TSA Federal Update

February 2023

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Agenda

- The Federal Context
- Policy Action in ‘23
- FY23 Funding
- ARP
- Mental Health Grants
- School Nutrition Regs
- Supreme Court Cases

Context Matters

Congress is off to a “spectacularly slow” start…”welcome to the Seinfeld Congress.”

2 more years of Biden left - how fast can they move? What will they do next?

- Student loan forgiveness has been a legal debacle
- Scrutiny over how they work with parents
- What progress can be made re childcare and PreK
- Immigration reform/DREAM/border security

Standoff over Debt Ceiling

Leadership Shifts

New HELP Committee Chair/Ranking Members

- Bernie Sanders (D-VT)
- Bill Cassidy (R-LA)

House Ed & Workforce Cmte

- Virginia Foxx (R)
- Bobby Scott (D)

New Senate Approps Leads

- Patty Murray (Chair, WA)
- Susan Collins (RM, Maine)

Same House Approps Leads

- Kay Granger (R, TX)
- Rosa DeLauro (D, CT)

New House Speaker and Minority Leader

- Kevin McCarthy and
- Hakeem Jeffries

GOP Ed Agenda in the House

Education & Woke Ideology

Schools should educate not indoctrinate. Unfortunately, the classroom has become a battlefield where competing political ideologies,

- Parents Bill of Rights
- NSBA-DOJ collusion to investigate parents
- “Unscientific justifications for school closures, mask mandates in school, and COVID vaccine mandates for young children”
- “Department of Education attempt to erase scientific definitions of gender/harm of proposed Title IX regulation”
- Educational Choice for Children Act ($10b/year for TTC vouchers)

Parents Bill of Rights: What Rights Would Parents Have?

LEAs must give parents the right to:

- attend school board meetings
- meet with child's teacher 2x/year
- see a list of all books and reading materials in their school's library
- be notified of any violent activity
- be notified if the gifted/talented program is being eliminated
- access a budget for the school year including all revenues by expenditures for each school (including contracts)

LEA Responsibilities under PBR

- Post the curriculum for each grade level, and make available to parents a list of all instructional materials, teacher manuals, films, surveys, and books in the schools
- Post their parent engagement plan
- Notify parents of their rights (see previous slide)
- Allow parents the right to opt-out out of any educational technology platform, app, curricular option offered electronically
- Obtain parental consent for any medical exam or screening (except in an emergency) which includes a mental health or substance use disorder screening but not a hearing, vision or scoliosis screening.

Raising Expectations with Child Opportunity Vouchers for Educational Recovery (RECOVER) Act

- Allows States and districts to direct unspent ARP on private school tuition, therapies for special education students and whatever else
- The funds are targeted to low-income families
- “77% of funding for ARP has not been spent yet.”

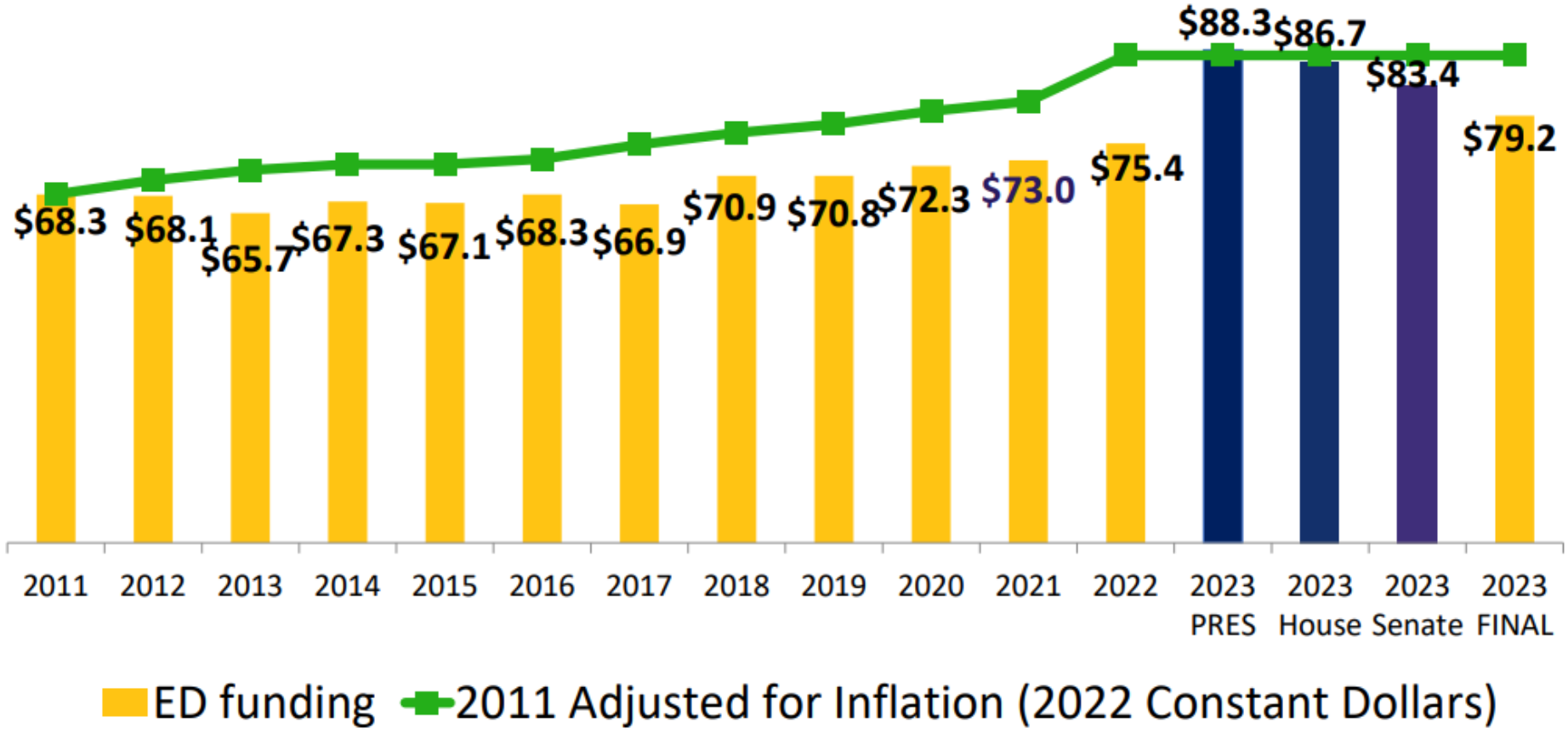
FY23 Omnibus

On December 23, Congress (finally) passed a full FY23 spending package. The bill included $79.6 billion for the Department of Education, $45 billion for K-12 (+2.4 billion from FY22). Highlights:

- **$18.4 billion for Title I** (+2.4 billion)
- **$14.5 billion for IDEA** (+934 million)
- **$2.19 billion for Title II** (+20 million)
- **$1.6 billion for Impact Aid** (+61 million)
- **$1.3 billion for Title IV** (+100 million)
- **$1.43 billion for CTE** (+50 million)
- **$215 million for REAP** (+20 million)
- **$115 million for IDEA Personnel Prep** (+20 million)
- **$70 million for Teacher Quality Partnerships** (+11 million)
- **$15 million for Hawkins Center for Excellence** (+7 million)
- **Community Schools** (+120m)

Education Funding Rises for FY 2023
But Remains Below the 2011 Inflation-Adjusted Level

(Department of Education Discretionary Funding in Billions of Dollars)



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FY23 Omnibus Policy Riders: PUMP Act

PUMP Act: Expands lactation protections to teachers. Requires employers to:

- Provide a place to pump that's shielded from view and is not a bathroom.
- Allow for reasonable break times for an employee to pump throughout the workday for the first year of their baby's life.

The break time is to be considered hours worked, so it should not affect compensation. Employers with fewer than 50 employees may be exempt from the requirements if they would cause "undue hardship" to the business.

FY23 Nutrition Policy Riders

- Summer EBT extension
- Summer meals flexibility
- No other CNR flexibilities or $

FY23 Tech $

Most notably, the bill did NOT include:

- Emergency Connectivity Funding – meaning the devices schools are currently providing to students and staff for internet access in home will go dark in 2023.

New ESSER FAQ document Released on December 7

‘Late-in-the-Game’ COVID Relief Fund Guidance Leaves Some Scratching Their Heads

Despite districts spending billions on construction, the federal government earlier this month said it ‘strongly discourages’ using funds that way

Unpacking New ESSER Guidance

- ED has worked on this document for over 8 months.
- Lacks clarity and adds confusion to the field
- Troubling tone around school construction/renovation projects
- Mixed messages around late liquidation

Because ESSER and GEER are State-administered programs, the SEA or Governor determines whether activities extending past the liquidation period are allowable under the circumstances. For example, an SEA may determine that it is reasonable and necessary under 2 CFR §§ 200.403-200.404 for an LEA to enter into a multi-year software licensing contract with a vendor during the period of availability of ARP ESSER funds and to pay for the entirety of the software license within the liquidation period. However, under the contract, the vendor would continue to provide the services (i.e., software and technical support) for some time after the funds had been liquidated.

Flip Flopping in ESSER Guidance

- Can’t use funds for attendance incentives
- Can’t use funds for increase in fuel
- Backtracking on using funds for school athletic facilities unless related to preventing, preparing for and responding to the pandemic BUT addendum states that:

  “These Federal emergency resources are available for a wide range of activities to address diverse needs arising from or exacerbated by the COVID-19 pandemic, **or to emerge stronger post-pandemic,** including responding to students’ social, emotional, mental health, and academic needs and continuing to provide educational services as States, LEAs, and schools respond to and recover from the pandemic.”

What Will Go Away?

In SY 2024-2025

57%

will end summer learning and enrichment offerings

53%

will end contracts with specialized staff

44%

will stop compensating staff for working additional hours for extended school year/day programming

The Safer Communities Act

- In addition to the gun violence prevention pieces, there are significant legislative K12 funding and policy wins in this law.
- Language requiring CMS to issue guidance on an updated school-based Medicaid program reimbursement system that includes taking steps to dramatically reduce the administrative burden on small and rural districts and the creation of a new TA center for districts to utilize to insure they are billing expansively for healthcare services they provide to students.
- $1b in competitive grants to districts via Title IV-A (known as the Stronger Connections grants)
- Increased funding for the STOP School Violence Act grant program, Project AWARE, and $1 billion in new funding for districts to hire mental health professionals and build a pipeline of mental health personnel.

2 MH Grant Programs

School-Based Mental Health Services Grant Program

- Open to SEAs, LEAs and consortia of LEAs to increase the number of credentialed school-based mental health service providers delivering school-based mental health services to students in LEAs with demonstrated need.
- Grantee must propose measures to increase the number of credentialed school-based mental health services providers, including plans to address the recruitment and retention of credentialed services providers in the LEA that includes both recruitment and retention strategies/programs.
- 143m total; range of awards $500k-3m. Average size 1.75. 5 years.

Mental Health Service Professional Demonstration Grant Program

- High-need LEA applicants and SEA applicants on behalf of one or more high-need LEAs must propose to work in partnership with an eligible institution of higher education to support and demonstrate innovative partnerships to train school-based mental health services providers
- High needs LEA: 20% poverty OR 10k children n poverty, or eligible for SRSA/RLIS funding, AND for which there is a high student to MH provider ratio as compared to other LEAs statewide or nationally
- 143 m; $400,000 -$1,200,000 awards over 5 years.

What else is ED working on? Asking of you?

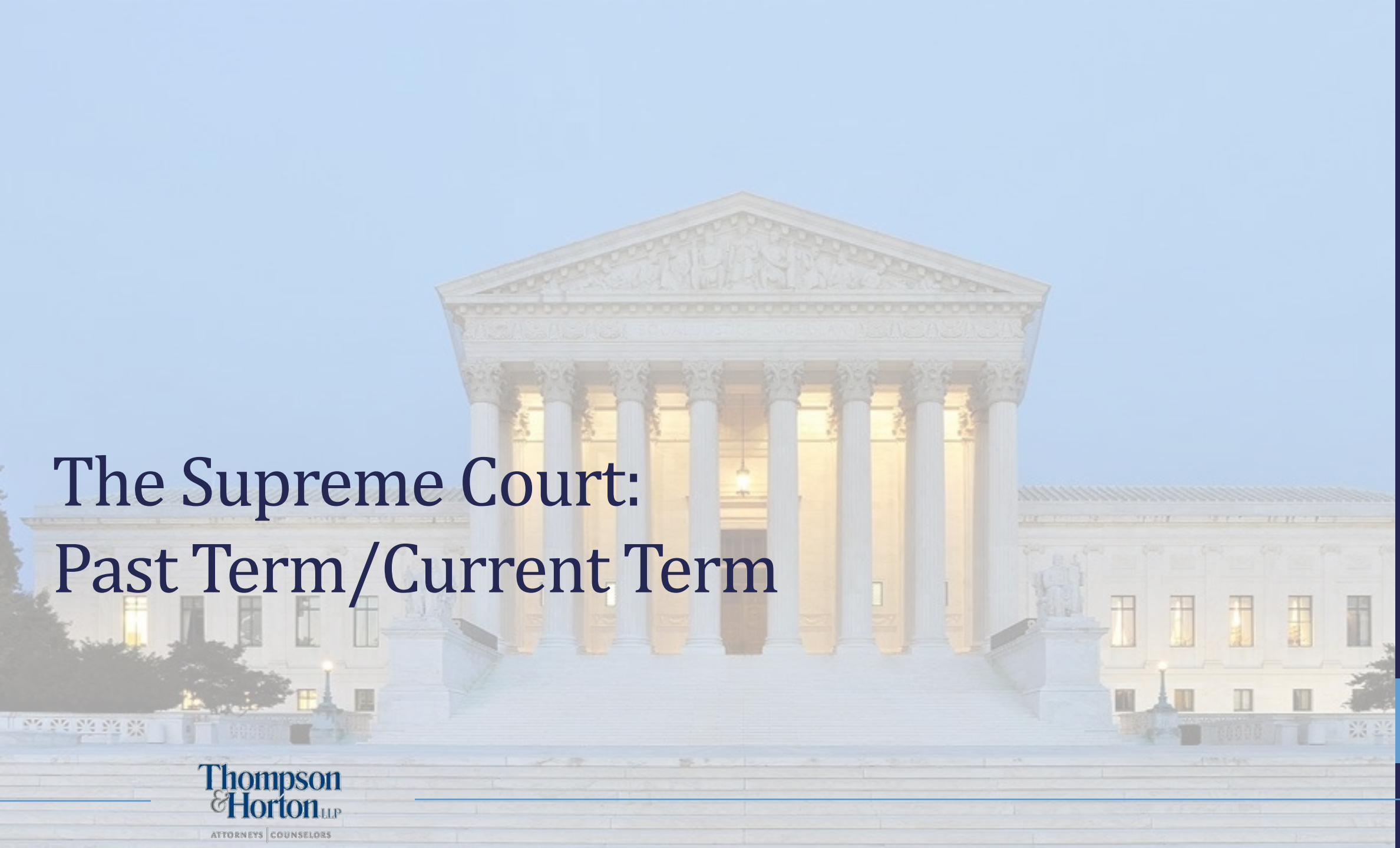
- Proposed regulations on 504
- School discipline guidance
- Title IX athletics proposal
- New data collection on school finance data
- ESSER data collection round 2
- CRDC

Other Agency Work to Keep an Eye on

- FCC is seeking public comment on using its E-rate program to pay for school and library cybersecurity improvements, such as advanced or next-generation firewalls. Feedback must be shared by Feb. 13
- New CMS claiming guide for school-based Medicaid
- Proposed EPA regulation on testing for lead/copper in schools – would not go into effect until October 2023
- New sodium/whole grain regulatory targets from USDA

New School Nutrition Standards Released

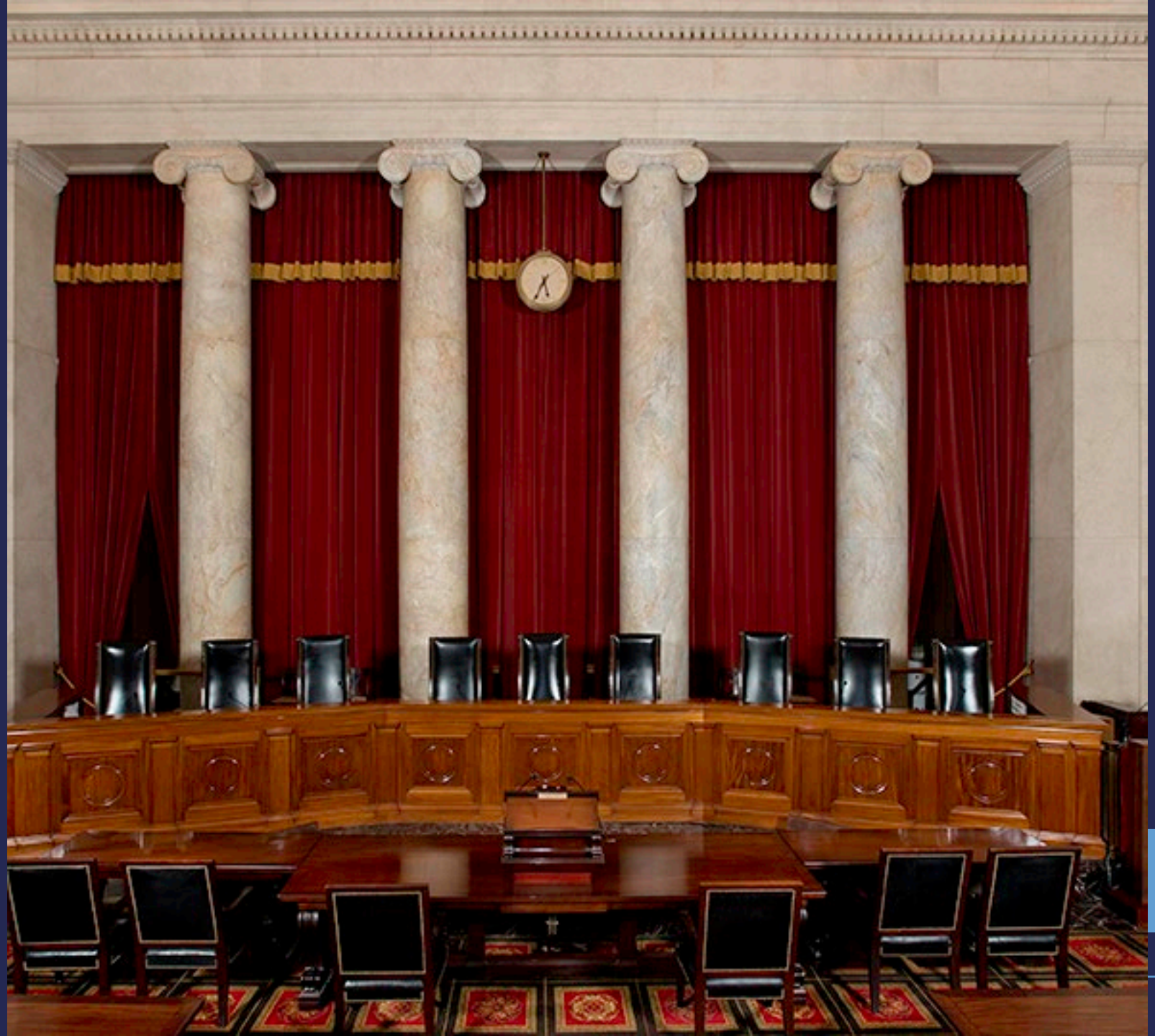
- Opportunity to comment by April 10th
- Implementation would begin 2025 with phased-in approach
- Limiting added sugars in certain high-sugar products and, later, across the weekly menu
- Allowing flavored milk in certain circumstances and with reasonable limits on added sugars
- Incrementally reducing weekly sodium limits over many school years with a reduction of 30% by 2029
- Emphasizing products that are primarily whole grain, with the option for occasional non-whole grain products
- Encourage domestically produced foods



The Supreme Court: Past Term/Current Term

2021-2022 Term:

Religion, Race, Gender, Speech



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Free Exercise and Establishment Clause Cases

Carson v. Makin, 596 U.S. ___(2022)

Maine could not refuse tuition assistance to students attending in-district religiously affiliated high schools in districts which provided funding instead of public high school education.

Carson v. Makin, 596 U.S. ___(2022)

Majority: This is a free exercise case, State can't discriminate because of the religious nature of the schools receiving support.

Carson v. Makin, 596 U.S. ___(2022)

Dissent: This is an establishment clause case, public funds should not support religious instruction.

Kennedy v. Bremerton, 597 U.S. ___ (2022)

Coach terminated after being repeatedly warned to end a practice of prayer with students/players; concern over whether school district was ENDORSING the prayer.

Kennedy v. Bremerton, 597 U.S. ___ (2022)

Holding: Coach prevails, Court saw little entanglement and no establishment concerns, overturns Lemon test.

Bostock v. Clayton County, 590 U.S. ___ (2020)

"**Sex**" in Title VII, encompasses discrimination against gay and transgender people and is not limited by biological sex only.

Bostock v. Clayton County, 590 U.S. ___ (2020)

Title IX is generally interpreted "*in pari materia*" with Title VII. Will *Bostock* control in Title IX bathroom/locker cases?

Free Speech

Mahoney Area Sch. Dist. v. B.L., 594 U.S. ___ (2021)

Schools cannot generally discipline students for off-campus speech and school must establish *Tinker*-style disruption concerns at school to do so.

Houston Community College System v. Wilson, 595 U.S. ___ (2022)

Can a board's public censure of one member violate his First Amendment right to free speech?

Houston Community College System v. Wilson, 595 U.S. ___ (2022)

Facts and background

- HCC Trustee Wilson often strongly disagreed with board actions and brought various lawsuits challenging them.
- Three years of these escalating disagreements led to the Board reprimanding Wilson publicly.
- Wilson then:
  - Went to the media and charged the Board with violating its bylaws and ethical rules;
  - Arranged for robocalls to the constituents of certain trustees to publicize his views;
  - Hired a private investigator to surveil another trustee, apparently seeking to prove she did not reside in her district;
  - Filed two new lawsuits in state courts – one alleging a bylaws violation when the Board allowed a trustee to vote via videoconference, and another challenging his exclusion from a meeting to discuss the lawsuit.

Houston Community College System v. Wilson, 595 U.S. ___ (2022)

Facts and background (cont'd)

- The Board incurred more than $270,000 in legal fees to defend Wilson's lawsuits.
- The Board adopted a resolution censuring Wilson in 2018.
  - Wilson's conduct was "not consistent with the best interests of the College," "not only inappropriate, but reprehensible."
  - Imposed penalties:
    - Ineligible for election to Board officer positions for 2018;
    - Ineligible for reimbursement for College-related travel; and
    - Future requests to access funds in his Board account for community affairs would require Board approval.

Houston Community College System v. Wilson, 595 U.S. ___ (2022)

Does one public board member's right to free speech trump the board's right to free speech?

- The board: "The First Amendment does not require school boards and other governmental bodies to hold their tongue when one member makes repugnant remarks or violates the rules. Allowing such members to sue for retaliation shuts down the government's own speech."
- The individual: "Members of legislative bodies, no less than anyone else, enjoy basic First Amendment freedoms, and cannot be penalized for protected speech that takes place outside the chamber."

Houston Community College System v. Wilson, 595 U.S. ___ (2022)

Decided March 24, 2022 – a victory for the board

- "[E]lected bodies in this country have long exercised the power to censure their members. In fact, no one before us has cited any evidence suggesting that a purely verbal censure analogous to Mr. Wilson's has ever been widely considered offensive to the First Amendment."
- In this case, Wilson's censure was not a "materially adverse action" under Supreme Court case law.
  - It was a form of speech by elected representatives and concerned the public conduct of another elected representative.
  - Everyone involved was an equal member of the same deliberative body.
  - The censure did not prevent Mr. Wilson from doing his job or deny him any privilege of office.

Houston Community College System v. Wilson, 595 U.S. ___ (2022)

Court limited its ruling to the censure itself, NOT the additional measures.

- It did NOT rule on whether suggested verbal reprimands or censures could support a First Amendment retaliation claim in some circumstances, when:
  - Government officials reprimand or censure students, employees, or licensees;
  - Legislative censures are accompanied by punishments;
  - Legislative censures are aimed at private individuals;
  - Government bodies censure or reprimand government officials who do not serve as members of those bodies.

"When the government interacts with private individuals as sovereign, employer, educator, or licensor, its threat of a censure could raise First Amendment questions."

Cummings v. Premier Rehab Keller PLLC, 596 U.S. ___ (2022)

Facts and Background:

- Jane Cummings, who is deaf and legally blind, sought physical therapy services from Premier Rehab Keller and requested that Premier provide an ASL interpreter at her appointments.
- Premier Rehab declined to do so, telling Cummings that she could communicate with the therapist using written notes, lip reading, or gesturing.
- Cummings then sought and obtained care from another provider.
- PRK receives reimbursement through Medicare and Medicaid for the provision of some of its services.
- Cummings sued, alleging that PRK's failure to provide an ASL interpreter constituted discrimination on the basis of disability in violation of the Rehabilitation Act and Patient Protection and Affordable Care Act, seeking declaratory relief, an injunction and damages.

Cummings v. Premier Rehab Keller PLLC, 596 U.S. ___ (2022)

Facts and Background:

- The District Court dismissed the complaint finding:
- "the only compensable injuries that Cummings alleged Premier caused were 'humiliation, frustration, and emotional distress'"
- "damages for emotional harm" are not recoverable in private actions brought to enforce the Rehabilitation Act or the Affordable Care Act.
- The Court of Appeals for the Fifth Circuit affirmed, adopting the same conclusion. 948 F.3d 673 (2000)

Cummings v. Premier Rehab Keller PLLC, 596 U.S. ___ (2022)

In a **6-3 ruling**, with Breyer, Kagan and Sotomayor dissenting, the majority held:

- **Emotional distress damages are not recoverable in private actions to enforce statutes authorized by the Spending Clause at issue here, the Rehabilitation Act and the Affordable Care Act.**
- Spending Clause legislation, which conditions receipt of federal funds on compliance with the statute, does not permit recovery of emotional distress damages because emotional injury is not generally recoverable for breach of contract.

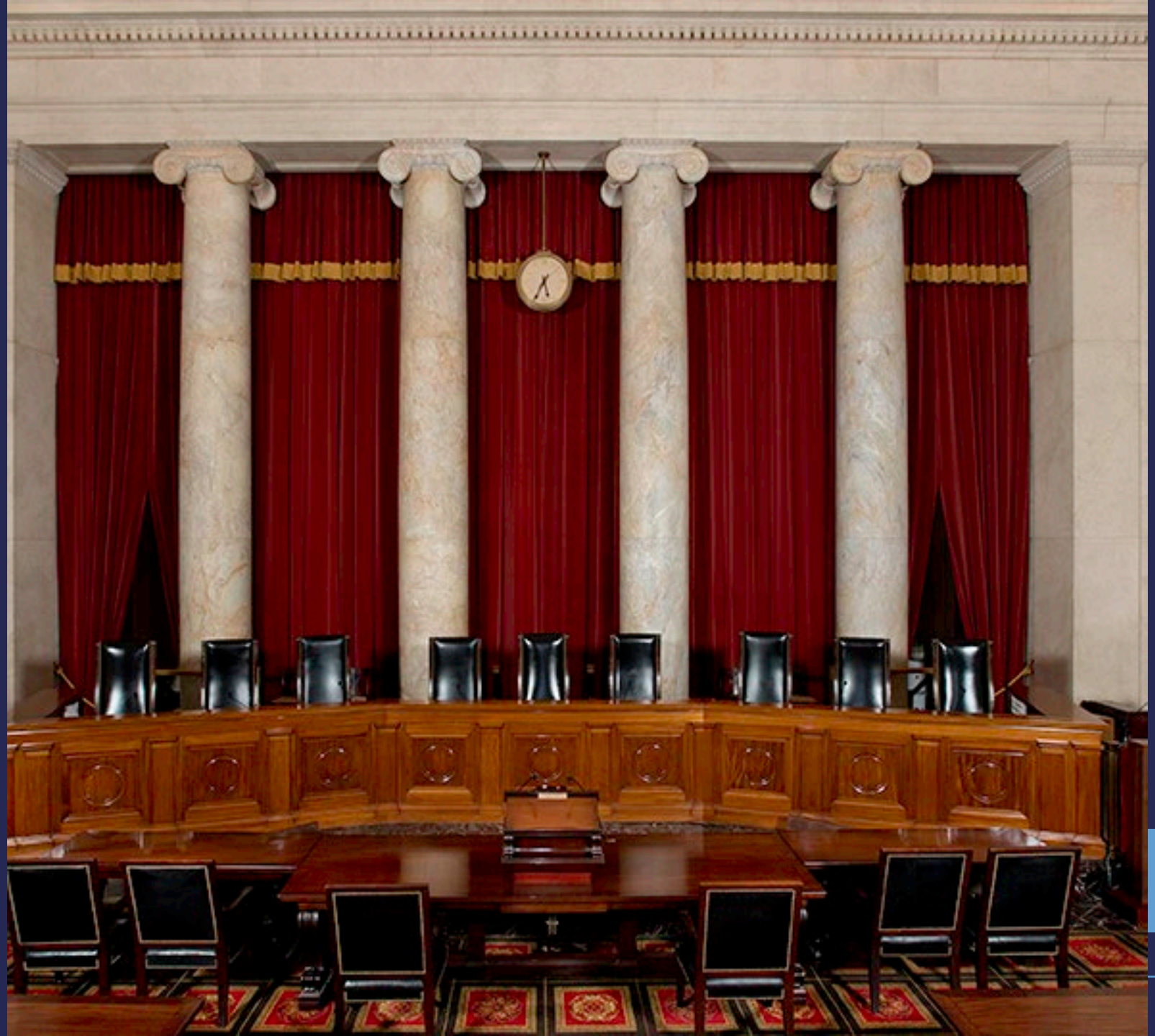
Cummings v. Premier Rehab Keller PLLC, 596 U.S. ___ (2022)

Spending Clause Statutes:

- Rehabilitation Act (prohibiting discrimination based on disability)
- Title IX of the Education Amendments Act of 1972 (prohibiting sex-based discrimination and harassment at educational institutions)
- Title VI of the Civil Rights Act of 1964 (prohibiting race discrimination at educational institutions)
- Patient Protection and Affordable Care Act (prohibiting healthcare entities from discriminating based on race, sex, disability or age)

2022-2023 Term:

Special Education, Religious Liberty, Race & Affirmative Action



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Special Education

Perez v. Sturgis Public Schools (argued 01/18/23)

- Deaf students and family settled an IDEA claim with the District, arising from the District's failure to provide a qualified sign language interpreter. The student then sued the District for violation of the ADA
- The district court dismissed the ADA claim for failure to exhaust administrative remedies (filing a due process request under the IDEA), and the 6th Circuit affirmed.
- The Supreme Court is considering whether futility should be an exception to the exhaustion requirement.

Religious Liberty

303 Creative v. Elenis (argued 12/05/22)

Question presented: Does a web designer have a right under the first amendment to refuse to create a webpage for a gay couple in violation of a state's public accommodation law?

- **What to watch for:** will the Court continue to expand its protection for claims of religious liberty when those claims run afoul of state laws of general applicability, especially laws designed to protect others from discrimination or harassment?

Race and Affirmative Action

SFFA v. Harvard Univ.; SFFA v. Univ. of NC (argued 10/31/22)

Question presented: Whether the Court should overrule *Grutter v. University of Michigan* and hold that race cannot be used as a factor in university admissions?

- In a lengthy set of arguments, several justices questioned whether the time for affirmative action had ended, and whether any consideration of race in assessing individual applicants should be declared unconstitutional.

SFFA v. Harvard Univ.; SFFA v. Univ. of NC (argued 10/31/22)

- Skeptical of the need for continued consideration of race as a means of achieving diversity in the student body.
- Concerned that a ruling requiring "color-blindness" may hurt the nation as a whole, because our society is not color blind.
- What criteria other than race might be used to create diversity?
- What would a restructured admissions program look like?
- Does *Grutter v. Bollinger* (2003) require an end to race-consciousness in the near-term?

Thomas

"I've heard the word diversity quiet a few times, and I don't have a clue what it means. It seems to mean everything for everyone."

Sotomayor

"(a decision requiring) color blindness may hurt the nation as a whole because our society is not color blind."

Jackson

It would be odd if admissions officers could consider factors like whether applicants were parents, veterans, or disabled – but if they were members of racial minorities. That has "the potential of causing more of an equal protection problem than it's actually solving."

Kagan

I'm worried about "a precipitous decline in minority admissions" if the court were to rule against affirmative action in higher education. "These are the pipelines to leadership in our society."

Roberts

"We did not fight a Civil War about oboe players. We did fight a Civil War to eliminate racial discrimination, and that's why it's a matter of considerable concern."

Health and Hospital Corp. of Marion Cty. Indiana v. Talevski, No. 21-806 (argued 11/8/22)

Issues:

1. Whether, in light of compelling historical evidence to the contrary, the Supreme Court should reexamine its holding that spending clause legislation gives rise to privately enforceable rights under 42 USC § 1983; and
2. Whether, assuming spending clause statutes ever give rise to private rights enforceable via Section 1983, the Federal Nursing Home Amendments Act of 1987's transfer and medication rules do so.

Biden v. Nebraska, No. 22-506 (to be argued 02/28/23)

Issues:

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

Dept. of Education v. Brown, No. 22-535 (to be argued 02/28/23)

Issues:

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

Groff v. DeJoy, No. 22-174 (to be argued 04/18/23)

Issues:

1. Whether the court should disapprove the more-than-de-minimus-cost test for refusing religious accommodations under Title VII of the Civil Rights Act of 1964 stated in *Trans World Airlines, Inc. v. Hardison*; and
2. Whether an employer may demonstrate "undue hardship on the conduct of the employer's business" under Title VII merely by showing that the requested accommodation burdens the employee's coworkers rather than the business itself.

Counterman v. Colorado, No. 22-138 (to be argued 04/19/23)

Issue:

Whether, to establish that a statement is a "true threat" unprotected by the First Amendment, the government must show that the speaker subjectively knew or intended the threatening nature of the statement, or whether it is enough to show that an objective "reasonable person" would regard the statement as a threat of violence.

Charter Day School v. Peltier, No. 22-238 (pet. pending)

The *en banc* Fourth Circuit determined that Charter Day School was a state actor after finding that the state of North Carolina had delegated a traditional and exclusive duty, public education, to charter schools and had designated charter schools and their teachers as "public" by statute. The dress code is being challenged, therefore, could be subjected to constitutional scrutiny. The Supreme Court has asked the Solicitor General to weigh in on the petition.

THANK YOU!

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