COMMENTARY

THE 2002–2003 TERM OF THE UNITED STATES SUPREME COURT AND ITS IMPACT ON PUBLIC SCHOOLS*

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* The views expressed are those of the authors and do not necessarily reflect the views of the publisher. Cite as 181 Ed.Law Rep. [1] (Nov. 20, 2003).

1. Hogan & Hartson L.L.P. has published an annual review of the Supreme Court's actions affecting public education since 1987.

INTRODUCTION

The 2002–2003 Term of the United States Supreme Court likely will be most remembered for a series of controversial cases in which a majority of this generally conservative Court issued rulings welcomed by liberals. In several narrowly decided cases, the Court upheld affirmative action in higher education admissions, struck down a state law criminalizing gay sex, and acknowledged the problem of workplace discrimination against women in one of two cases that also marked some boundaries to the Court's recent expansion of states' rights. While the Court considered few cases directly involving public elementary and secondary schools this Term, the impact of these major decisions, as well as others discussed below, on public education will likely be substantial.

The most important rulings of the Term came in a pair of cases involving race-conscious admissions policies at the University of Michigan. In these landmark decisions, the Court held that the educational benefits of diversity constitute a compelling governmental interest that can justify the consideration of race in individualized university admissions decisions.

A number of other cases that did not directly involve education nevertheless may have important implications for public school districts. For example, the Court held that local government bodies, potentially including school districts, may be subject to whistleblower suits for alleged fraud against the federal government under the False Claims Act. Several of the Court's decisions may affect school districts in their role as employers, including one that clarified the standards in mixed-motive discrimination claims under Title VII. The High Court also decided a number of cases involving restrictions on freedom of speech. For example, the Court upheld both the Children's Internet Protection Act, which applies to school libraries, and the Copyright Term Extension Act, which, in extending the length of existing copyrights, may raise the cost of some educational materials.

In addition to summarizing the Court's significant decisions in the 2002–2003 Term, this review also describes a number of cases relevant to public schools that the Court declined to consider. When the Supreme Court decides not to review a case, known as a denial of *certiorari*, it means only that the lower court's ruling will stand and does not necessarily signify that the Supreme Court agrees with the lower court's reasoning or conclusion. The Supreme Court has essentially unlimited discretion to decide which cases it will consider and rarely explains its reasons for declining to review a case. During the 2002–2003 Term, the Supreme Court decided only 81 cases and denied review of literally thousands.

This Term the Court declined to review several lower court decisions involving school districts that raised issues ranging from voting rights to the separation of church and state. The Supreme Court also declined again to review any of the numerous cases involving the education of students with disabilities that it was asked to consider.

This summary also briefly addresses several cases that the Supreme Court is expected to decide during the 2003–2004 Term, which officially begins in October 2003. To date, the Court has decided to review a number of cases of interest to public schools, including ones involving First Amendment freedom of speech and freedom of religion issues, and a case raising significant federalism questions.

For the ninth consecutive year, the 2002–2003 Term produced no changes in the composition of the Court. There has been no turnover among the Justices since Justice Stephen Breyer took his seat in August 1994, making this the longest period of stable court membership since 1823. Because of concerns about the age or health of several Justices, it had been widely speculated that President Bush would have the opportunity to make one or more new appointments to the High Court. Such speculation increased throughout this Term, only slowing when the Term ended with none of the sitting Justices announcing his or her retirement. With no Justices retiring this year and intense debate in the Senate over lower court nominees, it is unclear whether the President will have the opportunity to see a new Court appointee confirmed before the 2004 election.

The importance of the judicial selection process continues to be underscored by this Court's division on key issues. Again this Term, many of the Court's most important decisions were decided by five-to-four votes. Justice O'Connor, one of the Justices rumored to be considering leaving the Court, continued more then ever to be the key swing vote on the Court, finding herself in the majority in all 13 of this Term's five-to-four decisions. Chief Justice Rehnquist, the leader of the Court's generally conservative majority, and Justice Stevens, one of the Court's most liberal members, are the other two Justices who have been thought to be contemplating retirement. Any changes on the Court could have important implications for public school districts, by possibly tipping the delicate balance in significant cases.

This review of the Supreme Court's 2002–2003 Term is divided into sections by subject matter, as follows: (1) Race-Conscious Decision–Making; (2) Sexual Orientation Issues; (3) Federalism; (4) False Claims Act; (5) Employment Issues; (6) Freedom of Speech; (7) Racial Discrimination; (8)

Punitive Damages; (9) Voting Rights; (10) Immigration; (11) Separation of Church and State; (12) State Action; (13) Students with Disabilities; and (14) A Preview of the 2003–2004 Term. Full citations to the cases and statutes discussed appear in the appendix at the end of this summary.

I. RACE-CONSCIOUS DECISION–MAKING

In a pair of landmark decisions, the Court this Term ruled that student body diversity in higher education is a compelling state interest that can justify race-conscious admissions policies. In *Grutter v. Bollinger*, the Court upheld the University of Michigan law school admissions policy as a narrowly tailored means to achieve that interest, but in *Gratz v. Bollinger* it held unconstitutional the University of Michigan undergraduate admissions system.

A. *Grutter v. Bollinger*

Grutter v. Bollinger upheld the law school admissions policy under the Equal Protection Clause, Title VI of the Civil Rights Act of 1964 ("Title VI"), and 42 U.S.C. § 1981. Justice O'Connor authored the majority opinion, joined by Justices Breyer, Ginsburg, Souter, and Stevens.

The Court applied the "strict scrutiny" standard, under which racial classifications drawn by government must be "narrowly tailored" to achieve a "compelling state interest," but Justice O'Connor reiterated that this standard is not always "fatal in fact" and that "[n]ot every decision influenced by race is equally objectionable." The Court first held that the law school had a compelling interest in advancing student body diversity. Justice O'Connor's opinion drew on Justice Powell's opinion for the Court in *Regents of the University of California v. Bakke* (1978) and endorsed his "view that student body diversity is a compelling state interest that can justify the use of race in university admissions." According to the Court, earlier decisions that had addressed affirmative action in public contracting had not ruled out diversity as a permissible justification for race-based governmental action. The Court gave deference to the law school's judgment that diversity is essential to its educational mission, cited "a constitutional dimension, grounded in the First Amendment, of educational autonomy," and said it would presume the university's good faith.

The benefits of diversity are "substantial," the Court found, citing evidence that diversity helps to break down stereotypes, improves classroom discussion, prepares students for the workforce and citizenship, and permits universities to cultivate a set of leaders with legitimacy in the eyes of the citizenry. While the Court did not believe that race necessarily determines viewpoint, it acknowledged that being a member of a minority group is likely to affect an individual's views.

The Court also held that the law school policy was "narrowly tailored" to meet the school's compelling interest in diversity. While "outright racial balancing . . . is patently unconstitutional"–and a university admissions system may not use quotas, have separate admissions tracks for minority students, or insulate minority group members from competition with others for admission–an admissions system may consider race or ethnicity more

flexibly as a plus factor in the context of individualized consideration of applications.

The law school policy met those criteria, the Court held, for several reasons. First, the law school did not use a quota system. The Court distinguished the law school's goal of attaining a "critical mass" of underrepresented minority students from a quota. "[S]ome attention to numbers" is lawful, the Court said. Minority enrollment in relevant years varied between 13.5 and 20.1 percent, a range the Court found "inconsistent with a quota." Second, the law school gave applicants individualized consideration. It did not automatically admit or disqualify them based on race, nor did it award "mechanical, predetermined diversity 'bonuses.' " Third, the policy did not unduly harm nonminorities because the law school also took into account their potential contribution to diversity. Fourth, while all governmental use of race must have "a logical end point," in higher education admissions that requirement can be met by sunset provisions and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity. The Court said it "expect[ed] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

The Court did not require the law school to exhaust every conceivable race-neutral alternative, sacrifice its reputation for excellence by lowering standards, or abandon individualized application review to demonstrate that its policy was narrowly tailored to advance its lawful interest in student body diversity. Instead, the Court held that narrow tailoring requires serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks. The Court concluded that the law school had met this burden. The Court was not convinced that race-neutral systems, such as plans that admit a fixed percentage of the top students from each high school in a state, would present a viable alternative in the context of a graduate school or permit an institution to achieve broad diversity. However, the Court suggested that universities can and should draw on the most promising aspects of these and other race-neutral alternatives as they develop.

In a dissenting opinion, Justice Scalia predicted that the Court's decisions would prolong the controversy and the litigation concerning race-conscious admissions. Future lawsuits, he forecasted, may focus on the following issues: whether an admissions policy contains enough evaluation of the applicant as an individual and sufficiently avoids separate admissions tracks; whether an admissions office goes below or above critical mass or pursues it so zealously that it creates a *de facto* quota system; whether in a particular setting any educational benefits flow from racial diversity (an issue Justice Scalia said was not contested in *Grutter*); or whether an institution's expressed commitment to the educational benefits of diversity are bona fide. Justice Scalia also predicted that lawsuits might be brought on behalf of minority groups "intentionally short-changed in the institution's composition of its generic minority critical mass."

B. *Gratz v. Bollinger*

In a separate decision in *Gratz v. Bollinger*, the Court acknowledged the holding in *Grutter* that diversity is a compelling state interest, but concluded

that the University of Michigan's undergraduate admissions policy was not narrowly tailored and thus violated the Equal Protection Clause, Title VI, and 42 U.S.C. § 1981. Chief Justice Rehnquist authored the majority opinion, joined by Justices O'Connor, Scalia, Kennedy, and Thomas. Including Justice Breyer, who concurred in the judgment, six Justices found that the undergraduate policy was unlawful.

While Justice Powell's opinion in *Bakke* and the majority opinion in *Grutter* emphasized the importance of considering each particular applicant as an individual, the Court found that the undergraduate policy did not provide such individualized consideration. Instead, the policy automatically distributed 20 points to all minority applicants, making the factor of race decisive for virtually every minimally qualified underrepresented minority applicant admitted to the university. This fact, the Court held, distinguished the undergraduate admissions policy from the Harvard admissions policy that Justice Powell cited with approval in *Bakke.* Although the undergraduate policy permitted admissions officers to flag for individualized review the applications of nonminorities as well as those of minorities, the Court said this process did not make the policy narrowly tailored because virtually all qualified minorities were admitted without such review on the basis of the automatic 20–point bonus.

C. Implications of *Grutter* and *Gratz* for School Districts

Although the decisions in *Grutter* and *Gratz* do not directly address primary and secondary education, the Court's holding that pursuit of a diverse student body constitutes a compelling interest may have important implications for school districts. Many of the educational benefits of a diverse student body identified by the Court, such as "break[ing] down racial stereotypes," and "preparing students for work or citizenship" are equally–or arguably more–compelling at the K–12 level than in higher education. In addition, the Court's decision that student body diversity can be a compelling state interest changes the law for districts located in Texas, Louisiana, and Mississippi by overturning the Fifth Circuit's *Hopwood v. Texas* decision, which had held that remedying past discrimination was the only interest that could justify race-conscious admissions policies.

The Court's narrow-tailoring analysis also does not directly apply to elementary and secondary education policies, but does provide some guidance for school districts. For example, for districts that use race as a factor in academically competitive admissions processes, such as for selective magnet schools, a policy that mechanically factors in race without individualized consideration of applications may not be narrowly tailored. However, a more flexible admissions process that individually considers applicants and seeks a critical mass of students from an underrepresented racial or ethnic group or groups is more likely to pass constitutional muster.

Outside of academically competitive programs, the implications of *Grutter* and *Gratz* are more difficult to determine. For example, while the decisions do not directly address race-consciousness in public school student assignment processes, they direct courts to consider, among other things, whether the use of race unduly burdens individuals who are not members of the favored racial and ethnic groups. A school district's use of race-conscious

means to assign students to academically comparable schools offering similar programs might not unduly burden any student. On the other hand, the Court's opinion in *Grutter* held unconstitutional "outright racial balancing," although it did not define that term. In any event, these important decisions provide an opportunity for school districts, particularly those committed to providing the educational benefits of diverse school enrollments, to re-evaluate their student assignment policies to ensure they are both effective and legally defensible.

D. Cases the Court Declined to Review

The Supreme Court also denied *certiorari* this Term in a case involving allegations of race-conscious decision-making by a school district. In *Scott v. Pasadena Unified School District*,[2] the Ninth Circuit held that plaintiffs did not have standing to challenge a school district policy permitting consideration of race and ethnicity in admissions to magnet (or "voluntary") schools to which students must apply. The plaintiffs, parents of students in the school district, alleged that a provision of the policy that permitted, if necessary to avoid segregation, consideration of race in lotteries for three voluntary schools violated the Equal Protection Clause. The Ninth Circuit held that plaintiffs lacked standing and that their claims were unripe, because the school district had not actually used race as a factor in the lotteries for the year at issue. The Supreme Court's decision not to review this case leaves intact the Court of Appeals' ruling in favor of the school district.

II. SEXUAL ORIENTATION ISSUES

The 2002–2003 Term also will be remembered for the Supreme Court's decision in *Lawrence v. Texas*, in which the Court held that a Texas statute criminalizing certain homosexual activity violated the Due Process Clause of the Fourteenth Amendment. The Court explicitly overruled its prior decision in *Bowers v. Hardwick* (1986), which had upheld a similar statute.

Petitioners Lawrence and Garner were arrested after Houston police, responding to a reported weapons disturbance in a private residence, entered Lawrence's apartment and saw the two men engaged in a private, consensual sexual act. They were convicted of "deviate sexual intercourse" under Texas law. A state appeals court, considering *Bowers* to be controlling precedent, upheld the statute against constitutional challenge.

Writing for the majority, Justice Kennedy concluded that *Bowers* should be reconsidered. He reviewed earlier cases that expanded the "substantive reach of liberty under the Due Process Clause" and concluded that they "could not be confined to the protection of rights of married adults."

Justice Kennedy criticized the Court's formulation of the issue in *Bowers*: whether the "Constitution confers a fundamental right upon homosexuals to engage in sodomy." That issue statement, he said, "discloses the Court's own failure to appreciate the extent of the liberty at stake." Justice Kennedy emphasized that the challenged laws concerned "the most private human conduct, sexual behavior, and in the most private of places, the home."

2. Hogan & Hartson L.L.P. represented the school district in the case.

The majority also rejected *Bowers'* reliance on the "ancient roots" of proscriptions against homosexual sodomy, noting that early sodomy laws sought to prohibit non-procreative sexual activity more generally and historically have not been enforced against consenting adults acting in private. The Court also observed that "American laws targeting same-sex couples did not develop until the last third of the 20th century," and that the recent trend has been for states with same-sex sodomy laws to abolish such restrictions. In all, the Court said, the laws and traditions of the past half-century "show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." Justice Kennedy also pointed to the laws of European and other nations that explicitly protect the "right of homosexual adults to engage in intimate, consensual conduct," and noted that five different state courts in this country have declined to follow *Bowers* in interpreting their own state constitutions.

Justice Kennedy discussed two later cases that had "cast [*Bowers*'] holding into even more doubt." First, *Planned Parenthood of Southeastern Pennsylvania v. Casey* "confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." Second, in *Romer v. Evans*, the Court struck down an amendment to Colorado's constitution that would have denied homosexuals protection under antidiscrimination laws because it was "born of animosity toward the class of persons affected" and had no rational relationship to a legitimate governmental purpose. Moreover, the Court emphasized, "there has been no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding." In addition, the Court held, *Lawrence* involved private consensual conduct between adults. The case did not involve the protection of minors, public or commercial conduct, or formal governmental recognition of homosexual relationships. Thus, the Court found, the Texas law furthered no legitimate state interest.

Justice O'Connor, in a concurring opinion, would have relied on the Equal Protection Clause to strike down the law. She did not support the Court's overturning of *Bowers v. Hardwick*, but said the Texas statute made "homosexuals unequal in the eyes of the law by making particular conduct–and only that conduct–subject to criminal sanction."

In a scathing dissent, Justice Scalia found an inconsistency between the majority's willingness to overturn *Bowers* and its unwillingness to overrule *Roe v. Wade*, a case that, he said, also had drawn much criticism and had produced even less legislative and judicial reliance than had *Bowers*. In addition, he argued, the majority overruled *Bowers* without even attempting to dispute its narrow holding–that criminal prohibitions of homosexual sodomy are not subject to strict scrutiny because they do not implicate a *fundamental* right under the Due Process Clause, that is, a right deeply rooted in the Nation's history and tradition. The liberty interest in homosexual sodomy, Justice Scalia asserted, may be abridged or abrogated pursuant to a validly enacted state law if that law is rationally related to a legitimate state interest. Morality, he said, is a legitimate state interest–as is evidenced by criminal laws against fornication, bigamy, adultery, incest, bestiality, and

obscenity. Under the Court's reasoning, Justice Scalia said, none of these laws could survive rational-basis review.

For school districts, the reverberations from *Lawrence* are likely to be indirect but significant. Many believe the decision has invigorated the gay rights movement, while others say it is prompting a backlash against gay rights that will affect the debate over other issues, such as government recognition of same-sex unions. Whatever the ultimate impact of *Lawrence*, many school districts are likely to encounter more questions concerning the appropriate treatment of openly gay students and employees.

The Supreme Court this Term also declined to review a Seventh Circuit decision upholding the dismissal of a lawsuit by a teacher claiming that a school district failed to take effective steps to prevent him from being harassed by students and parents because of his sexual orientation. In *Schroeder v. Hamilton School District,* the Seventh Circuit, applying rational basis review, concluded there was "scant evidence" that the district "failed to address [the plaintiff's] complaints in the same manner that they handled complaints of harassment based on race or gender." Instead, the court rejected the plaintiff's attempt to equate the harassment he experienced to instances of race-or gender-based harassment against students. Moreover, school officials were not deliberately indifferent to the teacher's plight, but had taken "some action in response to nearly all of his complaints" of harassment. Although the Supreme Court declined to review this lower court decision, an increase in the number of legal challenges based on alleged unequal treatment of gay employees and students seems likely in the wake of *Lawrence*.

III. FEDERALISM

In two important cases this Term, *Nevada Department of Human Resources v. Hibbs* and *Jinks v. Richland County,* the Supreme Court departed from its pattern in recent years of expanding states' Eleventh Amendment immunity and interpreting narrowly the scope of Congress' authority.

In *Hibbs*, the Court held that Eleventh Amendment immunity did not preclude Nevada employees from recovering money damages from the state under the Family and Medical Leave Act of 1993 ("the FMLA"). William Hibbs brought suit under the FMLA against the Nevada Department of Human Resources ("Nevada") after it had terminated his employment while he was on leave caring for his injured spouse. The district court found that the Eleventh Amendment precluded Hibbs' claim against Nevada. The Ninth Circuit reversed.

In a somewhat surprising opinion authored by Chief Justice Rehnquist, a strong proponent of state sovereign immunity, and joined by five other Justices, the Court affirmed the Ninth Circuit's judgment. The majority reaffirmed that Congress has the power to abrogate states' Eleventh Amendment immunity from suits in federal court under two conditions. First, the statute must express "unmistakably clear" intent to abrogate state immunity. Second, the act must be a valid exercise of congressional power under § 5 of the Fourteenth Amendment.

The FMLA met both of these conditions, the Court found. First, Congress clearly indicated its intent to abrogate sovereign immunity by specifically providing for damages against any public or private employer. Addressing the second condition, Chief Justice Rehnquist reasoned that the FMLA protects employees against gender-based workplace discrimination grounded in sexual stereotypes, and therefore found that the act was a valid exercise of congressional power under § 5 of the Fourteenth Amendment. He explained that § 5 grants Congress powers both to provide remedies for discrimination and to deter violations through "prophylactic legislation" that is congruent and proportional to the targeted injury.

In a dissent joined by Justices Scalia and Thomas, Justice Kennedy questioned whether the evidence before Congress when it passed the FMLA was sufficient to support concern about state-sponsored discrimination. The evidence Congress relied upon, he argued, demonstrated only a general history of discrimination against women, and did not identify such discrimination by the states. In a separate dissent, Justice Scalia argued that evidence of discrimination by a number of individual states should not be sufficient to condemn the states "as a body," and that specific evidence concerning each state should instead be required if the statute is to be applied to the states generally.

The Court's decision in *Hibbs* clears the way for lawsuits seeking money damage awards against any employer, public or private, for violations of the FMLA. *Hibbs* underscores that all school districts, even those normally protected by Eleventh Amendment immunity, may be subject to claims for money damages if they violate the FMLA.

In *Jinks v. Richland County,* the Supreme Court held that a federal law extending the time in which a lawsuit may properly be filed in state court while a related federal suit is pending both is within congressional authority and may be applied to political subdivisions of a state. When a federal court has jurisdiction over a claim, 28 U.S.C. § 1367 ("Section 1367") allows the court to decide state-law claims that would not otherwise be within its jurisdiction if those claims are part of the same "case or controversy" as the federal claims. If the federal court decides not to hear the state claims, however, the plaintiff may still bring them in a separate action in state court. Congress therefore included in Section 1367 a provision requiring state courts to extend their deadlines for filing a lawsuit until 30 days after the federal court decides whether to address the state claims. Otherwise, a plaintiff's legal claim in state court could expire without a ruling on the merits simply because the federal court took too much time in deciding not to hear it.

In *Jinks,* a federal district court granted summary judgment to Richland County on a federal civil rights claim and declined to exercise supplemental jurisdiction over a related wrongful death claim brought under South Carolina law. The plaintiff subsequently brought a new case in state court within the limitations period established by Section 1367, but otherwise after the expiration of the state's statute of limitations, and received $80,000 in damages. The South Carolina Supreme Court reversed the state trial court's decision, holding that Section 1367 could not constitutionally be applied

against Richland County, a subdivision of the State, and that Jinks's claim in state court had not been filed within the applicable statute of limitations.

In a unanimous decision, the Supreme Court reversed. The Court found that Congress has the authority to pass laws necessary to carry out its constitutionally enumerated duties, including laws requiring state courts to adjust a state limitations period. The Court concluded that Section_1367 was necessary to promote fair and efficient operation of the courts. The Court also rejected Richland County's contention that Section 1367 infringes on state sovereignty by regulating state court procedures. The Court first questioned Richland County's attempt to draw a distinction between congressional actions affecting state procedures and substantive law, but reasoned that, even if such a distinction could be made, statutes of limitations should be considered substantive. Finally, the Court rejected the argument that Section 1367 should not apply to claims brought against the County. The Court explained that while states enjoy immunity from suit, the Constitution does not extend such protection to local governments such as counties or cities.

Jinks should serve as a reminder to counsel for school districts (at least the majority of districts that are not considered arms of the state) that when state law claims are brought against them in a federal court, that court's decision not to exercise jurisdiction over the claim does not necessarily end the matter. A plaintiff can bring suit in state court until the latter of the following: the expiration of the state statutory limitations period or 30 days after the federal court's dismissal of the claim.

While these decisions themselves may not be sufficient to establish a new trend in the Court's decision-making, they do set important limitations on the expansion of state sovereign immunity. In addition, both rulings expand the potential legal exposure of those school districts (such as those in California and Maryland) that, as arms of the state, share Eleventh Amendment immunity.

The Supreme Court declined to review another Eleventh Amendment case, *Clark County School District v. Eason*, in which the Ninth Circuit concluded that school districts in Nevada are not arms of the state and, therefore, are not entitled to sovereign immunity. In reaching its conclusion, the Ninth Circuit distinguished the status of school districts in Nevada from those in California, which the court of appeals had previously held to be entitled to Eleventh Amendment immunity. The *Eason* court's decision reinstated plaintiffs' claims under the Americans with Disabilities Act and the Rehabilitation Act alleging mistreatment of special education students by district teachers and staff.

The Court also declined to review *Okanogan School District No. 105 v. Superintendent of Public Instruction*, in which the Ninth Circuit determined that the state of Washington did not violate the National Forest Management Act when it deducted the amount of funds it provided to forest land counties under that statute from the state-mandated education aid that those particular counties received. The court held that school districts lacked standing to challenge the state's funding practice in federal court because school districts are political subdivisions of the state. The court also rejected the individual

plaintiffs' claims, reasoning that because the federal statute allocates funds to the states–not school districts–for educational and other public purposes, and does *not* specify that federal funds must supplement and not supplant state funds otherwise used for such purposes, the statute did not constrain the manner in which the state allocated its own funds.

IV. FALSE CLAIMS ACT

In *Cook County v. United States ex rel. Chandler*, the Supreme Court unanimously held that local government bodies, potentially including many school districts, are "persons" subject to claims for treble damages brought under the False Claims Act ("the FCA"). The *Cook County* decision resolved a split among federal courts of appeals.

The FCA allows the U.S. Attorney General or any private citizen to sue any "person" who submits to the United States government false or fraudulent claims for payment. To encourage private suits on the government's behalf, the law allows a successful plaintiff to receive up to 30 percent of the damages awarded, in addition to reasonable expenses, costs, and attorney's fees. The FCA also provides for awards of up to three times the actual financial loss. Finally, the FCA protects whistleblowers by prohibiting any retaliation for bringing, or assisting others in bringing, false claims cases.

In *Chandler,* a research scientist brought an FCA claim alleging that the Cook County hospital had fraudulently administered a $5 million grant from the National Institute of Drug Abuse. The scientist alleged that the hospital had obtained the grant funds by making false claims, including false reports on research subjects and incorrect assurances that the hospital had complied with the grant's terms and with federal requirements regarding the treatment of human subjects. The County sought to have the case dismissed, claiming that it is not a "person" subject to suit under the FCA.

The district court dismissed the case against the County shortly after the Supreme Court's 2000 ruling in *Vermont Agency of Natural Resources v. United States ex rel. Stevens.* In *Stevens*, the Court had held that states are not "persons" subject to *qui tam* actions under the FCA, in part because the treble damages available under the FCA were "essentially punitive." Since local governmental entities usually are not subject to punitive damage awards, the district court in *Chandler* concluded that although Cook County is a "person" for purposes of the FCA, it should be immune from claims for treble damages under that statute. The Seventh Circuit reversed the district court's decision, creating a conflict with the Third and Fifth Circuits.

Justice Souter, writing for the Supreme Court, first looked at the meaning of "person" in the FCA. The Court noted the traditional understanding that municipal corporations, like private corporations, are legal persons that can be sued, and found no Congressional intent in the FCA to exclude local governments from this definition. Instead, the Court stated, the FCA was meant to protect the federal government from fraud by many kinds of entities, including local governments.

Acknowledging that municipalities are generally not subject to punitive damages and that the Court had recently determined in *Stevens* that the FCA's treble damages were "essentially punitive," the Court nonetheless

concluded that allowing treble damage awards in FCA suits against local governments serves several important remedial purposes. Permitting such treble damages awards enables the federal government to recoup the costs of detecting and investigating fraud, while the plaintiff's 30 percent share of such awards encourages individuals to report fraud and to pursue claims on the government's behalf.

The Court also noted the FCA's mechanism for preventing excessive awards. Unlike classic punitive damage awards, which are determined by the jury with few limitations, damages under the FCA are calculated using the jury's assessment of actual damages and a multiplier set by the presiding judge. Furthermore, the Court found, local taxpayers are not unduly harmed by treble damages because, presumably, they previously enjoyed the benefit of the fraud through lower taxes or expanded services.

Chandler strongly suggests that those school districts that are local governmental bodies, rather than state agencies, also could be held liable for treble damages under the FCA. In contrast, before the *Chandler* decision, several significant FCA actions against school districts had been dismissed by district courts or overturned on appeal. In one of those cases, *United States ex rel. Garibaldi v. Orleans Parish School Board,* for example, a fraud in a school district's unemployment insurance and workers' compensation program resulted in a $22 million jury verdict against the school district. The Fifth Circuit, however, overturned this award on the grounds that treble damages are punitive and school districts cannot be held liable for punitive damages. The Supreme Court has now explicitly rejected this reasoning. Therefore, it appears likely that more school districts may be subject to treble-damage claims in FCA whistleblower suits in the future.

V. EMPLOYMENT ISSUES

This Term, the Supreme Court decided a number of cases that may affect school districts in their role as employers.

A. Title VII

In *Desert Palace, Inc. v. Costa*, a unanimous Court concluded that a 1991 amendment to Title VII of the Civil Rights Act of 1964 ("Title VII") allows a plaintiff to proceed on a "mixed-motive discrimination" claim (that is, one challenging employment actions allegedly based on both legitimate and illegitimate motives) without having to produce direct evidence of discrimination. In 1989, in *Price Waterhouse v. Hopkins*, the Court interpreted Title VII to preclude a finding of mixed-motive discrimination if the employer could prove it would have made the same decision in the absence of discrimination. Justice O'Connor concurred in that judgment, but contended that the plaintiff should be required to show by *direct evidence* that discrimination was a substantial factor in the decision. After the Court's decision in *Price Waterhouse*, Congress amended Title VII in 1991 to make employment practices unlawful whenever a discriminatory consideration "was a motivating factor" in the decision, but did not explicitly address the "direct evidence" requirement.

Even following passage of the 1991 amendment, most federal courts, relying primarily on Justice O'Connor's concurring opinion in *Price Waterhouse*, concluded that *direct evidence* of a discriminatory motivation was still required. The Ninth Circuit, however, concluded in *Desert Palace* that Justice O'Connor's references to direct evidence were not controlling in light of the 1991 amendments and that plaintiffs could therefore establish a violation by showing through a preponderance of evidence (whether direct or circumstantial) that a discriminatory purpose was "a motivating factor" in the challenged employment decision.

The Supreme Court unanimously affirmed the Ninth Circuit decision. First, the Court noted that the plain language of Title VII requires only that a plaintiff *demonstrate* that an employer used a forbidden consideration with respect to any employment practice. The statute did not mention, let alone mandate, a showing through direct rather than circumstantial evidence. In addition, the Court said, Congress explicitly defined the term "demonstrates" simply as "mee[ts] the burdens of production and persuasion." Second, the Court indicated that requiring direct evidence would be contrary to the conventional rules of civil litigation, which typically permit plaintiffs to prove their claims by either direct or circumstantial evidence. In fact, the Court stated, circumstantial evidence is often adequate in other contexts and may even be "more certain, satisfying and persuasive than direct evidence." Finally, the Court noted the use of the term "demonstrates" in other Title VII provisions, and "decline[d] to give the same term in the same Act a different meaning" absent "some congressional indication to the contrary."

By allowing plaintiffs to proceed with a Title VII mixed-motive discrimination claim based solely on circumstantial evidence, the Court's decision in *Desert Palace* should make it easier for plaintiffs in some cases to succeed on mixed-motive discrimination claims against employers, including public school districts.

B. Americans with Disabilities Act

In *Clackamas Gastroenterology Associates, P.C. v. Wells*, the Supreme Court addressed the meaning of "employee" for purposes of the Americans with Disabilities Act ("the ADA") and, potentially, other federal anti-discrimination statutes.

In *Clackamas*, a medical clinic sought to disclaim liability under the ADA by arguing that it did not have 15 or more employees and therefore was not a covered employer. The Ninth Circuit, however, rejected the definition of "employee" adopted by the Second and Seventh Circuits in other cases, and determined that four physician-shareholders who owned the professional corporation should be deemed "employees" under the ADA.

Because the ADA provides no clear definition of "employee," the Supreme Court determined that the term should be interpreted in accordance with common law definitions. Adopting the position advocated by the Equal Employment Opportunity Commission ("EEOC"), the Court found six factors to be particularly relevant for determining whether an individual is an "employee": (1) whether the organization can hire or fire the individual or set the rules and regulations of the individual's work; (2) whether and, if so,

to what extent, the organization supervises the individual's work; (3) whether the individual reports to someone higher in the organization; (4) whether and, if so, to what extent, the individual is able to influence the organization; (5) whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and (6) whether the individual shares in the profits, losses, and liabilities of the organization. The Court emphasized, however, that the common-law element of control is the principal guidepost.

The Court's decision in *Clackamas* could have implications beyond the context of the ADA itself. As the Court noted, several other federal anti-discrimination statutes, such as Title VII, similarly limit coverage only to those employers that have at least a specified number of employees. Accordingly, a limited conception of "employee" could contract the coverage of these statutes by decreasing the number of employers subject to their requirements. In addition, although not directly an issue in *Clackamas*, the interpretation of the term "employee" determines which individuals working for covered employers will be able to invoke certain statutory protections. Accordingly, the Court's decision in *Clackamas* may affect public schools by clarifying who is a school district "employee" eligible for protection under the ADA and other federal anti-discrimination statutes.

C. Fair Labor Standards Act

In *Breuer v. Jim's Concrete of Brevard, Inc.*, the Supreme Court considered whether a defendant may remove to federal court a suit brought in state court under the federal Fair Labor Standards Act ("the FLSA"). Phillip Breuer brought suit against Jim's Concrete in Florida state court, claiming rights to unpaid wages, liquidated damages, prejudgment interest, and attorney's fees under the FLSA. Jim's Concrete removed the case to federal district court, and Breuer objected. The Supreme Court eventually agreed to hear the case to decide whether removal was proper.

Normally, a defendant may remove to federal court a case brought in state court if the plaintiff could sue in federal court initially. Removal is not permitted, however, when Congress has established an express exception to the normal rule. In the FLSA, Congress specified that an action "may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction." The plaintiff argued that this provision barred removal of an FLSA suit from state to federal court.

The Supreme Court disagreed. Writing for a unanimous Court, Justice Souter held that the FLSA provision at issue created no exception to normal removal standards. In particular, the Court refused to read the statutory term "maintain" as a restriction on removal, instead reading it to confer, at most, only a right to "fight to the finish," whether in state or in federal court.

The Court's decision in *Breuer* thus confirms that a school district defending an FLSA case filed in state court may elect to remove the case to federal court.

D. Cases the Court Declined to Review

The Court declined to review *Doe ex rel. Doe v. City of Roseville*, in which the Sixth Circuit held that school officials were not personally liable for

failing to prevent a student's sexual abuse by a technician. The plaintiff claimed that her constitutional right to bodily integrity had been violated when various officials, including the principal, the director of special education, assistant superintendents, and the district superintendent, failed to take action to prevent a teacher from sexually abusing students. Although the Sixth Circuit agreed that a constitutional right to bodily integrity was clearly established, because the plaintiff sought to hold school administrators individually liable for injury caused directly by someone else, the court determined that supervisory liability standards applied. Under those standards, a plaintiff must show that the failure of school officials to take adequate precautions constituted deliberate indifference to students' constitutional rights. In rejecting the plaintiff's claim, the court concluded that the behavior of the school officials did not constitute "deliberate indifference."

In addition, the Supreme Court declined to review two other noteworthy decisions involving employment issues that have implications for public school districts.

- In *Friedman's Inc. v. West Virginia ex rel. Dunlap*, the West Virginia Supreme Court refused to enforce an arbitration clause in an employment contract because the clause restricted the employee's–but not the employer's–access to courts.
- In *In re Halliburton Co*., the Texas Supreme Court held that an employer's arbitration policy is enforceable under state law against an at-will employee if the employee receives notice of the policy and continues to work past the date of the policy's implementation. The employer need not have the employee sign or review the policy for the arbitration provisions to be enforced. This ruling applies only to at-will employees.

VI. FREEDOM OF SPEECH

In a number of cases this Term, the Court permitted some curtailment of free speech rights to protect other societal interests.

A. Internet Filters

In *United States v. American Library Association, Inc*., the Supreme Court upheld the Children's Internet Protection Act ("CIPA"), ruling that Congress could condition federal funding for the provision of computers and Internet services to public libraries, including public school libraries, on the requirement that filters be installed to block the transmission of pornographic materials. CIPA applies to all libraries receiving federal funding under either the E-rate program, which provides discounted rates for Internet access, or the Library Services and Technology Act, which provides grants for acquiring computers or telecommunications technologies. Enacted in 2001, CIPA was immediately challenged by the American Library Association and other plaintiffs. A three-judge district court found that the filtering provisions constituted a content-based restriction on access to a public forum, and were therefore subject to strict scrutiny. Applying this standard, the panel found that the use of software filters was not sufficiently narrowly tailored to further the government's compelling interest in preventing the dissemination of obscenity, child pornography, or material harmful to minors.

The Supreme Court reversed the panel and upheld CIPA. Six members of the Court, writing in three separate opinions, found CIPA was a valid exercise of Congress's spending power and that it did not require libraries to engage in unconstitutional restrictions of speech.

Although no single opinion spoke for a majority of the Court, there were some key points of consensus. The Justices were united in their belief that restricting *children's* access to pornographic material did not itself pose a constitutional problem. All nine Justices also agreed that the Internet filters currently available were imperfect instruments that would inevitably block non-pornographic material. The central issue debated by the Court was the extent to which this "overblocking" infringes upon the First Amendment rights of adult library users.

Chief Justice Rehnquist, joined by Justices O'Connor, Thomas, and Scalia, declined to follow the lower court's strict scrutiny analysis. According to this plurality, "Congress has wide latitude to attach conditions to the receipt of federal assistance to further its policy objectives." Public libraries can legally refuse to use Internet filters, as long as they are willing to forego federal funding.

A majority of the Court found that CIPA did not require libraries to engage in unconstitutional restrictions on speech. The plurality opinion written by the Chief Justice compared the use of filtering software to libraries' traditional decisions to exclude pornography from their print collections. Moreover, even assuming that "erroneous blocking" of Internet materials "presents constitutional difficulties," the plurality found that "any such concerns are dispelled by the ease with which patrons may have the filtering software disabled."

Justice Kennedy, writing separately, similarly found CIPA constitutional because it permitted librarians to disable filtering software if requested to do so by an adult patron. He noted the possibility of future constitutional challenges on an "as applied" basis, however, should implementation of the Act unduly burden an adult user's ability to view constitutionally protected material. Such challenges are likely, absent clearer direction regarding how requests for disabling filtering software should be addressed. Such constitutional challenges to the implementation of CIPA in the elementary or secondary school setting, however, likely would be rejected. All of the Justices seemed to agree that application of the Act would be upheld "if the only First Amendment interests raised . . . were those of children."

Justice Breyer also wrote a separate concurrence, contending that the Court should have applied heightened scrutiny to analyze CIPA's constitutionality, but finding that CIPA was constitutional under such scrutiny. Like Justice Kennedy, Justice Breyer also pointed to the CIPA provision permitting removal of Internet filters upon request as "an important exception that limits the speech-related harm that 'overblocking' might cause."

In dissent, Justices Stevens, Souter, and Ginsburg argued that CIPA imposed an unconstitutional condition on government subsidies to local libraries, finding that the "abridgment of speech is equally obnoxious whether a rule . . . is enforced by a threat of penalties or by a threat to withhold a benefit." Justice Stevens characterized CIPA as a "statutory blunderbuss,"

mandating a "vast amount of 'overblocking' [that] abridges the freedom of speech protected by the First Amendment." Justices Souter and Ginsburg rejected the plurality's view that the use of Internet filters was akin to libraries' traditional exercise of selection criteria in book purchasing, to which courts traditionally give deference. Rather, they noted that CIPA merely permits–but does not mandate–removal of Internet filters upon patron request, and allows removal "only for a bona fide research or other lawful purpose." Accordingly, Justices Souter and Ginsburg found the proper analogy to be "either to buying a book and then keeping it from adults lacking an acceptable 'purpose,' or to buying an encyclopedia and then cutting out pages for anything thought to be unsuitable for all adults."

As a result of the Court's conclusion, CIPA will finally, more than two years after its original enactment, be put into effect. Accordingly, schools will have greater scope in protecting students from the threats of exposure to pornographic material on the Internet. As some members of the Court noted, however, the Act may still be subject to constitutional challenges as implemented.

B. Intellectual Property

In a case with important implications for publishers and other media companies, including those providing educational materials to school districts, the Supreme Court upheld the Copyright Term Extension Act of 1998 ("the CTEA"), ruling that it violates neither the Copyright Clause of the Constitution nor the First Amendment. The CTEA adds 20 years to the term of every copyright, extending all copyrights that already have been granted so that they now extend 70 years beyond the author's death.

In *Eldred v. Ashcroft*, individuals and businesses whose products build upon copyrighted works that have gone into the public domain filed suit against Attorney General John Ashcroft, claiming that the CTEA exceeded Congress' power under the Copyright Clause and violated the First Amendment by unduly restricting the speech of those who would use works after their original copyright expired. The district court upheld the law. On appeal, the Court of Appeals for the District of Columbia Circuit affirmed. The Supreme Court affirmed the lower courts.

Justice Ginsburg, writing for a 7–2 majority of the Court, emphasized Congress' broad discretion under the Copyright Clause and a series of similar copyright extensions granted since the 19th century. The majority held that a 20–year extension was within the "limited time" allowed by the Copyright Clause and rejected the petitioners' argument that allowing Congress to extend existing copyrights would, in effect, permit unlimited future extensions.

In dissent, Justice Stevens argued that the CTEA's after-the-fact extension of the copyright term for existing works frustrated the underlying purposes of the Copyright Clause by effectively transferring wealth from the public to copyright holders with no apparent public benefit. Writing separately, Justice Breyer echoed those concerns and emphasized the costs that copyright extensions would pose for users of historical material, particularly for nonprofit users of digital databases, including educators and their stu-

dents. Justice Breyer contended that prices of such products would increase as the costs of obtaining permission from copyright holders rose.

Despite this concern, the effect of *Eldred v. Ashcroft* on public schools and other educators may be muted by the availability of the "fair use" defense, which historically has afforded considerable latitude for use of copyrighted material in teaching and scholarship. The CTEA also contains a provision allowing libraries and similar institutions to reproduce and distribute copies of certain published works for scholarly purposes during the last 20 years of any copyright term if the work is not already being exploited commercially and further copies are unavailable at a reasonable price.

C. Restrictions on Access to Property

In *Virginia v. Hicks*, a unanimous Court faced little difficulty in balancing First Amendment concerns with a public housing development's restrictions on entry, where the local government had ceded title of the property to the housing development and the development's trespass policy restricted only entry of nonresidents with no "legitimate business or social purpose." The Court reversed the Virginia Supreme Court's ruling that a low-income housing development's unwritten rule requiring advance permission to enter the development for leafleting rendered the entire trespass policy unconstitutionally overbroad in violation of the First Amendment.

Writing for the Court, Justice Scalia found that the development's trespass policy was not facially invalid because it did not restrict a "substantial" amount of protected free speech "in relation to the statute's plainly legitimate sweep." Indeed, the plaintiff had "failed to demonstrate that *any* First Amendment activity falls outside the 'legitimate business or social purpose[s]' that permit entry," although the Court left the door open for such a case in the future.

Virginia v. Hicks suggests that school districts, if ceded rights to their surrounding property by local authorities, can create a "buffer zone" wherein entry can be restricted to legitimate business or social purposes. As a result of this Term's First Amendment decisions, schools will be better able to take action to protect their students from perceived harms without raising free speech concerns.

D. Advertising

The Court likewise faced little difficulty in limiting the scope of First Amendment free speech protections in *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.* Justice Ginsburg delivered the opinion for a unanimous Court, holding that telemarketers who make false or misleading representations designed to deceive charitable donors about how their donations will be used cannot seek refuge behind the First Amendment to bar fraud claims against them. Although the First Amendment protects the right to engage in charitable solicitations, the Court concluded that, "[l]ike other forms of public deception, fraudulent charitable solicitation is unprotected speech." If using telemarketers to raise funds, school administrators must be aware of the constitutional limits to solicitation techniques and establish careful guide-

lines against possible misrepresentations regarding the allocation of monies received.

E. Regulation of Threatening Symbols

In *Virginia v. Black*, the Court upheld the constitutionality of a Virginia statute that banned cross burning with the intent to intimidate. The Court attempted to strike an appropriate balance between permissible free speech and unlawful criminal threats.

At issue was the constitutionality of a 50–year-old Virginia law that banned cross burning when done with the intent to intimidate. The statute contained a separate provision stating that the act of cross burning was itself prima facie evidence of intent to intimidate, and, the element of intent thus did not have to be proven to a jury. Three respondents were separately convicted of violating the cross burning statute. One respondent was convicted for burning a cross during a Ku Klux Klan rally. Two others were convicted of attempting to burn a cross that had been planted in an African American neighbor's yard.

The Supreme Court held that a state may, consistent with the First Amendment, ban cross burning carried out with the intent to intimidate, but concluded that the Virginia statute's provision treating any cross burning as prima facie evidence of intent to intimidate rendered the statute unconstitutional. As a result of the Court's ruling, the conviction of the Ku Klux Klan member was dismissed, while the convictions of the two men who attempted to burn a cross on the lawn of an African American neighbor were vacated and remanded for further consideration. The majority took pains to distinguish between cross burning as "a statement of ideology" or a "symbol of group solidarity," and cross burning meant to intimidate, noting that the former is protected by the First Amendment while the latter may be subject to criminal prosecution.

F. Cases the Court Declined to Review

The Supreme Court also declined to review several First Amendment cases of interest to school districts, including:

- *Vargas-Harrison v. Racine Unified School District*: The Seventh Circuit held that a grade school principal was a "policy-making employee"–someone with meaningful input into governmental decision-making as to which there is room for principled disagreement–and that her public statements in opposition to the school district's policies were not protected speech under the First Amendment.
- *Cockrel v. Shelby County School District*: The Sixth Circuit ruled that a public elementary school teacher should be allowed to pursue her First Amendment retaliation action, which alleged that she had been fired for inviting the actor Woody Harrelson to speak to her class about the benefits of industrial hemp. The court concluded that the teacher's selection of a speaker constituted protected speech touching on a matter of public concern, and that the defendants' interests in efficient operation of the school and a harmonious workplace did not outweigh the teacher's First Amendment interest.

- *Sypniewski v. Warren Hills Regional Board of Education*: The Third Circuit concluded that a school district could not bar a student's wearing a "You might be a redneck" T-shirt. Although the court acknowledged an atmosphere of racial hostility in the district, it found insufficient evidence that the term "redneck" in and of itself raised "a well-founded fear of disturbance."

VII. RACIAL DISCRIMINATION

In *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*, the Court held that a city did not violate the Constitution or any federal anti-discrimination statute when it gave effect to a racially motivated, citizen-initiated petition. In 1996, the City of Cuyahoga Falls, Ohio, approved a site plan for construction of a low-income housing complex submitted by a nonprofit developer. Pursuant to a provision of the City Charter, city residents initiated a referendum petition drive to block the project. During the course of the referendum drive, many private individuals stated that their opposition to the proposed housing complex stemmed from a fear of increased crime, drug activity, and costs of services, and a concern that the complex would attract "a population similar to the one on Prange Drive," the only African–American neighborhood in Cuyahoga Falls.

The referendum passed, but the Ohio Supreme Court later struck it down on unrelated state law grounds. In the meantime, the developer sued the City and its officials in federal court, alleging that they had violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment by permitting the referendum to take place and giving effect to its proponents' racial biases. After the Ohio Supreme Court declared the referendum invalid, the district court determined that the plaintiffs' federal action now involved only a claim for damages relating to the delay in construction and granted summary judgment for the defendants.

On appeal, the Sixth Circuit reversed. The federal appeals court held that there was sufficient evidence for a trial on the claim that the City had given effect to the public's racial bias in violation of the Equal Protection Clause, and that a triable issue was presented concerning whether the City acted arbitrarily and irrationally in violation of substantive due process.

In a unanimous opinion authored by Justice O'Connor, the Supreme Court reversed. First, the Court held that an equal protection violation requires evidence of discriminatory intent *by the government*. The Court found no evidence that the official acts being challenged were motivated by racial bias. Instead, the Court concluded, the City simply followed required procedures when it placed the referendum on the ballot and refused to issue building permits pending the election results. The Court found it significant that the plaintiffs did not challenge the outcome of the referendum, but instead challenged the City's execution of the referendum process–a process that was race-neutral–and did not allege that the City followed that process in a selective or racially biased manner. Indeed, Justice O'Connor's opinion showed great respect for the referendum process as a "basic instrument of democratic government." Second, the Court found no substantive due process violation because the actions of City officials were reasonable attempts to comply with the City Charter.

City of Cuyahoga Falls clarifies that a government entity, including a school district, may not be liable under the Fourteenth Amendment when it even-handedly complies with reasonable and neutral procedures, even if those procedures are initiated by citizens motivated by racial animus. The Court left open the possibility, however, that evidence of racial animus by referendum sponsors or other decision-makers could still be used to challenge an enacted referendum.

The Supreme Court this Term declined to review the Tenth Circuit's decision in *Kansas v. Robinson*, in which the plaintiff alleged that Kansas' school funding laws violated regulations adopted pursuant to Title VI of the 1964 Civil Rights Act ("Title VI"), the Rehabilitation Act of 1973, and the Fourteenth Amendment. The Tenth Circuit acknowledged that the Supreme Court had held in *Alexander v. Sandoval* (2001) that no private right of action exists under the Title VI disparate impact regulations, but held that a private right of action for prospective injunctive relief does exist under 42 U.S.C. § _1983. The court of appeals also held that Kansas had waived its sovereign immunity from suit under Title VI by voluntarily accepting federal funds. These rulings, which affirm the district court's denial of a motion to dismiss, will allow the case to proceed.

VIII. PUNITIVE DAMAGES

In *State Farm Mutual Automobile Insurance Co. v. Campbell*, the Supreme Court held that a $145 million punitive damage award was excessive and violated the Due Process Clause of the Fourteenth Amendment. The Court also vacated and remanded two other cases addressing punitive damages awards, *Ford Motor Co. v. Smith* and *Ford Motor Co. v. Romo*, for further consideration in light of *Campbell*.

In *Campbell*, a Utah jury awarded $2.6 million in compensatory damages and $145 million in punitive damages against State Farm. The trial court reduced the compensatory damages to $1 million and the punitive damages to $25 million, and both parties appealed. The Utah Supreme Court found that the jury award was not excessive and reinstated it.

The Supreme Court reversed, finding that the Utah court had misapplied the three-prong test delineated in *BMW of North America, Inc. v. Gore* (1996) in reinstating the punitive damages award. *Gore* provides that courts should consider three guideposts when assessing punitive damages awards: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the amount of the compensatory damages and the punitive damages award; and (3) the disparity between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

The Court found that the Utah Supreme Court's analysis of the first guidepost was deficient because it had inappropriately considered out-of-state conduct when evaluating the reprehensibility of State Farm's activities. According to the Court, a state does not have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of its jurisdiction. The Court explained that out-of-state conduct is relevant only when directly connected to the in-state actions that harmed the plaintiff.

Addressing the second *Gore* guidepost, the Court refused to identify a precise limit on the acceptable ratio between compensatory and punitive damages, but hinted that "few awards exceeding a single-digit ratio . . . will satisfy due process." The Court also rejected the Utah Supreme Court's analysis under the third guidepost, finding that there was very little correlation between possible civil sanctions under Utah state law and the $145 million punitive damages award.

Campbell is the latest in a line of recent Supreme Court decisions reining in the permissible scope of punitive damages awards. Although the law regarding the availability of punitive damages against school districts and other public entities varies from state to state, *Campbell*, by reaffirming the constitutional limits on punitive damage awards, could have an impact on educational institutions that are subjected to large punitive damage claims.

IX. VOTING RIGHTS

The Court decided two important voting rights cases this Term and also declined to review several lower court decisions in this area with direct implications for school districts.

In *Branch v. Smith,* the Supreme Court upheld a decision by a three-judge district court that both enjoined a congressional redistricting plan fashioned by a Mississippi state court and imposed its own election plan relying on single-member districts.

The case arose under Section 5 of the Voting Rights Act ("the VRA"). Section 5 provides that when a "covered jurisdiction"–a jurisdiction, like Mississippi (and many school districts in the South), with a history of racial discrimination in its electoral process–seeks to enact a change in "any voting qualification or prerequisite to voting, or standard, practice, or procedure," it must obtain preclearance from the U.S. Department of Justice or a three-judge panel of the United States District Court for the District of Columbia before that change can be enforced.

In response to the 2000 Census, which resulted in Mississippi's losing a congressional seat, the state legislature was unable to develop an acceptable redistricting plan. After plaintiffs sued in state court, however, that court developed its own redistricting plan. When it became clear that the state court's plan would not receive the required Department of Justice preclearance in sufficient time to allow congressional candidates to qualify for upcoming elections, a federal district court in a separate case enjoined the state court's plan and ordered the implementation of an alternative plan.

The Supreme Court upheld the district court's actions. Although the Court noted that congressional redistricting is primarily a state responsibility, it found that the federal trial court had acted only when it became clear that Mississippi would not obtain timely preclearance of its plan. In addition, the Court held that the district court had correctly drawn single-member districts rather than allowing at-large elections. Finally, the Court vacated the district court's ruling that Mississippi's un-precleared plan was unconstitutional.

The Court's decision in *Branch v. Smith* makes clear that a federal court may step in and provide its own plan if a covered jurisdiction does not obtain timely preclearance for a proposed redistricting plan. The implications of this

ruling are potentially significant for public school districts in covered jurisdictions. To preserve local control over the reapportionment process, such school districts must be prepared to develop election plans in a fashion that allows sufficient time for the sometimes lengthy preclearance process.

In another case involving the permissibility of a redistricting plan under Section 5 of the VRA, a divided Supreme Court held in *Georgia v. Ashcroft* that a three-judge district court had applied an incorrect legal standard when it invalidated Georgia's state senatorial redistricting plan for impermissibly causing "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."

Following the 2000 Census, Georgia Democrats sought to redistrict the State's senatorial districts to maintain at least the number of majority-minority districts while also increasing Democratic strength in the Georgia senate. Because the Democratic leadership believed that an increase in the size of the black voting age population in individual election districts beyond what was "necessary" would favor Republicans, they designed a redistricting plan that would increase the number of so-called "influence" districts, where black voters would be able to exert a significant–although perhaps not decisive–force in the election process.

The three-judge district court held that Georgia failed to meet its burden of proving nonretrogression and invalidated the plan under Section 5. According to the district court, the plan failed because it would lessen the opportunity for the black candidates of choice to win election.

The Supreme Court in a five-to-four decision redefined retrogression, holding that the district court had focused too narrowly on the plan's effect on a few majority black districts. Instead, the Court held, Section 5 requires a holistic consideration of the entire plan. Accordingly, diminution of African Americans' effective electoral participation in one or two districts may suffice to show a Section 5 violation "only . . . if the covered jurisdiction cannot show that the gains in the plan as a whole offset the loss in a particular district."

The majority also rejected the primacy sometimes placed on the "comparative ability of a minority group to elect a candidate of its choice," declaring that this factor, while important, "cannot be dispositive or exclusive." Instead, courts analyzing the permissibility of a plan under Section 5 should consider a variety of factors, including "the extent to which a new plan changes the minority group's opportunity to participate in the political process." According to the Court, Section 5 permits states to choose between various alternatives–such as an increase in the number of majority-minority districts or an increase in the number of "influence" or "coalition" districts–to increase minority voting strength.

Applying these factors to the plan at issue, the Court found it "likely," but did not hold, that Georgia had met its burden of demonstrating nonretrogression. Accordingly, the Court remanded the case to the three-judge district court for an examination of the facts under the proper legal standard.

The Court's decision in *Georgia v. Ashcroft* broadens the definition of retrogression under Section 5 of the VRA. For school districts that are covered jurisdictions, assessing the legality of new redistricting plans now

demands more than comparing the number of majority-minority districts in the old election plan with the number in a new proposed plan. The number of minority "influence" districts, the presence of majority "coalition" districts, the actual responsiveness of elected officials to minority concerns, and the intent of the redistricting decision-makers all become potentially more relevant under *Ashcroft*. School districts may have more options under Section 5 after *Ashcroft*, but if their redistricting plans are challenged, they also likely face even more complex evidentiary issues.

The Supreme Court also denied *certiorari* in three important voting rights cases involving the governance of public school districts. First, the Court declined to review, and thereby left undisturbed, the Sixth Circuit's decision in *Moore v. Detroit School Reform Board*. In *Moore*, the Sixth Circuit, for the second time, ruled that changes from elected to appointed school boards are not covered by Section 2 of the VRA.

Moore involved a challenge to state legislation aimed at improving the Detroit public schools through creation of an appointed school board. Opponents of the legislation argued that it violated the Fourteenth and Fifteenth Amendments to the U.S. Constitution and Section 2 of the VRA, which prohibits voting practices with racially discriminatory effects. The plaintiffs argued that the Michigan School Reform Act ("the MSRA") effectively disenfranchised the voters of Detroit (a city with a predominantly African–American population) by allowing the mayor to appoint a seven-member reform board and by relegating elected members of the Detroit school board to a purely advisory role. Furthermore, the plaintiffs argued that the MSRA was discriminatory because it prohibited only the residents of Detroit from electing school board members, but did not affect the voting rights of other Michigan residents.

The Sixth Circuit disagreed and held that the MSRA violates neither the Constitution nor the VRA. The court of appeals reasoned that the plaintiffs could not prove that the MSRA was intentionally discriminatory, and found that a showing that the Act disparately affected minorities was insufficient to prove a constitutional violation. In deciding that the MSRA also did not violate the VRA, the Sixth Circuit held that Section 2's non-discrimination requirements apply only to elections. Because the MSRA established an appointive rather than elective system, the Sixth Circuit reasoned that Section 2 did not apply. The court of appeals stated that citizens do not have a right under federal law to elect school board members because state governments possess great leeway in managing their internal affairs.

By declining to review *Moore,* the Supreme Court made it easier for states in the Sixth Circuit to remove authority from elected school boards. Since the other courts of appeals have not addressed this issue, *Moore* will likely be a precedent widely cited in defense of such measures in other jurisdictions. In recent years, more and more states and city governments not only in the Sixth Circuit, but also throughout the country, have begun implementing school board takeovers or restructuring, a trend that will likely accelerate under the school district accountability provisions in the No Child Left Behind Act. *Moore* imposes a substantial barrier for potential plaintiffs seeking to challenge the replacement of elected school boards on voting rights grounds.

The Supreme Court also declined to review two Third Circuit cases concerning the "one person, one vote" principle in the context of a New Jersey law that allows school districts to fulfill their obligation to educate the children of their district by sending them to another district's schools and paying the costs of educating those students. The law further provides that sending school districts may have a representative on the receiving district's school board, and that that representative may vote on issues directly relevant to the sending district's students.

In *English v. Board of Education of Boonton*, the Third Circuit acknowledged that typically, under the constitutional principle of "one person, one vote," when members of an elected body are selected from different districts, each district's voters must be able to vote for proportionally equal numbers of officials. Nevertheless, the court noted, "the Supreme Court has also recognized that this right must operate within certain geographic boundaries." The Third Circuit ruled that strict scrutiny of a denial of proportional representation to nonresidents would apply only where the governmental unit at issue exercises a level of control over the non-residents' lives close or equal to that which it exercises over those who reside within its borders. The court therefore applied rational basis review to conclude that New Jersey had "legitimate reasons for limiting the input of a sending district in the receiving district's board's decisions." In particular, the court found, because the sending district could sever its relationship with the receiving district, its "residents do not have the same vested interest in the long-term affairs of the [receiving] school district as do [that district's own] residents." In *Board of Education of Branchburg v. Livingston*, the Third Circuit extended its holding in *English* to apply even where the sending school district cannot withdraw from its send-receive relationship.

In declining to review these two Third Circuit decisions, the Court left intact New Jersey's ability to control this special form of school board election.

X. IMMIGRATION

In *Demore v. Kim*, a closely divided Supreme Court upheld the no-bail provision of the Immigration and Nationality Act, ruling that it is constitutionally permissible to detain without a bond hearing a lawful permanent resident who has committed one of a statutorily specified set of crimes. Hyung Joon Kim, a South Korean citizen, had entered the United States in 1984 at the age of six, and became a lawful permanent resident two years later. Upon completion of a sentence in California state prison for a petty theft that he had committed as a teenager, Mr. Kim was arrested and held without bail by immigration officials pending a determination regarding whether he was subject to deportation. Mr. Kim argued, and both the trial court and the Ninth Circuit agreed, that detention without an individualized determination of his flight risk violated his due process rights under the Fifth Amendment. The Third, Fourth and Tenth Circuits had reached similar conclusions, while the Seventh Circuit had disagreed.

The Supreme Court, in a five-to-four decision, overturned the Ninth Circuit's ruling and held that detaining such aliens without providing an individualized determination of flight risk did not violate due process rights

under the Fifth Amendment. The Court also refused to draw a distinction between rights afforded to lawful permanent residents and those conferred upon other aliens. Chief Justice Rehnquist, writing for the majority, observed that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."

In dissent, Justice Souter summarized the concerns of many advocates of immigrants' rights: "The Court's holding that the Constitution permits the government to lock up a lawful permanent resident of this country when there is concededly no reason to do so forgets over a century of precedent acknowledging the rights of permanent residents, including the basic liberty from physical confinement lying at the heart of due process."

Given that approximately one out of every five elementary and high school students in the United States has at least one foreign-born parent and that many public school students themselves, like Mr. Kim, are lawful permanent residents, the Court's ruling may have some effect on school districts. Allowing the government to detain lawful permanent residents without individualized bail hearings may increase the likelihood that some students or parents are detained, with a potential negative impact on child welfare and school performance. Any alien student or parent, even a lawful permanent resident, whom the government claims to be deportable based upon a criminal conviction may now be detained without a hearing pending a determination on deportation.

XI. SEPARATION OF CHURCH AND STATE

The Supreme Court did not review any cases on the separation of church and state in the context of public primary or secondary education during the 2002–2003 Term, but instead declined to review several lower court decisions involving the Establishment and Free Exercise Clauses in the education setting.

In *Fleming v. Jefferson County School District,* for example, the Tenth Circuit considered rules announced by Columbine High School concerning a student tile-painting project in the school building, which had been the site of tragic shootings in 1999. To maintain a positive atmosphere and to prevent the project from becoming a "memorial" to victims of the shootings, the school prohibited references to the tragedy, its victims, or "religious symbols" in the tile designs. The Tenth Circuit held that the project constituted school-sponsored speech within a nonpublic forum due to the school's involvement in the "creation, funding, [and] supervision . . . of the tile project." A school could reasonably regulate school-sponsored speech if its regulations are in accordance with its legitimate pedagogical interests, the court found, and the school's desire to avoid a disruptive religious debate through the medium of the tile project constituted such an interest.

The Supreme Court also declined to review *Steele v. Industrial Development Board of Metropolitan Government Nashville*, in which the Sixth Circuit determined that a municipal board's issuance of tax-exempt revenue bonds for the benefit of a religious educational institution found to be "pervasively sectarian" by the district court did not violate the Establishment Clause. The

court reasoned that the revenue bond program operated in a neutral manner to further the legitimate governmental purpose of economic development and that any benefit that the religious institution received was in the form of indirect aid. Accordingly, the court found that the nature of the institution–secular or religious–was not relevant when evaluating the constitutionality of this type of bond program, which was "analogous to an indirect financial benefit conferred by a religiously neutral tax or charitable deduction."

XII. STATE ACTION

The Supreme Court declined this Term to review *Logiodice v. Trustees of Maine Central Institute*, in which the First Circuit determined that a private school that was contractually obligated to provide a high school education to a public school district's students was not a state actor, and thus was not required to follow Fourteenth Amendment due process requirements when it suspended a student for cursing at a teacher and at the dean of students. After concluding that education was not a public function rendering the private school a state actor, the court found no entwinement between the school district and the private school with respect to discipline. According to the court, under the contract at issue, the private school's trustees retained the sole right to promulgate, administer, and enforce all rules pertaining to student behavior. The court further declined to expand the state action doctrine to include the private school absent evidence that the threat of wrongful expulsion was "serious, reasonably wide-spread, and without alternative means of redress," concluding that "*[n]one* of these elements [was] satisfied in this case."

Furthermore, with respect to the public school district defendants, the court acknowledged that they were state actors, but determined that their failure to include protections against improper discipline in the district's contract with the private school was not actionable. According to the court, "inaction by state actors is ordinarily not treated as a due process violation by the state actor, even though this permits harm to be caused by others."

XIII. STUDENTS WITH DISABILITIES

During its 2002–2003 Term, the Supreme Court again did not decide any cases directly pertaining to students with disabilities. Instead, the Court declined to review several interesting special education cases, leaving in place the lower court rulings described below:

- In *Board of Education of Pawling Central School District v. Schutz*, the Second Circuit concluded that a prior administrative decision approving a unilateral placement in private school constituted a "current educational placement" such that the child's parents were entitled to reimbursement of tuition expenses while their challenge to a new individualized education program ("IEP") prepared by the school district was pending. The court reasoned that the school district's proposal for an amended IEP did not abrogate the parents' entitlement to reimbursement under the "stay put" provision of the Individuals with Disabilities Education Act ("IDEA").
- In *Beth B. v. Van Clay*, the Seventh Circuit affirmed a determination that placement in a special education classroom with reverse main-

streaming did not violate IDEA's "least restrictive environment" ("LRE") requirement. According to the court, the LRE provision requires districts to consider whether the placement is the least restrictive *appropriate* environment, not necessarily the least restrictive possible placement.

- The Ninth Circuit held in *Porter v. Board of Trustees of Manhattan Beach Unified School District* that parents are not required to exhaust state complaint resolution procedures prior to filing a civil action to enforce a due process hearing order requiring compensatory education for their child. The court reasoned that, because IDEA deems hearing orders "final" and requires exhaustion only of due process procedures, "Congress did not intend to allow states to add additional exhaustion requirements not identified in the statute."
- In *Devine v. Indian River County School Board*, the Eleventh Circuit adopted a position taken by several other circuits in requiring the party challenging an IEP to bear the burden of showing that the IEP is inappropriate.
- In *Roslyn Union Free School District v. Geffrey W.*, a New York State court held that, while IDEA does not permit a school district unilaterally to remove a student from school pending completion of a special education assessment, the district may petition the court for an extension of the student's suspension pending resolution of those proceedings if it can show that the student's return to regular instruction is substantially likely to result in injury to himself or others.
- The Ninth Circuit in *Bird v. Lewis & Clark College* held that the school's overseas program, which accepted a severely physically disabled student, did not violate Section 504 of the Rehabilitation Act or the ADA by failing to provide access to all the program's outdoor activities or to ensure that all lodging facilities were wheelchair accessible. Rather, the court concluded that the program, viewed in its entirety, was readily accessible to persons with disabilities, and noted that the college had made several efforts to accommodate the plaintiff's disabilities, including the provision of special lodging, altered outdoor activities, the employment of aides, special equipment, and modified travel arrangements.
- In *McKinney v. Irving Independent School District*, the Fifth Circuit held that a school district was not liable under the federal Due Process Clause for injuries inflicted by a special education student on the plaintiff school bus driver while he was transporting special education students to and from school. Although the school district refused to accommodate the driver's requests for a bus monitor to improve bus safety, the court concluded that the district could not be held legally responsible for the student's conduct given that the school district neither acted affirmatively to increase the plaintiff's risk nor burdened the plaintiff's ability to protect himself.

XIV. A PREVIEW OF THE 2003–2004 TERM

A. Free Exercise versus Establishment of Religion

The Supreme Court agreed to review the Ninth Circuit's decision in *Davey v. Locke*, a case addressing the State of Washington's Promise Scholar-

ship program. Promise Scholarships are awarded to higher education students based on academic achievement and financial need, but the state prohibits their award to students pursuing degrees in theology. The Ninth Circuit held that the program unconstitutionally excludes qualified students because they choose to pursue higher education from a religious viewpoint. The court of appeals held that the Washington constitution's clear prohibition on funding religious education also did not justify the exclusion, as the Free Exercise rights of the student-petitioner outweighed the State's interest. Next Term, the Supreme Court will address whether the Promise Scholarship Program is an appropriate exercise in selective funding or an unconstitutional infringement on students' Free Exercise rights.

The Supreme Court has not yet decided whether to review another noteworthy First Amendment case. In *Newdow v. United States Congress*, a parent challenged a state law provision and a school policy that required teachers to lead a daily recitation of the Pledge of Allegiance. The Ninth Circuit found that a teacher-led pledge including the words "Under God" violated the Establishment Clause, and thus disagreed with a prior decision of the Seventh Circuit that had upheld mandatory recitation of the Pledge. The Supreme Court has not yet acted on the petitions for *certiorari* filed in the case.

B. Federalism

The Supreme Court has agreed to review a Fifth Circuit case that raises important federalism issues. In *Frazar v. Gilbert,* the Fifth Circuit held that state officials do not indisputably waive Eleventh Amendment immunity by entering into a consent decree that is based on federal law and that provides for federal court supervision of compliance with the decree. The court of appeals also held that the district court could not enforce such a consent decree unless it found that the state's violation of the decree was also a violation of federal law. The Fifth Circuit's ruling, if affirmed by the Supreme Court, would raise serious questions about the enforceability of many consent decrees involving state officials.

C. Free Speech

The Supreme Court has granted expedited review of *McConnell v. Federal Election Commission*, in which a sharply divided three-judge district court addressed the constitutionality of the Bipartisan Campaign Reform Act ("BCRA"). Among the many issues the Supreme Court will consider are BCRA's newly enacted restrictions on the expenditure of so-called "soft" money for federal election activities, disclosure requirements for "issue advertisements," and the manner in which for-profit and non-profit corporations may fund such issue advertisements.

The Supreme Court's determination of the BCRA's constitutionality next Term could have far-reaching effects on the way that federal election campaigns are funded and conducted. Such a determination may in turn affect which parties and candidates are elected, and thus influence the course of federal education policy.

APPENDIX: CASES AND OTHER AUTHORITIES DISCUSSED IN THIS SUMMARY

Cases:

Other Authorities: