellate cases, including in the United States Supreme Court.

In 2016, he was named a fellow of the American Academy of Arts and Sciences. In 2017, National Jurist magazine again named Dean Chemerinsky as the most influential person in legal education in the United States. In 2022, he was the President of the Association of American Law Schools.

Education: B.S., Northwestern University (1975), J.D., Harvard Law School (1978)



Photo of Miguel A. Estrada

Miguel A. Estrada

Miguel A. Estrada is a partner in the Washington, D.C. office of Gibson, Dunn & Crutcher.

Mr. Estrada has represented clients before federal and state courts throughout the country in a broad range of matters. He has argued 24 cases before the United States Supreme Court, and briefed many others.

He has also argued dozens of appeals in the lower federal courts.

Best Lawyers® recognized Mr. Estrada as a 2023 “Lawyer of the Year” in Intellectual Property Litigation and as a 2020 “Lawyer of the Year” in Appellate Practice. He has been recognized by Benchmark Litigation as a 2020 U.S. Appellate Litigation “Star”. In 2014, The American Lawyer named Mr. Estrada a “Litigator of the Year,” praising his “brains and tenacity” and noting he is the lawyer to call for “a tough, potentially unwinnable case.” From 2014-2022, Chambers has named him as one of a handful of attorneys that it ranked in the top tier among the nation’s leading appellate lawyers.

Mr. Estrada was selected by his peers for inclusion in the 2022 edition of The Best Lawyers in America® in the area of Appellate Law, in addition to previous recognition by the publication in the specialties of Bet-the-Company Litigation, Commercial Litigation and Criminal Defense: White Collar, Intellectual Property Litigation, and Regulatory Enforcement Litigation in the areas of SEC, Telecom, and Energy. In 2017, he was elected as a member of the American Law Institute. In 2021, Mr. Estrada was named among the Lawdragon 500 Leading Lawyers in America.

Mr. Estrada joined Gibson Dunn in 1997, after serving for five years as Assistant to the Solicitor General of the United States. He previously served as Assistant U.S. Attorney and Deputy Chief of the Appellate Section, U.S. Attorney’s Office, Southern District of New York. In those capacities, Mr. Estrada represented the government in numerous jury trials and in many appeals before the U.S. Court of Appeals for the Second Circuit. Before joining the U.S. Attorney’s Office, Mr. Estrada practiced corporate law in New York with Wachtell, Lipton, Rosen & Katz.

Mr. Estrada served as a law clerk to the Honorable Anthony M. Kennedy in the U.S. Supreme Court from 1988 to 1989 and to the Honorable Amalya L. Kearse in the U.S. Court of Appeals for the Second Circuit from 1986 to 1987. He received a J.D. degree magna cum laude in 1986 from Harvard Law School, where he was editor of the Harvard Law Review. Mr. Estrada graduated with an A.B. degree magna cum laude and Phi Beta Kappa in 1983 from Columbia College, New York. He is fluent in Spanish and proficient in French.



Photo of Gregory G. Garre

Gregory G. Garre

Gregory Garre is a partner in the Washington, D.C. office of Latham & Watkins LLP and chair of the firm's Supreme Court and appellate practice. He previously served as the 44th Solicitor General of the United States, Principal Deputy Solicitor General, and Assistant to the Solicitor General, and is the only person to have held all of those positions within the Office of the Solicitor General. He has argued 48 cases before the Supreme Court, including *SEC v. Cochran* during the past term, and scores of additional cases before the courts of appeals. His Supreme Court cases include *Fisher v. University of Texas*, *Ashcroft v. Iqbal*, *FCC v. Fox*, and *Massachusetts v. EPA*.

Following his graduation from law school, he served as a law clerk to Chief Justice William H. Rehnquist, and to Judge Anthony J. Scirica of the United States Court of Appeals for the Third Circuit. He speaks frequently on issues related to the Supreme Court and appellate practice.



Photo of Amy L. Howe

Amy L. Howe

Until September 2016, **Amy Howe** served as the editor and reporter for SCOTUSblog, a blog devoted to coverage of the Supreme Court of the United States; she continues to serve as an independent contractor and reporter for SCOTUSblog. Before turning to full-time journalism, she served as counsel in over two dozen merits cases at the Supreme Court and argued two cases there. From 2004 until 2011, she co-taught Supreme Court litigation at Stanford Law School; from 2005 until 2013, she co-taught a similar class at Harvard Law School. She has also served as an adjunct professor at American University's Washington College of Law and Vanderbilt Law School. Amy is a graduate of the University of North Carolina at Chapel Hill and holds a master's degree in Arab Studies and a law degree from Georgetown University.



Photo of Fred Lawrence

Fred Lawrence

Frederick M. Lawrence is the 10th Secretary and CEO of the Phi Beta Kappa Society, the nation's first and most prestigious honor society, founded in 1776. Lawrence is also Distinguished Lecturer at the Georgetown Law Center, and has previously served as president of Brandeis University, Dean of the George Washington University Law School, and Visiting Professor and Senior Research Scholar at Yale Law School. He was elected to the American Philosophical Society in 2018 and the American Law Institute in 1999. Lawrence is the recipient of the 2019 Ernest L. Boyer Award from the New American Colleges and Universities, and the 2018 Advocacy Award of the Council of Colleges of Arts and Sciences.

An accomplished scholar, teacher and attorney, Lawrence is one of the nation's leading experts on civil rights, free expression, bias crimes, and higher education law. Lawrence has published widely and lectured internationally. He is the author of *Punishing Hate: Bias Crimes Under American Law* (Harvard University Press), examining bias-motivated violence and how such violence is punished in the United States. He has testified before Congress, appeared as a commentator on CNN MSNBC and Fox News, among others, and has frequently contributed op-eds to major news sources. Lawrence's legal career was distinguished by service as an assistant U.S. attorney for the Southern District of New York in the 1980s, where he became chief of the Civil Rights Unit.

Lawrence received a bachelor's degree in 1977 from Williams College magna cum laude where he was elected to Phi Beta Kappa, and a law degree in 1980 from Yale Law School where he was an editor of the Yale Law Journal.



Photo of Dahlia Lithwick

Dahlia Lithwick

Dahlia Lithwick is a senior editor at Slate, and in that capacity, has been writing their "Supreme Court Dispatches" and "Jurisprudence" columns since 1999. Her work has appeared in the New York Times, Harper's, The New Yorker, The Washington Post, The New Republic, and Commentary, among other places. She is host of Amicus, Slate's award-winning biweekly podcast about the law and the Supreme Court.

In 2018, Lithwick received the American Constitution Society's Progressive Champion Award, and the Hillman Prize for Opinion and Analysis. Lithwick won a 2013 National Magazine Award for her columns on the Affordable Care Act. She has been twice awarded an Online Journalism Award for her legal commentary. She was inducted into the American Academy of Arts and Sciences in October 2018. In 2021, she was a recipient of the Women's Media Center's Exceptional Journalism Awards. In 2021 she won a Gracie Award for Amicus Presents: The Class of RBG, which featured the last in-person audio interview with Ruth Bader Ginsburg.

Lithwick has held visiting faculty positions at the University of Georgia Law School, the University of Virginia School of Law, and the Hebrew University Law School in Jerusalem. She was the first online journalist invited to be on the Reporters Committee for the Freedom of the Press. She has testified before Congress about access to justice in the era of the Roberts Court and how #MeToo impacts federal judicial law clerks. She has appeared on CNN, ABC, The Colbert Report, the Daily Show and is a frequent guest on The Rachel Maddow Show.

Ms. Lithwick earned her BA in English from Yale University and her JD degree from Stanford University. Her new book, *Lady Justice*, was an instant New York Times bestseller. She is co-author of *Me Versus Everybody* (Workman Press, 2006) (with Brandt Goldstein) and of *I Will Sing Life* (Little, Brown 1992) (with Larry Berger). Her work has been featured in numerous anthologies including *Jewish Jocks* (2012), *What My Mother Gave Me: Thirty-one Women on the Gifts That Mattered Most* (2013), *About What Was Lost* (2006); *A Good Quarrel* (2009); *Going Rouge: Sarah Palin, An American Nightmare* (2009); and *Thirty Ways of Looking at Hillary* (2008).

24th Annual Supreme Court Review

A Joint Virtual Presentation by ADL and the National Constitution Center

Thursday, July 13, 2023

Overview of Cases Discussed

303 Creative LLC v. Aubrey Elenis (SCOTUS: decided 6/30/2023)

Issue: At issue in this case is a business seeking a free speech exemption from a Colorado state anti-discrimination law for the purpose of denying wedding-related services to LGBTQ+ couples. The business does not currently sell such services and there is no allegation that the business violated the law.

Judgment/Holding: In a 6-3 opinion by Justice Gorsuch, the Court ruled that the First Amendment prohibits Colorado from forcing a website designer to create expressive designs speaking messages with which the designer disagrees. Justice Sotomayor filed a dissenting opinion, in which Justices Kagan and Jackson joined.

ADL Brief: ADL joined 7 other civil rights organizations in an [amicus brief](#) led by the Lawyers' Committee for Civil Rights Under Law arguing that upholding public accommodation laws is essential to ensuring that people of color can access publicly available goods and services. The argument focuses on the ongoing importance of having strong public accommodation laws in light of continuing discrimination, the state's compelling interest in preventing discrimination, and the case law supporting public accommodation laws against First Amendment challenges. The brief underscores that historically marginalized groups, including people of color, LGBTQ+ individuals, and other groups continue to experience discrimination and need the protection provided by strong public accommodation laws.

Groff v. DeJoy (SCOTUS: decided 6/29/2023)

Issue: In *Trans World Airlines, Inc. v. Hardison* (1977), the Supreme Court held that an employer is required to allow a religious accommodation for an employee under Title VII of the Civil Rights Act of 1964 unless doing so would constitute an "undue hardship" for the business. However, the Court defined an "undue hardship" as anything that imposes "more than a de minimis cost" for the employer – a very low standard that has made it difficult over the years for people of faith to obtain religious accommodations in the workplace. In this case, the Supreme Court was asked to revisit that standard..

Judgment/Holding: In a 9-0 decision by Justice Alito, the Court ruled that Hardison, properly interpreted, means that Title VII requires an employer that denies a religious accommodation to show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business.

ADL Brief: ADL joined 5 other faith-based organizations in an [amicus brief](#) arguing that the “de minimis” standard needed to be changed. The brief provides a workable alternative to the de minimis standard by suggesting that “undue hardship” be defined in the same way as it is in the Americans with Disabilities Act. It also highlights that the burden of religious discrimination falls disproportionately on religious minorities and people who are economically vulnerable. Finally, the brief argues that the Court should declare that – extreme situations aside – an employer cannot establish “an undue hardship” merely because it would affect an employee’s coworkers.

[Students for Fair Admissions, Inc. v. President and Fellows of Harvard College; Students for Fair Admissions, Inc. v. University of North Carolina \(SCOTUS: decided 6/29/2023\)](#)

Issue: These cases involve legal challenges to the race-conscious admissions policies of Harvard College and the University of North Carolina, pursuant to which race is considered as one factor among many as part of a holistic evaluation of each individual applicant.

Judgment/Holding: The Court addressed both cases in a 6-3 opinion by Chief Justice Roberts, holding that race-conscious admissions violate the Equal Protection clause of the 14th Amendment.

ADL Brief: Consistent with ADL’s prior positions on affirmative action and following up on our brief filed [previously](#) with the First Circuit Court of Appeals, ADL filed an [amicus brief](#) in support of Harvard College before the Supreme Court. Both briefs support the trial court’s ruling that Harvard’s policies do not impose quotas, assign people to categories based on their race, or use race as a determinative factor in making admissions decisions. ADL’s brief to the Supreme Court makes three points: first, that diversity in higher education is a compelling government interest; second, that race must never be used as a determinative factor; and third, that Harvard’s current admissions practices (which are intended to promote rather than inhibit diversity) are clearly distinguishable from Harvard’s admissions practices in the 1920s and 1930s, which were motivated by antisemitism, were explicitly designed to decrease Jewish enrollment, and imposed a quota on Jews.

Moore v. Harper (SCOTUS: decided 6/27/2023)

Issue: Whether, under the “independent state legislature theory,” the North Carolina General Assembly has the sole power to set the state’s congressional map, and this power cannot be challenged under the state’s constitution in state courts.

Judgment/Holding: In a 6-3 opinion by Chief Justice Roberts, the Court ruled that the federal elections clause does not vest exclusive and independent authority in state legislatures to set the rules regarding federal elections and therefore did not bar the North Carolina Supreme Court from reviewing the North Carolina legislature’s congressional districting plans for compliance with North Carolina law.

ADL Brief: ADL led an [amicus brief](#) in this case, rebutting this narrow interpretation of the U.S. Constitution and asserting that “providing unchecked power over fundamental rights to a state legislature risks serious harm to all vulnerable marginalized and minority populations that have — throughout history — relied on the balance of powers to protect them from the potential tyranny of the majority.”

Allen v. Milligan (SCOTUS: decided 6/8/2023)

Issue: Whether Alabama’s redistricting map for its seven seats in the U.S. House of Representatives violated Section 2 of the Voting Rights Act by diluting the votes of the state’s Black residents. Voters and other groups challenged the redistricting map, arguing that even though Black people constitute 27% of the state’s population, the new map concentrated many Black voters into a single district in a part of central Alabama known as the “Black Belt,” while at the same time dispersing Black voters in the rest of the Black Belt into several other districts.

Judgment/Holding: In a 5-4 opinion by Chief Justice Roberts, the Court held that the Plaintiffs demonstrated a reasonable likelihood of success on their claim that the districting plan adopted by the state of Alabama for its 2022 congressional elections likely violated Section 2 of the Voting Rights Act.

Counterman v. Colorado (SCOTUS: decided 6/27/2023)

Issue: The First Amendment does not protect true threats, which can lead to criminal charges in certain cases. However, there is dispute as to how courts should determine what constitutes “true threats.”

Judgment/Holding: In a 7-2 opinion by Justice Kagan, the Court held that, in order to establish that a statement is a “true threat” unprotected by the First Amendment, the state must prove that the defendant had some subjective understanding of the statements’ threatening nature, based on a showing no more demanding than recklessness.

Gonzalez v. Google LLC (SCOTUS: decided 5/18/2023)

Issue: This case marks the first time that the Supreme Court heard a case regarding the scope of Section 230 of the Communications Decency Act, the key law that has been interpreted to provide near-total protection from liability to internet platforms for harm caused by user-generated content. The case, brought by the family of an American murdered by ISIS, alleges that YouTube knowingly hosted and recommended terrorist content, thus aiding and abetting terrorism. The lower court would not allow the case to go forward, ruling that Section 230 preemptively immunized Google, which owns YouTube.

Judgment/Holding: In a per curiam decision, the Court vacated the lower court's ruling and remanded the case for reconsideration in light of the Court's decision in *Twitter, Inc. v. Taamneh*.

ADL Brief: ADL filed an [amicus brief](#) supporting neither party, citing our expertise on countering hate and extremism, as well as our research on the role platform algorithms and recommendation engines play in exacerbating extremism, leading to offline harm and even mass violence. We ask the Court to make clear that the overbroad misinterpretation of Section 230 by lower courts is wrong as a matter of law. More specifically, the brief urges the Court to look at what Congress had in mind when it passed the law more than 25 years ago, before the advent of social media and their use of algorithms designed to maximize advertising revenue by keeping users online as long as possible, increasingly feeding them incendiary content and connecting them to extremist communities. The brief also asserts that the Court should not get rid of Section 230 entirely because a portion of it is what makes it possible for platforms to engage in responsible content moderation and remove those who spread hate and extremism online.

Twitter v. Taamneh (SCOTUS: decided 5/18/2023)

Issue: Relatives of a victim of a 2017 ISIS terror attack allege that Twitter and other social media platforms aided and abetted an act of international terrorism and are secondarily liable under the Anti-Terrorism Act (ATA) because the platforms allowed ISIS to use their platforms to recruit members, issue terrorist threats, spread propaganda, fundraise, and intimidate civilian populations.

Judgment/Holding: In a 9-0 opinion by Justice Thomas, the Court held that Plaintiffs' allegations that Twitter aided and abetted ISIS in its terrorist attack on a nightclub in Istanbul, Turkey fail to state a claim under 18 U.S.C. § 2333(d)(2), and therefore Twitter is not liable.

ADL Brief: ADL filed an [amicus brief](#) that highlights how terrorists and terrorist organizations use social media to advance their agendas and commit acts of terror and cites our expertise on countering hate and extremism, as well as our research on the role platform algorithms and

recommendation engines play in exacerbating extremism, leading to offline harm and even mass violence. We ask the Court to affirm the Ninth Circuit's interpretation of aiding-and-abetting liability and reject an overly narrow interpretation of the ATA that would prevent victims of terror from seeking any redress from social media companies that aid and abet terrorism unless they can demonstrate that a foreign terrorist organization (FTO) used particular support and resources to commit a specific terrorist attack. The extremely narrow interpretation proposed by social media platforms would render the ATA a dead letter because it is rarely possible to meet this exceedingly high standard. We take no position as to the legal sufficiency of the allegations against Twitter, or the ultimate merit of the claims. Still, liability under the ATA for aiding-and-abetting terrorism should not be so narrowly construed as to eliminate any possibility of holding social media platforms, or other global businesses, accountable if they are found to have knowingly provided substantial assistance to FTOs.

Biden v. Nebraska (SCOTUS: decided 6/30/2023)

Issue: Whether certain states have standing to challenge the Biden Administration's student loan debt forgiveness program and whether the Biden Administration has authority under the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act) to establish a student loan debt forgiveness program that would permanently cancel up to \$20,000 of debt for qualified borrowers.

Judgment/Holding: In a 9-0 opinion by Justice Alito, the Court ruled that individual borrowers lack Article III standing to assert a procedural challenge to the student loan debt forgiveness plan adopted by the Secretary of Education pursuant to the HEROES Act.

Arizona v. Mayorkas (SCOTUS: order issued 5/18/2023)

Issue: Whether states may intervene to challenge the District Court's summary judgment order requiring the government to terminate the Title 42 immigration policy. Title 42 is a public health law that was invoked by the Trump Administration at the onset of the COVID-19 pandemic as a means to turn away asylum seekers. President Biden continued and expanded its use, long after other pandemic measures ended. In *Huisha-Huisha v. Mayorkas*, the D.C. Circuit Court of Appeals ruled that the Administration must end its use of Title 42 to expel migrants. Arizona and 18 other Republican-led states then asked the Supreme Court for permission to belatedly intervene on appeal.

Judgment/Holding: Title 42 enforcement ended on May 11, 2023. Consequently, the Supreme Court vacated the order of the U.S. Court of Appeals for the District of Columbia Circuit denying petitioners' motion to intervene and remanded the case to that court with instructions to dismiss the motion as moot. Justice Jackson dissented from the vacatur of the order and would instead dismiss the writ of

certiorari as improvidently granted. Justice Gorsuch issued a separate statement expressing concern about overuse of the government’s emergency powers more broadly.

ADL Brief: ADL joined 59 other civil rights organizations in an [amicus brief](#) led by Human Rights First and Justice Action Center opposing the states’ request to intervene. The brief focuses on the harms of continuing Title 42, including the violence that migrants and asylum seekers face in Mexico, the disproportionate harm to Black and Indigenous asylum seekers, and the ways in which LGBTQ+ people, women, girls, and people with disabilities face compounded dangers due to this policy.

United States v. Texas (SCOTUS: decided 6/23/2023)

Issue: In a September 2021 memorandum, the Secretary of Homeland Security explains that because the Department of Homeland Security does not have the resources to apprehend and deport all of the more than 11 million noncitizens who could be subject to deportation, immigration officials should prioritize the apprehension and deportation of three specific groups of people: suspected terrorists; noncitizens who have committed crimes; and those caught recently at the border. Texas and Louisiana challenged the policy.

Judgment/Holding: In an 8-1 opinion by Justice Kavanaugh, the Court held that Texas and Louisiana lack Article III standing to challenge immigration-enforcement guidelines promulgated by the Secretary of Homeland Security that prioritize the arrest and removal of certain noncitizens from the United States. The Court did not rule on the legality of the policy itself.

Haaland v. Brackeen (SCOTUS: decided 6/15/2023)

Issue: The Indian Child Welfare Act (ICWA) is a landmark 1978 federal civil rights law that seeks to keep Native American children with Native American families. In this case related to child custody proceedings governed by ICWA, the Court was asked to decide whether ICWA overreaches Congress’s Article I authority and/or violates the Tenth Amendment.

Judgment/Holding: In a 7-2 opinion by Justice Barrett, the Court held that ICWA is consistent with Congress’s Article I authority, rejected petitioners’ anticommandeering challenges under the Tenth Amendment, and found that the parties lack standing to litigate their other challenges to ICWA’s placement preferences.

Arizona v. Navajo Nation (SCOTUS: decided 6/22/2023)

Issue: Whether the 1868 Treaty of Bosque Redondo, known to the Navajo Nation as the Old Paper, or Naal Tsoos Sani, established an ongoing relationship between the tribe and the United States wherein the federal government must fulfill the purposes of the treaty, or merely required the U.S. to recognize enumerated tribal rights.

Judgment/Holding: In a 5-4 opinion by Justice Kavanaugh, the Court held that the 1868 treaty establishing the Navajo Reservation reserved necessary water to accomplish the purpose of the Navajo Reservation but did not require the United States to take affirmative steps to secure water for the tribe.

Glacier Northwest, Inc. v. International Brotherhood of Teamsters Local Union 174 (SCOTUS: decided 6/1/2023)

Issue: Whether an employer could sue its employees' union under state law for damage the employer incurred as a result of the union's strike.

Judgment/Holding: In an 8-1 ruling authored by Justice Barrett, the Court held that the National Labor Relations Act did not preempt Glacier's state tort claims related to the destruction of company property during a labor dispute where the union failed to take reasonable precautions to avoid foreseeable and imminent danger to the property.



In the Courts:

ADL'S LEGAL DOCKET 2021-23

July 2023

Civil Rights Department



605 Third Avenue, New York, NY 10158-3560 | t: 212.885. 7700 | www.adl.org

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-  Contrary to ADL
-  Decision on other grounds
-  Favorable and contrary portions of the decision
-  Settled
-  Removed from court calendar

THE U.S. SUPREME COURT

Decided in the U.S. Supreme Court

Immigration

Asylum



[Arizona v. Mayorkas](#) (U.S. Supreme Court, 2023)

Title 42 is a public health law that was invoked by the Trump Administration at the onset of the COVID-19 pandemic as a pretext to turn away asylum seekers, contrary to the expertise of public health professionals and U.S. obligations under national and international law. President Biden continued and expanded its use, long after other pandemic measures ended. In *Huisha-Huisha v. Mayorkas*, the D.C. Circuit Court of Appeals ruled that the Administration must end its use of Title 42 to expel migrants. Arizona and 18 other Republican-led states then asked the Supreme Court for permission to belatedly intervene on appeal. ADL joined 59 other civil rights organizations in an amicus brief led by Human Rights First and Justice Action Center opposing the states' request to intervene. The brief focuses on the harms of continuing Title 42, including the violence that migrants and asylum seekers face in Mexico, the disproportionate harm to Black and Indigenous asylum seekers, and the ways in which LGBTQ+ people, women, girls, and people with disabilities face compounded dangers due to this policy. Note: On Feb. 16, 2023, after the amicus brief was filed, the Court removed the case from its argument calendar.

Discrimination

First Amendment



[303 Creative LLC v. Aubrey Elenis](#) (U.S. Supreme Court, 2022)

At issue in this case is a business that seeks a religious exemption from a state anti-discrimination law for the purpose of denying wedding-related services to LGBTQ+ couples. It, however, does not currently sell such services and there is no allegation that the business violated the law. ADL joined 7 other civil rights organizations in an amicus brief led by the Lawyers' Committee for Civil Rights Under Law arguing that upholding public accommodation laws is essential to ensuring that people of color can access publicly available goods and services. The argument focuses on the ongoing importance of having strong public accommodation laws in light of continuing discrimination, the state's compelling interest in preventing discrimination, and the case law supporting public accommodation laws against First Amendment challenges. The brief underscores that historically marginalized groups, including people of color, LGBTQ+ individuals, and other groups continue to experience discrimination and need the protection provided by strong public accommodation laws.



Groff v. DeJoy
(U.S. Supreme Court, 2023)

In *Trans World Airlines, Inc. v. Hardison* (1977), the Supreme Court held that an employer is required to allow a religious accommodation for an employee under Title VII of the Civil Rights Act of 1964 unless doing so would constitute an “undue hardship” for the business. However, the Court defined an “undue hardship” as anything that imposes “more than a de minimis cost” for the employer – a very low standard that has made it difficult over the years for people of faith to obtain religious accommodations in the workplace. In this case, the Supreme Court is asked to revisit that standard. ADL joined 5 other faith-based organizations in an amicus brief arguing that the standard needs to be changed. The brief provides a workable alternative to the de minimis standard by suggesting that “undue hardship” be defined in the same way as it is in the Americans with Disabilities Act. It also highlights that the burden of religious discrimination falls disproportionately on religious minorities and people who are economically vulnerable. Finally, the brief argues that the Court should declare that – extreme situations aside – an employer cannot establish “an undue hardship” merely because it would affect an employee’s coworkers.



Moore v. Harper
(U.S. Supreme Court, 2022)

This case, directly relevant to ADL’s Democracy Initiatives, involves a claim by the North Carolina General Assembly that under the oft-discredited “independent state legislature theory” it has the sole power to set the state’s congressional map, and this power cannot be challenged under the state’s constitution in state courts. ADL’s brief, joined by The Sikh Coalition, The Union for Reform Judaism, Central Conference of American Rabbis, Women of Reform Judaism, and Men of Reform Judaism, rebuts this narrow interpretation of the U.S. Constitution and asserts that “providing unchecked power over fundamental rights to a state legislature risks serious harm to all vulnerable marginalized and minority populations that have – throughout history – relied on the balance of powers to protect them from the potential tyranny of the majority.”



Students for Fair Admissions, Inc., Petitioner, v. President and Fellows of Harvard College, Respondent
(U.S. Supreme Court, 2022)

This case involves a legal challenge to Harvard College’s race-conscious admissions policy, pursuant to which race is considered as one factor among many as part of a holistic evaluation of each individual applicant. Consistent with ADL’s prior positions on affirmative action, we filed a brief in support of Harvard in the Supreme Court following up on our brief filed previously with the First Circuit Court of Appeals. Both briefs support the trial court’s ruling that Harvard’s policies do not impose quotas, assign people to categories based on their race, or use race as a determinative factor in making admissions decisions. ADL’s brief to the Supreme Court makes three points – first, that diversity in higher education is a compelling government interest; second, that race must never be used as a determinative factor; and third, that Harvard’s current admissions practices (which are intended to promote rather than inhibit diversity) are clearly distinguishable from Harvard’s admissions practices in the 1920s and 1930s, which were motivated by antisemitism, were explicitly designed to decrease Jewish enrollment, and imposed a quota on Jews.



Gonzalez v. Google
(U.S. Supreme Court, 2022)

This is the first time the Supreme Court is hearing a case regarding the scope of Section 230 of the Communications Decency Act, the key law that has been interpreted to provide near-total protection from liability to internet platforms for harm caused by user-generated content. The case, brought by the family of an American murdered by ISIS, alleges that YouTube knowingly hosted and recommended terrorist content, thus aiding and abetting terrorism. The lower court would not even let the case go forward, ruling that Section 230 preemptively immunized Google, which owns YouTube. ADL’s brief, which supported neither party, cites our expertise on countering hate and extremism, as well as our research on the role platform algorithms and recommendation engines play in exacerbating extremism, leading to offline harm and even mass violence. We ask the Court to make clear that the overbroad misinterpretation of Section 230 by lower courts is wrong as a matter of law. More specifically, the brief urges the Court to look at what Congress had in mind when it passed the law more than 25 years ago, before the advent of social media and their use of algorithms designed to maximize advertising revenue by keeping users online as long as possible, increasingly feeding them incendiary content and connecting them to extremist communities. The brief also asserts that the Court should not get rid of Section 230 entirely because a portion of it is what makes it possible for platforms to engage in responsible content moderation and remove those who spread hate and extremism online.



Twitter v. Taamneh
(U.S. Supreme Court, 2023)

In this case, relatives of a victim of a 2017 ISIS terror attack allege that Twitter and other social media platforms aided and abetted an act of international terrorism and are secondarily liable under the Anti-Terrorism Act (ATA) because the platforms allowed ISIS to use their platforms to recruit members, issue terrorist threats, spread propaganda, fundraise, and intimidate civilian populations. ADL's brief highlights how terrorists and terrorist organizations use social media to advance their agendas and commit acts of terror and cites our expertise on countering hate and extremism, as well as our research on the role platform algorithms and recommendation engines play in exacerbating extremism, leading to offline harm and even mass violence. We ask the Court to affirm the Ninth's Circuit's interpretation of aiding-and-abetting liability and reject an overly narrow interpretation of the ATA that would prevent victims of terror from seeking any redress from social media companies that aid and abet terrorism unless they can demonstrate that a foreign terrorist organization (FTO) used particular support and resources to commit a specific terrorist attack. The extremely narrow interpretation proposed by social media platforms would render the ATA dead letter because it is rarely possible to meet this exceedingly high standard. We take no position as to the legal sufficiency of the allegations against Twitter, or the ultimate merit of the claims. Still, liability under the ATA for aiding-and-abetting terrorism should not be so narrowly construed as to eliminate any possibility of holding social media platforms, or other global businesses, accountable if they are found to have knowingly provided substantial assistance to FTOs.



Biden v. Texas
(U.S. Supreme Court, 2022)

Under the Trump Administration's "Remain in Mexico" policy, also known as the Migrant Protection Protocols (MPP), most asylum seekers arriving at the U.S./Mexico border were forced to return to Mexico to await their U.S. asylum hearing. The Biden Administration attempted to terminate the program. Texas and Missouri sued to stop termination of the program. The district court entered a nationwide permanent injunction requiring the Department of Homeland Security to reinstate and maintain MPP; the 5th Circuit affirmed. ADL joined 60 other civil rights, immigration advocacy, and service provider organizations in an amicus brief to the Supreme Court led by RAICES and Justice Action Center highlighting the inhumane impacts of this policy. The brief argues that the Fifth Circuit misconstrued the claim being brought in order to reach its own desired

conclusion, that it ignored precedent regarding procedural law, and that it invented its own procedural standard. The brief further argues that MPP harms children and separates families, enables human trafficking, heightens risks to the most vulnerable migrants, endangers Black migrants, disadvantages Indigenous language speakers, and impedes fair hearings. Throughout, the brief highlights the stories of people who have been affected by MPP and the effects that this policy has had on people at the border.

Discrimination

Free Exercise Clause



Kennedy v. Bremerton School District **(U.S. Supreme Court, 2021)**

This case involves a public high school football coach who filed a lawsuit claiming religious discrimination under the Free Exercise Clause and employment discrimination laws after he was fired for refusing to stop kneeling in prayer at the football field's 50-yard line immediately following every game. This practice started after the school district directed him to stop leading his team in pre- and post-game prayer, which the coach had done for eight years prior. The lower courts repeatedly ruled in favor of the school district. ADL joined 33 religious' organizations, religious denominations, and local clergy in an amicus brief in support of the school district. The brief argues that allowing the football coach to lead the team in prayers at football games undermines the freedom of conscience of student athletes – who may wish to refrain from joining the prayer but who may feel overwhelming pressure to please their coach. It also argues that those student athletes who are able to resist the coach's pressure are at increased risk of harassment and bullying, from both students and teachers. Moreover, religious minorities are likely to bear the brunt of that bullying, which causes short-term and long-term harms.

Civil Liberties



NetChoice v. Paxton **(U.S. Supreme Court, 2022)**

This case involves a challenge to a Texas law that seeks to stop social media censorship and would effectively eviscerate the ability of major platforms to engage in meaningful content moderation. ADL joined a coalition amicus brief urging the Supreme Court to prevent the law from going into effect, arguing that the law “decimates platforms’ efforts to effectively and usefully curate content” and “forces disgraceful and wasteful speech onto platform users.” For example, platforms “could not moderate pro-Nazi speech – that is unless they also moderated all content pertaining to political ideologies. They could not moderate speech denying the Holocaust – at least not without banning all content remembering or educating about the Holocaust. They could not remove speech glorifying terrorist attacks against the United States – unless they also remove

speech decrying, memorializing, or educating about terrorist attacks against the United States.” As the brief observes, by broadly rejecting “censorship,” this law would render platforms “powerless to stop their private spaces from being used as breeding grounds for radicalization and recruiting of those who will engage in the most terrifying and destructive of acts.”

Civil Liability
for Sponsors of
Terrorism



[Weiss v. National Westminster Bank PLC](#)
(cert. denied, U.S. Supreme Court, 2022)

In this case brought by families of dozens of American victims of Hamas terrorist attacks, the U.S. Court of Appeals granted summary judgment in favor of a British-based bank that provides banking services to a company, Interpal, that has been designated as a “Specially Designated Global Terrorist” (SDGT) by the U.S. Treasury Department. The issue is whether a bank that is “generally aware” of Interpal’s connection to Hamas can be held liable under U.S. anti-terrorism laws for aiding and abetting terrorist activity. The coalition brief ADL joined asks the Supreme Court to grant certiorari and allow the families to amend their complaint so that a jury can consider the bank’s potential liability.

Reproductive
Rights

Due Process



[Dobbs v. Jackson Women’s Health Organization](#)
(U.S. Supreme Court, 2021)

Mississippi passed a law in 2018 that bars abortions after the 15th week of pregnancy, with limited exceptions. ADL joined with the National Women’s Law Center and 71 other organizations on an amicus brief urging that the law – an unmistakable challenge to *Roe v. Wade* – be found unconstitutional. The brief focuses on due process and explains that the devastating impact of allowing a pre-viability abortion ban to stand – or overturning the right to abortion entirely – will deny the liberty and equality of people who can become pregnant. The brief emphasizes how gutting or overturning the right to abortion would undermine the bodily autonomy of people forced to carry a pregnancy to term; limit the ability of people who can become pregnant to participate equally in social and economic life; and make it more difficult to navigate life’s course free from sex stereotypes regarding the capabilities and expected social roles of women. It highlights how such abortion bans especially harm people with disabilities, those living in poverty, LGBTQ+ people, and people of color. The brief also responds to Mississippi’s argument that the advances in contraceptive access and the existence of gender equality policies obviates the need for the right to abortion.



[Carson v. Makin](#)
(U.S. Supreme Court, 2021)

At issue in this case is a free exercise challenge to a Maine secondary school tuition assistance program. To provide for high school education in over half of the State's school districts that do not have public secondary schools, Maine pays for students to attend public or private schools which provide secular education, including religiously affiliated schools that do not indoctrinate religion. The lawsuit was brought by parents seeking to send their children to religious schools. ADL joined a legal brief asserting that the history of the Free Exercise Clause reflects it does not require states to fund religious education. To do so, would be an unwarranted and substantial expansion of the Free Exercise Clause contrary to the Court's existing precedent.



[Shurtleff v. City of Boston](#)
(U.S. Supreme Court, 2021)

At issue in this case is the constitutionality of a decision by the City of Boston to reject a request by some residents to raise the Christian flag in front of City Hall, next to the American flag and the Massachusetts state flag. ADL filed an amicus brief with the U.S. Supreme Court, highlighting that the consequence of a finding that Boston's City Hall flagpoles are a public forum would be that anyone could express any viewpoint from them, subject only to reasonable time, place, and manner restrictions. Such a decision would have serious, real world ramifications precisely because flying a flag from a government flagpole is prototypical government speech. Finding a free speech right for any member of the public to fly any flag on Boston's City Hall flagpoles would give private speakers the ability to falsely present their own message as government approved.



[Pecoske/Wolf v. Innovation Law Lab](#)
(U.S. Supreme Court, 2021)

Under the "Remain in Mexico" policy, also known as the Migrant Protection Protocols (MPP), certain asylum seekers arriving at the U.S./Mexico border were forced to return to Mexico to await their U.S. asylum hearing. As of January 2021, tens of thousands of MPP asylum seekers were waiting in Mexico for their asylum hearings, which had been postponed due to the COVID-19 pandemic since March 2020 with no clear dates for when the hearings would resume. ADL joined 110 other nongovernmental organizations and law school clinics on an amicus brief led by Human Rights First and the National Immigration Law Center, arguing that the Supreme Court should hold that the Remain in Mexico policy is unlawful. The brief argues that MPP

is an illegal and inhumane policy that denies refugees access to the U.S. asylum system, blocking virtually all MPP individuals from humanitarian protection in the U.S.; that MPP subjects vulnerable people to harms that rival the persecution they fled; and that by implementing MPP, the U.S. violates its legal commitment to nonrefoulement, which prohibits the U.S. from sending individuals to any country where they would face a well-founded risk of persecution, torture, or other serious human rights violations.

Voting Rights



Brnovich v. Democratic National Committee/Arizona Republican Party v. Democratic National Committee **(U.S. Supreme Court, 2021)**

Section 2 of the Voting Rights Act of 1965 prohibits voting practices and procedures that discriminate on the basis of race, color, or membership in language minority groups. In this case, the U.S. Court of Appeals for the Ninth Circuit held that two Arizona election provisions – one that prohibits third-party ballot collection and another that prohibits the counting of out-of-precinct votes – violated Section 2 because of their discriminatory impact on communities of color. The petitioner in this case, the Republican Arizona Attorney General, asked the Supreme Court to reverse the Ninth Circuit decision. ADL joined 52 other organizations on an amicus brief led by the Leadership Conference on Civil and Human Rights in support of the Ninth Circuit decision. The brief discusses the vital continuing role of Section 2 to communities of color not just in Arizona but across the nation. It also explains that Section 2 has been a particularly crucial legal tool since the Supreme Court’s gutting of Section 5 and the pre-clearance regime in its 2013 *Shelby County v. Holder* decision. The brief emphasizes to the Court that Section 2 has a vital continuing role in protecting access to the ballot for marginalized communities and the necessity of remaining vigilant to combat discrimination in voting.

Free Speech



Mahanoy Area School District v. B.L. **(U.S. Supreme Court, 2021)**

At issue in this case is the extent to which K-12 schools can regulate student speech that occurs off-campus. ADL joined a brief prepared by the National Women’s Law Center, Lambda Legal Defense and Education Fund and Lawyers’ Committee for Civil Rights Under Law, urging the Court to ensure that when it comes to off-campus speech, schools can regulate student bullying, harassment, or threats, but not speech that is merely perceived to substantially disrupt school activities. The brief contends that this balance is needed because students belonging to one or more historically marginalized groups – including girls and

women, LGBTQ+ students, students of color, and students with disabilities – are especially vulnerable to bullying, harassment, and threats from their peers, but also disproportionately subjected to unwarranted school discipline for speech that school administrators deem “defiant” or “disrespectful.” This standard would ensure that all students can be safe and access equal educational opportunities without victimization by other students, and also not face disparate discipline for their own speech.

Free Exercise
Clause

Establishment
Clause



Fulton v. City of Philadelphia **(U.S. Supreme Court, 2021)**

At issue in this case is a religiously affiliated, taxpayer-funded foster care agency seeking to discriminate against same-sex couples applying to be foster parents. Invoking the Free Exercise Clause, the agency claims that its religious beliefs about same-sex marriage supplant a local anti-discrimination law’s prohibition on sexual orientation discrimination. In rejecting this claim, ADL’s amicus brief asserts that the sought exemption is not permitted by the Free Exercise Clause because the law is neutral to religion and serves a public interest of the highest order – eradicating discrimination. It would violate the Establishment Clause by favoring the agency’s religious beliefs over the civil rights of others. Furthermore, the harm from a ruling in the agency’s favor would not be limited to LGBTQ+ people because it would open the door wide open to discrimination against religious minorities, undermining religious liberty protections found in anti-discrimination laws across the nation.

Free Exercise
Clause



South Bay United Pentecostal Church v. Newsom **(U.S. Supreme Court, 2021)**

At issue in this case is a church and member of the clergy invoking the Free Exercise Clause to seek a broad exemption from California coronavirus public-health orders that restrict indoor religious gatherings to the same extent or more favorably than similarly situated secular gatherings. In opposing this claim, the legal brief joined by ADL explains that the history of the Free Exercise Clause demonstrates it was never intended to require religious exemptions from laws that protect public health or safety. Rather, it was enacted to address a long history of governmental efforts to suppress particular religious groups based on disapproval of them. Furthermore, the Supreme Court’s longstanding interpretation of the Clause has aligned with that original intent, recognizing religious exercise is worthy of respect and accommodation, but not to the extent of jeopardizing the health and safety of others.



[Harvest Rock Church, Inc. v. Newsom](#)
(U.S. Supreme Court, 2021)

At issue in this case is a church invoking the Free Exercise Clause to seek a broad exemption from California coronavirus public-health orders that restrict indoor religious gatherings to the same extent or more favorably than similarly situated secular gatherings. In opposing this claim, the legal brief joined by ADL explains that the history of the Free Exercise Clause demonstrates it was never intended to require religious exemptions from laws that protect public health or safety. Rather, it was enacted to address a long history of governmental efforts to suppress particular religious groups based on disapproval of them. Furthermore, the Supreme Court’s longstanding interpretation of the Clause has aligned with that original intent, recognizing religious exercise is worthy of respect and accommodation, but not to the extent of jeopardizing the health and safety of others.



[Gish v. Newsom](#)
(U.S. Supreme Court, 2021)

At issue in this case is clergy and congregants from several churches invoking the Free Exercise Clause to seek a full exemption from California coronavirus public-health orders that restrict indoor religious gatherings to the same extent or more favorably than similarly situated secular gatherings. In opposing this claim, the legal brief joined by ADL explains that the history of the Free Exercise Clause demonstrates it was never intended to require religious exemptions from laws that protect public health or safety. Rather, it was enacted to address a long history of governmental efforts to suppress particular religious groups based on disapproval of them. Furthermore, the Supreme Court’s longstanding interpretation of the Clause has aligned with that original intent, recognizing religious exercise is worthy of respect and accommodation, but not to the extent of jeopardizing the health and safety of others.

THE FEDERAL AND STATE COURTS

Pending in the Federal and State Courts

Discrimination

Civil Liberties

[B.P.J. v. West Virginia](#) **(U.S.C.A. 4th Circuit, 2023)**

B.P.J. is a transgender girl in middle school who challenged her exclusion from participating in school sports by West Virginia's anti-transgender sports ban. A district court found that Title IX does not protect a transgender student's right to participate in school sports consistent with the student's gender identity. In a brief led by the National Women's Law Center, ADL joined 51 organizations committed to gender justice to support B.P.J.'s appeal of this district court decision. The brief specifically highlights the ways that Title IX protects all girls, women, and LGBTQIA+ athletes from sex discrimination that's tied to overbroad and harmful stereotypes. It points out that targeting transgender women and girls for discrimination threatens opportunities for all women and girls, and is dangerous and creates harm for transgender, gender non-conforming, and intersex women and girls. The brief also addresses how policing who is and isn't a girl or a woman is especially harmful for Black and brown women and girls.

Note: Subsequent to the filing of this brief, the U.S. Supreme Court denied West Virginia's request to stay the preliminary injunction in this case. Consequently, B.P.J. can continue to run with her team while the merits case proceeds.

Discrimination

Free Exercise

[Chelsey Nelson Photography, LLC v. Louisville/Jefferson County Metro Government](#) **(U.S.C.A. 6th Circuit, 2023)**

At issue in this case is a wedding photographer who seeks a religious exemption to Louisville's anti-discrimination ordinance for the purpose of denying wedding-related services to same-sex couples. ADL joined 14 other faith-based organizations in a brief led by Americans United for Separation of Church and State. The brief argues that the Free Exercise Clause of the First Amendment does not require granting the photographer a religious exemption to this neutral, generally applicable anti-discrimination ordinance. Furthermore, it argues that exempting businesses from anti-discrimination laws to enable them to deny service to LGBTQ+ people based on the businesses' religious views actually "would undermine, not advance, religious freedom." The brief illustrates how anti-discrimination laws protect religious freedom and that granting a religious exemption here would undermine religious freedom. It argues that rewriting free-exercise law to require an exemption here would create a sharp, slippery slope toward limitless forms of discrimination – including discrimination based on religion.

[Members of the Medical Licensing Board of Indiana v. Anonymous Plaintiff](#)
(Indiana Court of Appeals, 2023)

In August 2022, Indiana passed a law banning abortion in the state under almost all circumstances. ADL joined a large interfaith coalition in this amicus brief, drafted by Americans United for the Separation of State, opposing the abortion ban, asserting that it “runs roughshod” over religious pluralism protected by the Indiana Constitution. The brief contends that Indiana’s new law, reflecting the intent of those legislators supporting it, “imposes one religion-based view of abortion on all Hoosiers” and that in so doing, it runs afoul of the Indiana Religious Freedom Restoration Act. It refers to how different religions, including those represented on the brief, have different answers to when life begins, which is “quintessentially a concern of religion, and one that each person must resolve in accordance with individual conscience.” The brief also tells the court that “keeping the most bitterly divisive religious disputes outside the reach of politics as much as possible is not only critical to religious freedom and social stability but also is a singularly appropriate application of judicial power.”

[Crisitello v. St. Theresa School](#)
(Supreme Court of New Jersey, 2021)

At issue in this case is the application of the First Amendment’s ministerial employee exception to an art teacher at a religious elementary school. Grounded in constitutionally mandated separation of church and state, the exception exempts religious institutions from all employment discrimination laws for employees deemed to be ministerial. A lower state court ruled that the teacher, who performed no “vital religious duties,” could move forward with her pregnancy and marital discrimination lawsuit against the school because the exception did not apply to her. ADL joined a brief drafted by Americans United for Separation of Church and State and the National Women’s Law Center in support of the teacher asserting that acceptance of the school’s excessively broad interpretation of the exception would have far-reaching consequences for employees of the numerous religious schools and other institutions in the State of New Jersey. It would deprive such employees of workplace anti-discrimination protections by permitting religious institutions to unilaterally determine when the exception applies without consideration of an employee’s actual duties.

[Corbitt v. Taylor](#)
(U.S.C.A. 11th Circuit, 2021)

Alabama only allows people to change the gender marker on their driver's licenses if they undergo surgical procedures and submit proof to the state, meaning that transgender people who do not want, cannot afford, or are medically unable to have the required surgeries are prevented from having a license that accurately reflects their gender. Carrying a license with an inaccurate gender marker puts transgender people – especially Black and brown transgender women – at a heightened risk of discrimination, harassment, and attack. Three transgender women who were denied accurate gender markers on their driver's licenses sued the state of Alabama, arguing that this policy violates their constitutional privacy, due process, free speech, and equal protection rights. The district court decided that Alabama's policy violates the Equal Protection clause because it discriminates against transgender people on the basis of sex. ADL joined 32 organizations in an amicus brief led by the National Women's Law Center supporting the women on appeal in the Eleventh Circuit. The brief urges the court to affirm the district court's decision, highlights the harms at stake – especially for Black and brown transgender women – and clarifies some issues that the state conflates in its appeal.

[Carpenter v. James](#)
(U.S.C.A. 2nd Circuit 2022; U.S.D.C. Western District of New York, 2021)

At issue in this case is a business invoking the Free Exercise Clause of the First Amendment to seek a religious exemption from a New York State anti-discrimination law for the purpose of denying wedding photography services to LGBTQ+ couples. In opposing this claim, the legal brief joined by ADL asserts that such an exemption is not required by the Free Exercise Clause. Furthermore, New York's public accommodations law does not coerce participation in religious activity. Finally, antidiscrimination laws protect religious freedom, including that of adherents of underrepresented faiths who could be discriminated against if this exemption is granted.

[A.M. v. Indiana](#)
(U.S.C.A. 7th Circuit, 2022)

This case involves a challenge to Indiana’s 2022 sports ban targeting transgender girls and young women. The ACLU brought the case on behalf of A.M., a 10-year-old transgender girl who was forced to leave her elementary school softball team as a result of the ban. A.M. won a preliminary injunction finding that the ban likely violates Title IX, and Indiana appealed. ADL joined 58 other organizations in an amicus brief led by the National Women’s Law Center in support of A.M. The brief highlights how sports bans like Indiana’s are based on debunked sex stereotypes and undermine opportunities for all girls and women seeking to play team sports at school. These laws harm transgender and cisgender girls and women by reinforcing sexist, racist stereotypes about femininity, with women and girls of color disproportionately targeted and harmed. Such bans actually force schools to violate Title IX and the Equal Protection clause by imposing sex discrimination on school teams.

[Ateres Bais Yaakov Academy of Rockland v. Town of Clarkstown et al.](#)
(2nd Circuit 2022)

This case alleges a pattern of discriminatory conduct by the Town of Clarkstown, in coordination with a group called Citizens United to Protect Our Neighborhood (“CUPON”), to block the purchase of property by an Orthodox Jewish school – Ateres Bais Yaakov Academy (“ABY”) – by any means necessary. ADL’s proposed brief, prepared by the law firm Stroock & Stroock & Lavan LLP in support of ABY, sets forth a history of the Religious Land Use and Institutionalized Persons Act (“RLUIPA”) and its intended purpose, summarizes the troubling pattern of anti-Orthodox exclusionary policy practices in New York and New Jersey localities, which have required intervention by the Department of Justice and State Attorneys General, and examines how the disturbing allegations in Clarkstown mirror the land-use actions taken by other municipalities in this region that were the subject of those enforcement actions.

Billard v. Charlotte Catholic High School
(U.S.C.A. 4th Circuit, 2022)

Lonnie Billard, a former drama teacher and substitute teacher at Charlotte Catholic High School, was fired after posting on Facebook that he was planning to marry a man. ADL joined 47 organizations committed to gender justice and LGBTQ+ rights in an amicus brief supporting Mr. Billard. The brief, filed before the Fourth Circuit, was led by the National Women’s Law Center. It points out that Title VII provides necessary workplace civil rights protections for nearly one million employees of religious employers, including against sex discrimination. It argues that improperly expanding the limited exceptions that Congress created in Title VII would undermine the crucial protections that Congress sought to safeguard, leaving many workers vulnerable to wholesale employment discrimination based on sex – including sexual orientation or gender identity – or any other basis. The brief further explains the harms that would result if the school’s arguments were accepted, including any aspect of an employee’s life being reinterpreted as violating an employer’s religious views.

Fellowship of Christian Athletes v. San Jose Unified School District Board of Education
(9th Circuit, 2022)

At issue, in this case, is whether a school district may deny a student club official recognition if the club conditioned students’ full participation on signing a “Statement of Faith and Purity” that discriminated against LGBTQ+ students in violation of the district’s nondiscrimination policy. ADL joined a coalition of 22 organizations in an amicus brief in support of the school district and its nondiscrimination policy that prohibits officially recognized student organizations from excluding students based on protected characteristics, such as race, gender identity, or sexual orientation.

Decided by the Federal and State Courts

Discrimination

Equal
Protection



[Carolina Youth Action Project v. Wilson](#) (U.S.C.A. 4th Circuit, 2022)

South Carolina’s “disturbing schools” and “disorderly conduct” laws are vague, punitive, and intensely subjective laws that have been vehicles for channeling students – disproportionately BIPOC students and students with disabilities – into the criminal legal system. Plaintiffs are public-school students in South Carolina challenging these laws. ADL joined 23 other civil rights and public interest organizations in an amicus brief led by the National Women’s Law Center, the NAACP, the National Disability Rights Network, and the National Center for Youth Law, to the U.S. Court of Appeals for the Fourth Circuit supporting the students and highlighting the discriminatory impact of vague school discipline laws and school policing, particularly on Black students including Black girls, who make up the core of the plaintiffs. The brief also discusses the ways in which these harms caused by interactions with law enforcement are exacerbated for other students of color, students with disabilities, LGBTQ+ students, and students at the intersection of these identities.

Discrimination

Transgender
Rights



[Adams v. School Board of St. John’s County](#) (U.S.C.A. 11th Circuit, 2021)

This case involves Equal Protection Clause and Title IX challenges to a county school board policy that prohibits transgender students from using the restroom which conforms to their gender identity. ADL and 50 other organizations joined an amicus brief led by the National Women’s Law Center opposing this policy. ADL had joined a previous brief in this case in 2019, resulting in a favorable decision from an 11th Circuit panel. In an *en banc* hearing, the full 11th Circuit is revisiting the opinion. The brief explains why the court’s initial decision was correct and describes the harms that would flow from a bad decision. It also debunks the myths and stereotypes that the school’s arguments rely on.



[Soule v. CIAC](#)
(U.S.C.A. 2nd Circuit, 2021)

The Connecticut Interscholastic Athletic Conference (CIAC) has a policy that allows K-12 athletes to participate in sports consistent with their gender identity. This inclusive policy and others like it help protect the safety and wellbeing of transgender youth, and help ensure that all women and girls can access the well-documented benefits of playing sports. In an amicus brief led by the National Women’s Law Center, ADL joined 34 other organizations in supporting CIAC against this lawsuit challenging its inclusive athletic policy and urging the court to affirm the lower court ruling dismissing the case. Among other things, the brief refutes the inaccurate and dangerous myths and stereotypes that undergird the challenge to the CIAC policy. It also explains that denying students an opportunity to participate in sports consistent with their gender identity is unlawful sex discrimination under Title IX.



[O C Food & Beverage, LLC v. Orange County, Florida](#)
(Fifth District Court of Appeal, Florida, 2021)

The Orange County, Florida Human Rights Ordinance provides broader anti-discrimination protections than the State’s Human Rights Law, including prohibitions on sexual orientation and gender identity discrimination. At issue in this case is whether the State law preempts these broader protections. ADL joined a brief asserting that the Florida Constitution and long-standing State Supreme Court rulings permit county and municipal governments to adopt more comprehensive anti-discrimination laws. Furthermore, the Orange County and numerous other local ordinances protect vulnerable Floridians, not covered under the State law, from discrimination in employment, housing, and public accommodations, which continues to be a serious issue in the State.



[Commonwealth of Massachusetts v. Jacobson](#)
(Massachusetts Superior Court, 2022)

This case seeks to cure a decades-old injustice arising from a criminal trial in the early 1980s that was tainted by antisemitism. In ADL’s letter amicus brief supporting defendant Barry Jacobson’s motion for post-conviction relief, ADL explained how one of the most prominent and persistent stereotypes about Jews is that they “are greedy and avaricious, hoping to make themselves rich by any means possible.” ADL argued that the prosecution’s suggestion at trial that these traits were inherent in Mr. Jacobson was not only improper, but fed directly into the preexisting antisemitic prejudices held by at least one of the jurors, whose comments (“All those rich, New York Jews come up here and think they can do anything and get away with it”) revealed that she believed Mr. Jacobson had these characteristics because he was Jewish, and was guilty

for this reason alone. ADL’s letter amicus highlighted the ways in which this was quintessential juror bias – and directly contrary to a “basic premise of our criminal justice system” that the “law punishes people for what they do, not who they are.”

First
Amendment

Establishment
Clause



Demkovich v. Saint Andrew the Apostle Parish
(U.S.C.A. 7th Circuit, en banc, 2021)

At issue in this case is whether the First Amendment ministerial exception should be expanded to categorically bar any Title VII or other hostile work environment claims by clergy and other ministerial employees of religious organizations. The purpose of the exception is to ensure that faith-based organizations have full control in hiring, firing and disciplining employees who perform religious duties. ADL joined a legal brief rejecting this expansion. The brief asserts that such an expansion is not supported by the First Amendment because it is unnecessary to protect the religious autonomy and freedom faith-based employers. Indeed, it would violate the Establishment Clause by placing hundreds of thousands of employees at risk of workplace harassment and abuse, with no possibility of legal recourse.

Bullying

LGBTQ+ Rights



Doe v. Hopkinton Public Schools
(U.S.C.A. 1st Circuit, 2021)

This case involves a legal challenge to Massachusetts’s anti-bullying statute – namely, that the “emotional harm” prong of the definition of bullying in M.G.L. c. 71, § 370(a) is unconstitutionally overbroad and vague. ADL has been a key proponent of anti-bullying legislation in Massachusetts and accordingly joined an amicus brief, prepared by GLBTQ Legal Advocates & Defenders (GLAD), to emphasize the vital importance of the emotional harm prong of the Massachusetts anti-bullying law and in particular (1) to bring to the Court’s attention the key medical and social science literature illuminating the consequences of emotional harm from bullying, which disproportionately and more severely impacts stigmatized groups, including LGBTQ+ youth; and (2) to clarify that the term “emotional harm” is a well-established and recognized concept in law and medicine, which, in the context of the language and requirements of M.G.L. c. 71, § 370, provides more than satisfactory notice of the statute’s prohibitions.

Education

COVID-19



[Resurrection School v. Hertel](#)
(U.S.C.A. 6th Circuit, 2021)

At issue in this case is a private religious school's Free Exercise clause challenge to a State of Michigan COVID-19 order requiring all persons who are at least five years old to wear face masks whenever they are in a shared space with someone outside their household, including both public and private schools. The brief asserts that in the context of a national pandemic that has taken the lives of 543,000 Americans, including more than 16,900 Michigan residents, the order is fully consistent with all Free Exercise clause standards.

Discrimination



[Morgan, et al. v. United States Soccer Federation, Inc.](#)
(U.S.C.A. 9th Circuit, 2021)

In March 2019, the United States Senior Women's National Soccer Team (USWNT) filed a class action lawsuit against the United States Soccer Federation, Inc. (USSF), claiming violations of the Equal Pay Act and of Title VII of the Civil Rights Act of 1964 alleging unequal pay and working conditions as compared to the Men's National Team (USMNT) in the District Court of Central California. For years, the U.S. Soccer Federation had been paying USWNT players less than their counterparts on the USMNT, despite the women's soccer team being more successful and bringing in substantially more money than the men's soccer team. Upon a summary judgment motion, the District Court granted partial summary judgment in favor of the women's team for the unequal working conditions claim, but granted summary judgment in favor of USSF for the unequal pay claim. ADL joined 63 civil rights organizations in a brief led by the National Women's Law Center and Women's Sports Foundation supporting the women's national team. The brief highlights the harms of the gender wage gap. It also underscores the importance of following the applicable legal standards for claims of equal pay for women, notably the Equal Pay Act and Title VII, and argues that the District Court failed to do so properly in this case.

Education

COVID-19



[Boston Parent Coalition for Academic Excellence Corp. v. School Committee of the City of Boston](#)
(U.S. District of Massachusetts, 2021)

This case involves a constitutional challenge to a temporary admissions program, developed in the wake of COVID-19, for Boston's three highly selective Exam Schools. The argument put forth by plaintiff is that the new plan – which involves the suspension of entrance exams in favor of criteria that value high academic standards, increased neighborhood equity, socioeconomic inclusion

and racial diversity — is a race-based quota program that purportedly “disfavor[s] Asian and white students.” From ADL’s perspective, however, the program is a constitutional and necessary adjustment in light of COVID-19 that will only serve to improve diversity within the Exam Schools. ADL’s brief, joined by a broad coalition of nonprofit organizations, sports teams, and local business entities, focuses on the beneficial impact of diversity on students’ education, achievement, and overall success, and also explains why Boston businesses have an interest in ensuring the city’s Exam Schools attract, educate, and graduate talented students of diverse backgrounds.

Note: After a court ruling that favored ADL’s position, the Plaintiff moved for a stay of the decision pending appeal. The First Circuit denied the stay.

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Standing Requirement Is a Bulwark Against Judicial Overreach

By Frederick Lawrence

Georgetown Law's Frederick Lawrence analyzes two student debt relief cases decided by the US Supreme Court June 30, saying the rulings signal the court's continued overreach at the expense of elected branches of government.

The US Supreme Court had two major questions to answer in the cases challenging the Biden administration's plan to reduce student debt—and it got both wrong.

The high court considered the right of these plaintiffs to bring the challenge and authority of the Department of Education to implement debt relief. In striking down debt relief, the court signaled a continued path towards an overreaching court at the expense of elected branches of government.

The legal doctrine of “standing” to bring a lawsuit is often thought of as dry and uninteresting to the general public. But standing is in fact a bulwark against judicial overreach.

Under our constitutional system, courts are available only to decide actual disputes, cases, and controversies. Answering abstract questions of policy is the business of elected officials and the citizens who elect them.

Plaintiffs in *Department of Education v. Brown* were two individuals with student loans who did not qualify for debt relief and the court properly and unanimously dismissed this case.

However, in *Biden v. Nebraska*, where the plaintiffs were six states, the court stretched to find the kind of direct injury that's required to establish the right to bring a lawsuit. Only an independent Missouri state agency arguably was harmed by the debt relief plan—an agency that notably chose not to be a part of the lawsuit.

By finding an injured plaintiff where none existed, the court weighed in on an issue that properly belongs with Congress and the executive branch. The court disturbed the political processes of voting and even lobbying that influences public policy.

As articulated by Justice Antonin Scalia, perhaps the leading conservative jurist of the past half-century, “the judicial doctrine of standing is a crucial and inseparable element of [separation of powers] whose disregard will inevitably produce ... an over-judicialization of the process of self-governance.”

Moving to the merits of the case, the court continued its project of limiting executive branch powers by adopting a cramped reading of Congressional authorization. Last term, in *West Virginia v. EPA*, the court adopted a robust “major questions” doctrine under which in extraordinary cases of significant political or economic scope, an agency may not rely on “oblique or elliptical language” to authorize an agency to make a “radical or fundamental change” to a statutory scheme.

But in this instance, there was nothing oblique or elliptical about the delegation to the agency to address student debt, nor was there a radical or fundamental change to the legislation involved.

The administration's debt relief plan turned on the plain language of the Higher Education Relief Opportunities For Students Act of 2003. HEROES was passed by bipartisan majorities in the Congress and signed into law by President George W. Bush.

The statute authorizes the secretary of education to grant waivers or relief to recipients of federal student financial aid programs "in connection with a war or other military operation or national emergency."

The act allows waiving of statutory or regulatory requirements related to federal student loans for three categories of individuals, one of which is "those who have suffered economic hardship as a result of wars, military operations, or national emergencies."

Congress could well have chosen to limit HEROES to war-related issues—it did not. Nor did Congress place an end-date in the statute or subsequently repeal it.

Significantly, during the national emergency declared due to the Covid-19 pandemic, the HEROES Act was invoked several times by the Trump and Biden administrations. The act was first invoked to pause student loan payments and interest multiple times, and, in October 2021, to reform a student debt forgiveness program for public workers.

In August 2022, the administration used the act again to announce student debt cancellation of up to \$10,000 or, for those eligible for Pell Grants, \$20,000.

The court's invocation of its "major questions doctrine" appears to stem from the price tag on the administration's program—as much as \$430 billion. The amount at stake may qualify this matter as one of a "significant political or economic scope," permitting the court to be on the lookout for administrative action that relies on "oblique or elliptical language" to authorize an agency.

But where, as here, the administration acted pursuant to clear Congressional authorization, the court should not interfere.

The court has decided a case it had no business taking and, with an unnecessarily limited reading of a Congressional statute, limited the ability of the executive branch to address a significant issue.

Scalia's caution was apt—we are observing "an over-judicialization of the process of self-governance."

The case is *Biden v. Nebraska*, U.S., No. 22-506, decided 6/30/23.

This article does not necessarily reflect the opinion of Bloomberg Industry Group, Inc., the publisher of Bloomberg Law and Bloomberg Tax, or its owners.

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JURISPRUDENCE

How Anti-Trans Legislation Took Over State-Level Governments

It was a coordinated effort with deep roots and deeper goals.

BY DAHLIA LITHWICK

JUNE 13, 2023 • 10:30 AM



Students and transgender rights activists during a demonstration on the University of Montana campus to protest the censure of transgender Montana state Rep. Zoey Zephyr by House Republicans in the Montana State Legislature. Justin Sullivan/Getty Images

This is part of [Opinionpalooza](#), Slate's coverage of the major decisions from the Supreme Court this June. We're working to [change the way](#) the media covers the Supreme Court. [Sign up for the pop-up newsletter](#) to receive our latest updates, and support our work when you join [Slate Plus](#).

At light speed, we have seen new laws attacking medical care for trans people, limiting their use of public restrooms, regulating athletics, and threatening parents who seek care for their children proliferate in recent months in nearly half the states. There has also been some pushback from the courts: Last week, a judge in Florida halted that state's draconian ban on gender-affirming health care for transgender minors in a stinging opinion that includes the finding that "Gender identity is real. The record makes this clear." Two weeks ago, a Tennessee judge struck down that state's limitations on drag shows as an unconstitutional encumbrance of free speech.

On last week's Amicus podcast, Dahlia Lithwick spoke with Chase Strangio, deputy director for transgender justice at the ACLU's LGBT and HIV project, about the massive uptick in legislation and litigation targeting trans Americans. This transcript has been lightly edited and condensed for clarity.

Dahlia Lithwick: In a world where the news is just a barrage, it's easy to miss the speed and the velocity of an issue that seemed to kind of be moseying along in a sluggish but general direction of progress and acceptance. I would love for you to just explain why this mass anti-trans hysteria has become the locus of so much energy? What does this signify in terms of a cultural moment when there are so many other salient existential issues. What is it about this issue that just rocket-fueled it into state legislatures?

Chase Strangio: As someone who is deeply cynical and pessimistic, even I, in 2023, have been terribly shocked at how fast things have gone downhill and how unbelievably devastating the material consequences have been in just such a short period of time.

So part of it, of course, is the consequences of *Shelby County v. Holder* and the striking down of section 5 of the Voting Rights Act. What happens between 2013 and 2023, with state legislatures shifting so dramatically far to the right, is that you see the consequences build over time, leading first, perhaps most consequentially, to the 2016 presidential election. But the left failing to really center what was going on in state legislatures allowed this really catastrophic rightward shift on top of a backlash to *Obergefell* and to *Bostock*. You then have the entirety of the right focused in on attacking same-sex marriage and attacking same-sex couples, then shift very swiftly to trans bodies, to trans people, beginning in 2016, and then slowly escalating over the course of the Trump administration.

And then I think there are two other fundamental factors. One is *Dobbs* and the way in which anti-abortion rhetoric in state legislatures, at the ballot, then became this crisis point for the right. They needed a new issue to focus on rapidly in the lead-up to the 2024 presidential election. And trans people were well positioned in the crosshairs because over

the past few years, the rhetoric has been slowly escalating, and state legislation has been slowly expanding from bathrooms to sports, to health care. We are seeing classroom censorship and public scrutiny and criminalization.

I think we have to also take into account that any time you see globally rightward shifts in governmental structures, there is almost always an emphasis on controlling the family and the body and self-determination. And globally, we're seeing this with attacks on trans people in far-right governments, whether it's Bolsonaro in Brazil, whether it's governments in Eastern Europe, there is a fixation on transness. And this idea that the rejection of the sex binary is some sort of fundamental threat to governmental control over its citizenry.

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We are counting hundreds of bills proposed in the states. Some have been signed into law. There is this elaborate game of whack-a-mole, where this is happening on like a whole bunch of different fronts, and yet, it's all coming from some of the same places. Tell us where baby anti-trans legislation is born, where it comes from, what forms it takes, and the ways in which this is in many ways reminiscent of the sort of cut-and-paste legislation and the cut-and-paste lawsuits that we're seeing in the reproductive rights context and so many other contexts. Because this is not just a grassroots effort that is happening on the ground in Tennessee.

It is absolutely not a grassroots effort, and you can trace it systematically among well-funded global organizations that come together and identify ways to draft model legislation, send it out to legislatures, and then position litigation in the court. It's very clear there is a group that came together, including at least the Heritage Foundation and the Alliance Defending Freedom. Stephen Miller is newly in the mix with his America First Legal. This is decades in the making, but in terms of what we're seeing in the most contemporary moment in 2023, legislation coming up with this so-called Promise to America's Children, and it's an entity that was drafting model legislation for states across the country, shipping it out to lawmakers, focused on positioning trans people as a threat to children. This is what we see all the time: A threat to white women and white children being positioned as the driving force behind these regressive pieces of legislation.

First, it was very focused on bathrooms and sports, and there was legislation that was drafted by these organizations and sent out to legislatures across the country that began to shift as the public discourse began to shift, as the success around sports began to take off. We had so many people who were in essence saying, well, isn't it true that trans people have this "unfair" advantage in sports? That allowed for that sort of rhetorical anxiety to fuel this legislation in states. And so we went from one state in 2020 passing an anti-trans sports bill to almost half the country passing anti-trans sports bills by the beginning of 2022.

That was the opening. It was never about sports, which we were saying over and over again. This was about the erosion of bodily autonomy and allowing for an entry point into criminalization, and that led the way to the model pieces of legislation around trans health care, which again, were about positioning this idea that children were being threatened by this "experimental medicine" that was being pushed into people's minds through social media in this rhetoric of contagion. The idea is nobody has autonomy, nobody has agency, and parents and doctors are part of some grand conspiracy to make everyone trans. That is the story that is being told, and they were so effective. They used right-wing media. They used model legislation, and unfortunately, they used, quite effectively, the center-left media as well to create the sense that there was some percolating crisis that the state needed to intervene in.

In 2020, it was absolutely unimaginable that a state could categorically ban health care that was accepted by every major medical association that people relied on for periods of time. No state even passed a single piece of legislation through one legislative chamber. Then in 2023, we have 21 states that have banned care. So, in a period of three months, the landscape of care has been so catastrophically eroded. Unlike in the context of abortion—where there has been a 50-year erosion, and there have been, for better or for worse, some networks put in place to help people move to access care—we have nothing, because it was in a matter of three months where everything disappeared.

The demand, of course, is going to increase in the states that still have care, but the supply has gone down nationally, and so we're in a crisis point. By July 1, we're going to have states immediately cutting off this medical care because of this false narrative and these model pieces of legislation that were systematically shipped out across the country. ■

OPINION

Opinion: The Supreme Court's message to red states: You can't sue just because you don't like federal law



The Supreme Court in Washington. (Patrick Semansky / Associated Press)

BY ERWIN CHEMERINSKY

JUNE 23, 2023 10:59 AM PT

A state government should not be able to sue the federal government just because it disagrees with a federal policy. This principle, affirmed by the Supreme Court in an 8-1 decision on Friday, should be obvious.

But in recent years, as the country has become more politically polarized, there have been a proliferation of suits filed by states to dismantle White House policies. Blue states, including California, did this during the Trump years and the trend has intensified with red states taking the Biden administration to court.

Friday's ruling in *United States vs. Texas* is a perfect illustration. In 2021, the Biden administration's Department of Homeland Security announced its priorities in arresting and deporting those who are illegally in the United States. There are more than 11 million undocumented individuals in the country, but only several hundred thousand can practically be [deported each year](#). The Biden administration said that it would focus its arrest and deportation efforts on suspected terrorists or dangerous criminals, or people who unlawfully entered the country recently.

Texas and Louisiana sued the administration in federal court claiming that federal laws require it to arrest more people pending their deportation. But Justice Brett M. Kavanaugh, writing for the majority (only Justice Samuel Alito dissented), ruled that the states lacked standing to sue. The decision was also a rebuke to the federal district court in Texas and the Court of Appeals for the 5th Circuit, both of which ruled that the states could sue the federal government over a policy disagreement.

It is a longstanding principle that for a federal court to hear a case, the plaintiff must show that it was directly harmed, that the defendant caused the harm and that the harm could be remedied by a court decision. The court said that neither Texas nor Louisiana met that test.

In the past, the standing issue was often used by the Supreme Court to dismiss suits seeking to change the law in a progressive direction. For example, 40 years ago, the

In the past, the standing issue was often used by the Supreme Court to dismiss suits seeking to change the law in a progressive direction. For example, 40 years ago, the court dismissed a case involving [use of chokeholds](#) by Los Angeles police officers for lack of standing to sue, concluding that the plaintiff could not show that he was likely to be injured in the future. And suits seeking [to protect the environment](#) have been dismissed for lack of standing.

Although I think the court is often too restrictive in its standing rulings, Friday's decision closely follows from earlier precedents and rightly limits the ability of states to sue in federal court because they disagree with a presidential policy.

The practical effect of the court's analysis is its recognition that the government must make choices in enforcing the law. Thus, the Department of Homeland Security must set priorities in arresting and deporting non-citizens and it is not for the federal courts to second guess those choices. As Kavanaugh wrote, "If the Court green-lighted this suit, we could anticipate complaints in future years about alleged Executive Branch under-enforcement of any similarly worded laws — whether they be drug laws, gun laws, obstruction of justice laws, or the like. We decline to start the Federal Judiciary down that uncharted path."

This is actually the second time this month that the court restricted the ability of states to sue when they dislike federal policy. Last week, in upholding the federal Indian Child Welfare Act — a law that says priority should be given to Native American families when Native American children are placed for adoption in foster care — the court again dismissed a claim by Texas that the law was an unconstitutional racial preference. In a 7-2 opinion by Justice Amy Coney Barrett, the court concluded that the state of Texas could not show that it was injured by the federal law.

Friday’s decision is a double-edged sword. It will mean that when there is a conservative Republican president, states like California will be limited in their ability to sue. But the court did not close the door to all suits by states, only that they must meet the standing test. While the law in this area certainly is not new, the court did the right thing by applying it in this case.

Erwin Chemerinsky is a contributing writer to Opinion and dean of the UC Berkeley School of Law. His latest book is “Worse Than Nothing: The Dangerous Fallacy of Originalism.”

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