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Commentary

*1 THE 2003-2004 TERM OF THE UNITED STATES SUPREME COURT AND ITS IMPACT ON PUBLIC SCHOOLS [FNa]

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***2** INTRODUCTION

The 2003-2004 Term of the United States Supreme Court was notably quiet overall and with respect to cases affecting public education as well. Indeed, the highest-profile case involving public education was decided without reaching the merits. In Newdow, the Court declined to decide whether classroom recitation of the Pledge of Allegiance violates the First Amendment, instead concluding that the plaintiff who litigated the high-profile case through the federal court system in fact had no standing to do so.

The High Court, however, did decide several cases with important implications for public education. For example, the Court held that tuition tax credits may be challenged in federal courts, and suggested, in a case involving higher education, that state law restrictions on private school voucher plans may not necessarily violate the Free Exercise Clause of the First Amendment. In addition, the Court upheld the enforceability of consent decrees approved by federal courts, even where they mandate that state officials take measures that are not otherwise specifically required by federal law. The Court, moreover, decided several cases affecting school districts in their role as employers.

This Term the Court declined to review several lower court decisions of significance to school districts in a number of important areas, including affirmative action and race-conscious decision making, Title IX, and the Fourth Amendment. As it has for several years, the Supreme Court declined again this Term to review any of the federal appellate court decisions involving the education of students with disabilities that it was asked 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 2003-2004 Term, the Supreme Court decided only eighty cases and denied review of thousands of others. Of these eighty cases, twenty-five-the highest of any federal appellate court-originated in the Ninth Circuit. The Court reversed the Ninth Circuit in nineteen of these cases, ***3** giving that court the highest number of reversals of any federal court of appeals last Term.

This summary also briefly addresses two important cases that the Supreme Court is expected to decide during the 2004-2005 Term, which officially begins in October 2004. These cases involve issues of alleged age discrimination and gender discrimination. In addition, this summary notes a third case, involving the separation of church and state, that the Court has not yet decided whether to review next Term.

For the tenth consecutive year, the 2003-2004 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. With no Justices retiring this year and intense debate in the Senate over lower court nominees, it does not appear that the President will have the opportunity to see a new Court appointee confirmed before the 2004 election.

As a result, the composition of the Court is likely to be significantly affected by the outcome of this Fall's presidential election. Because the Court is closely divided on a number of important issues, such changes in the Court could have important implications for public school districts. For example, in recent years, the Court has decided by the narrowest of margins significant cases involving the Establishment Clause of the First Amendment, the importance of diversity in education, and the respective power of our state and federal governments. Justice O'Connor, one of the Justices rumored to be considering leaving the Court, continued to be key to the Court's decisionmaking, dissenting in only five of the eighty cases that the Court decided last Term.

This review of the Supreme Court's 2003-2004 Term is divided into sections by subject matter, as follows: (1) Establishment of Religion; (2) Free Exercise of Religion; (3) Employment; (4) Freedom of Speech; (5) Federalism; (6) Voting Rights; (7) Affirmative Action and Other Race-Conscious Decision-making; (8) Fourth Amendment; (9) Title IX, (10) School Finance; (11) Students with Disabilities; and (12) A Preview of the 2004-2005 Term. Full citations to the cases and statutes discussed appear in the appendix at the end of this summary.

I. ESTABLISHMENT OF RELIGION

A. Newdow

In Elk Grove Unified School District v. Newdow, the much-anticipated Establishment Clause case decided this Term, the Supreme Court did not reach the merits at all. Rather, the Court held that the plaintiff father did not have standing to challenge the words "under God" in the Pledge of Allegiance, which his daughter recited every morning in elementary school.

The Court based its decision on Newdow's custody arrangements with his daughter's mother. Although he shared physical custody of his daughter, ***4** the child's mother had sole legal custody. The mother had opposed the litigation, arguing that her daughter believes in God and has no objection to the Pledge. In another case, a California state court had ruled that the father could not "includ[e] his daughter as an unnamed party or su[e] as her 'next friend.' "In its decision below in Newdow,

however, the Ninth Circuit had ruled that, despite this state court decision, Newdow had standing because he still had the "right to seek redress for an alleged injury to his own parental interest." The Supreme Court reversed.

The High Court held that Newdow could not sue on behalf of his daughter and, therefore, did not have standing to litigate the case. As a result, the Court did not decide the underlying question whether classroom recitation of the Pledge of Allegiance violates the Establishment Clause because it contains the words "under God."

Chief Justice Rehnquist and Justices O'Connor and Thomas, in concurring opinions, argued that Newdow had standing to bring the case, but that the words "under God" in the Pledge did not violate the Establishment Clause. Chief Justice Rehnquist would have found the Pledge constitutional because the nation has significant historical ties to religion and because reciting the Pledge is a voluntary and patriotic, rather than religious, endeavor. Justice O'Connor joined Chief Justice Rehnquist's opinion, but wrote separately to emphasize her preferred approach to Establishment Clause issues. Justice Thomas did not join with the Chief Justice's opinion, but instead argued for a new approach to the Establishment Clause that also would uphold the constitutionality of the Pledge.

Because the majority of the Court did not reach the constitutional issue, however, the question whether the Pledge of Allegiance violates the Constitution remains unresolved. Given the controversy surrounding this case and the ease with which a different party could avoid Newdow's procedural infirmities, the issue is likely to be litigated in other courts soon and may ultimately return to the Supreme Court. For example, after the Newdow decision, the Third Circuit in Circle School v. Pappert struck down a Pennsylvania statutory provision requiring schools to notify parents if their children chose not to participate in classroom recitation of the Pledge of Allegiance.

The Court's ruling with respect to Newdow's lack of standing is also significant to school districts. In light of Newdow, when school districts are sued, even in federal court, by a parent purporting to act on behalf of his or her child, state law child custody issues may provide potential defenses.

B. Hibbs

In a second Establishment Clause case, Hibbs v. Winn, the Supreme Court was not even asked to address the merits. Nevertheless, the Supreme Court issued an important procedural ruling. In Hibbs, the Supreme Court ruled that federal courts can hear challenges to state tax credit laws. Specifically, the Court held that the Tax Injunction Act ("the TIA"), which prohibits federal courts from hearing suits challenging the "assessment, levy, or collection" of state taxes where a remedy may be had in state court, does not bar an Establishment Clause challenge to Arizona's tuition tax credit law.

***5** In Hibbs, a group of Arizona taxpayers challenged the constitutionality of the State's tuition tax credit program, which provides a tax credit to individuals who make donations to organizations providing tuition grants. These grants primarily support students attending sectarian schools. The district court dismissed the case for lack of jurisdiction, concluding that the TIA barred the federal court from hearing the suit. The Ninth Circuit reversed the district court and held that the suit could go forward. The Supreme Court, by a narrow margin, agreed, affirming the Ninth Circuit's decision.

Writing for a 5-4 majority, Justice Ginsburg noted that for decades federal courts have considered challenges to state tax credits, especially those that states used as a way to circumvent court rulings banning racial segregation in public schools. Then, to determine whether or not the plaintiffs sought to "enjoin, suspend or restrain the assessment, levy or collection of any tax under state law," Justice Ginsburg analyzed the meaning of the term "assessment" as used in the TIA. "Assessment," the Court concluded, does not refer to a state's entire system of taxation. Instead, relying on the definition used by the Internal Revenue Code in 26 U.S.C. § 6203, the Court concluded that an assessment involves a "recording of the amount the taxpayer owes the government." Thus, a tax credit is not an assessment.

The Court also looked to Congress' intent in passing the TIA. The Court reasoned that the TIA was enacted to address situations in which state taxpayers seek a federal court order to avoid paying state taxes. Specifically, Congress enacted the TIA to encourage taxpayers to pursue refund suits, rather than attempt to restrain tax collections generally. The Court reasoned that, since plaintiffs were seeking to impede Arizona's receipt of tax revenues, not to avoid paying state taxes, the TIA should not be read to prevent them from challenging Arizona's tax credit law.

While the underlying Establishment Clause challenge to the tax credit was not before the Supreme Court in Hibbs, the decision nevertheless has implications for proponents and opponents of tax credits and vouchers. By ruling that the TIA does not preclude legal challenges to state tuition tax credit laws in federal court, opponents of such measures have retained an important forum for challenging such laws. The decision could leave tax credits in more than 40 states subject to federal court challenges. The potential significance of this alternative is underscored in Hibbs itself, since the Arizona Supreme Court had previously upheld the statute authorizing the state tax credit program against a facial challenge. The Supreme Court found, however, that the state court's decision had no preclusive effect on an as-applied challenge such as that presented in Hibbs.

C. Cases the Court Declined to Review

The Supreme Court also declined to review a number of other Establishment Clause cases that may affect public schools. In Mellen v. Bunting, for example, the Fourth Circuit considered the issue of school prayer at a public college. Two students at the Virginia Military Institute ("VMI") challenged the school's daily supper prayer. Because the students had graduated by the time the case reached the federal appellate court, many of their claims were dismissed. However, the issue of possible money damages remained. In the ***6** course of determining whether the former head of VMI was liable for damages, the Fourth Circuit examined whether the supper prayer violated the Establishment Clause. The court concluded that the prayer was unconstitutional because school officials could not require students to take part in religious activities. The court of appeals also held that the prayer improperly promoted religion and entangled the school in a religious activity. However, the court concluded that the school head was not liable for damages because the law governing school prayer at public universities had not been "clearly established." By declining to review this case, the Supreme Court left in place the Fourth Circuit's decision.

The Supreme Court also declined to review the Eleventh Circuit's decision in Glassroth v. Moor. The Eleventh Circuit held that the display of a monument depicting the Ten Commandments in an Alabama state courthouse violated the Establishment Clause for two reasons. First, the purpose of displaying the monument was religious. Second, the court concluded that the primary effect of the monument was to advance religion because of the "holy aura of the monument."

In contrast, in Briggs v. Mississippi, which the Supreme Court also declined to review, the Fifth Circuit ruled that even though the Confederate Flag contains what could be considered a religious symbol-the St. Andrew's Cross-Mississippi did not violate the Establishment Clause by flying its state flag, which contains a small version of the Confederate Flag. The Fifth Circuit held that the purpose of using the Confederate Flag as part of the Mississippi flag "is and was secular."

II. FREE EXERCISE OF RELIGION

A. Permissible State Law Restrictions on Vouchers

Despite having upheld an education voucher program in 2002 against a federal constitutional challenge in Zelman v. Simmons-Harris, the Supreme Court this Term declined an invitation to sweep aside many remaining potential state-law obstacles to such programs. The Court, in a setback for voucher proponents, refused to endorse the argument that a state's refusal to use public funds for religious education necessarily violates the Free Exercise Clause of the First Amendment. Specifically, in Locke v. Davey, the Court held that a state may, consistent with the Free Exercise Clause, refuse to provide

scholarship funds to students pursuing degrees in "devotional theology."

The Court's decision recognizes a state's prerogative to exclude religious studies from state-funded scholarship programs, but does not prohibit states from choosing to fund such studies. By implication, Locke suggests that even where a voucher program is permissible under the United States Constitution, as interpreted by Zelman, it nevertheless may face limitations under state constitutions or statutes.

Pursuant to its Promise Scholarship Program, the State of Washington offers scholarships, renewable for one year, to financially needy students who meet certain academic requirements. The Promise Scholarships may be used at any accredited institution in Washington, whether public or private, religious or secular. Because the Washington constitution provides that "[n]o ***7** public money or property shall be_._._. applied to any religious ... instruction, or the support of any religious establishment," however, the State does not allow students to use Promise Scholarships to pursue degrees in devotional theology.

Joshua Davey, whose Promise Scholarship was terminated after he chose to pursue a major in pastoral ministries, brought suit in federal court. Davey's suit alleged, in pertinent part, that Washington's refusal to award Promise Scholarships to otherwise-eligible students solely because those students sought to major in devotional theology violated the Free Exercise Clause of the First Amendment.

In a 7-2 decision, the Supreme Court upheld Washington's scholarship program. The Court, in a narrow opinion authored by Chief Justice Rehnquist, reaffirmed that " 'there is room for play in the joints' "between the Establishment and Free Exercise Clauses of the First Amendment, such that state action permitted by the Establishment Clause may not be required under the Free Exercise Clause. Thus, although the Court suggested that Washington could, consistent with the Establishment Clause, permit students to use Promise Scholarship funds to pursue devotional theology majors, Washington's decision, pursuant to its own constitution, to prohibit such use of state funds did not violate the Free Exercise Clause. Because "majoring in devotional theology is akin to a religious calling as well as an academic pursuit," a decision not to fund such studies reflects longstanding concerns about government establishment of religion through public funding of church leaders.

Furthermore, the Court noted that the Promise Scholarship Program "goes a long way toward including religion in its benefits" in that it permits students to attend "pervasively religious" institutions if accredited and to take devotional theology courses without majoring in that subject. Accordingly, the Court concluded that the "State's interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars." The Court also summarily rejected Davey's claims under the Free Speech and Equal Protection Clauses.

The Court further found no "credible connection" linking the Washington constitutional provision to impermissible bias against religion. Accordingly, the Supreme Court did not even consider Davey's argument that Washington's constitutional prohibition against use of funds to support religion, a so-called "Blaine Amendment," was unlawful because of its allegedly anti-Catholic motivation. The term "Blaine Amendment" refers to a common type of state constitutional provision adopted after the rejection of Senator James G. Blaine's proposed federal constitutional amendment in 1875 to prohibit use of government funds for religious purposes at sectarian schools. Such provisions remain on the books in approximately 36 states and pose a significant obstacle to the inclusion of sectarian schools in many voucher programs.

The Locke decision is probably most important to public elementary and secondary school districts for the arguments that the Court refused to accept in reaching its narrow ruling. The petitioner in Locke had asked the Court to strike down state constitutional barriers to public funding of religion as a ***8** violation of the federal Free Exercise Clause. Without explicitly addressing this issue, the Court declined to do so. Similarly, while the Court did not attempt to identify the precise boundaries

between the Religion Clauses of the United States Constitution, the decision underscores that the Free Exercise Clause does not necessarily require actions permitted by the Establishment Clause.

Moreover, by upholding a state program that expressly distinguished between religious and non-religious studies, the decision suggests that neutrality toward religion may not always be necessary to protect a state law from Free Exercise Clause challenges. For example, a state could argue, consistent with the reasoning of the Locke decision, that it should be allowed structure a school voucher program to prohibit students from using state funds to attend parochial schools, even though the Court's decision in Zelman would permit states to allow vouchers to be used at such schools.

Of course, as more and more state legislators consider voucher programs, there is likely to be more litigation concerning the relationship between state and federal constitutional provisions governing, on the one hand, the exercise of religious beliefs and, on the other, limitations on the use of public funds for religious purposes. Indeed, at least one state court has considered the constitutionality of a state voucher program in light of the Supreme Court's ruling in Locke. In Bush v. Holmes, a Florida appellate court struck down the State's voucher program under a State constitutional provision, known as the "no-aid provision," which prohibited both direct and indirect aid to sectarian schools. That court further held that "application of the no-aid provision to deny the use of [state-funded] vouchers in religious schools fits within the 'play in the joints' between the Establishment Clause and the Free Exercise Clause and, thus, does not violate the Free Exercise Clause of the United States Constitution." Like the Florida court in Bush v. Holmes, other courts may soon have to determine just how much "play is in the joints" between the Free Exercise and Establishment Clauses, and in so doing, will go a long way in determining the future of voucher programs in the various states.

B. Cases the Court Declined to Review

The Supreme Court declined to review a number of cases involving the extent to which school districts must accommodate students' right to the free exercise of religion. For example, in Lassonde v. Pleasanton Unified School District, the Ninth Circuit held that a school properly removed religious proselytizing comments from a student's commencement speech. Rather than allow the student to read a disclaimer at the beginning of the speech, the school and the student agreed that the student would remove the proselytizing comments from his speech, but keep several personal religious references and distribute copies of the original speech outside the building where the graduation was being held. The Ninth Circuit held that the school acted properly for two reasons. First, the school had to avoid the appearance of sponsoring religion because of its absolute control over the graduation ceremony. Second, if the school allowed the student to give his original speech, even with a disclaimer, graduation attendees would have been "coerced" into participating in a religious practice.

***9** The Supreme Court also denied to review Prince v. Jacoby. In Prince, a public high school had not given the same benefits to a religious student group that it did to secular student groups, including money to fund activities, free participation in fundraising events, permission to meet during school hours, and use of the school's public address system, supplies, and vehicles. The Ninth Circuit held that the Equal Access Act required the school to provide the same benefits to both religious and secular groups.

The Supreme Court also declined to review another Ninth Circuit decision involving a school district's refusal to hand out religious material to children. In Hills v. Scottsdale Unified School District No. 48, the court of appeals held that the school district should have distributed literature advertising a religious program when it distributed similar literature for secular programs.

III. EMPLOYMENT

This Term the Court decided several cases that could affect school districts in their role as employers.

A. Age Discrimination in Employment Act

In General Dynamics Land Systems, Inc. v. Cline, the Court resolved a split among the federal courts of appeals by deciding that the Age Discrimination in Employment Act of 1967 ("ADEA") does not prohibit an employer from favoring older employees over relatively younger employees.

As a cost-saving measure, General Dynamics negotiated a collective bargaining agreement with the United Auto Workers that eliminated retirement health benefits for all workers under age 50 but retained those benefits for workers 50 and older as well as for all current retirees. The case arose when a class of General Dynamics employees between the ages of 40 and 49 sued, alleging employment discrimination under the ADEA, which prohibits employment discrimination against individuals over the age of 40. The plaintiff class argued that, although courts, including the Supreme Court, had previously interpreted the ADEA to prohibit age-related employment discrimination in favor of younger workers, the Act should be read more broadly to prohibit employment discrimination on the basis of age in favor of older workers as well.

A federal district court disagreed and dismissed the suit. According to the district court, the employees' claim was one of "reverse age discrimination" upon which "no court had ever granted relief under the ADEA."

A divided panel of the Sixth Circuit reversed, concluding that under Equal Employment Opportunity Commission ("EEOC") regulations, the ADEA protected both older employees against the younger and younger employees against the older. The Supreme Court granted certiorari.

Writing for a 6-3 majority, Justice Souter dismissed the employees' argument, and the EEOC's interpretation of the ADEA, as "clearly wrong." According to the majority, neither the common understanding of the term "age discrimination," nor the ADEA's legislative history, nor the federal caselaw on employment discrimination, could support so broad an interpretation of the statute. The ADEA's purpose, the Court found, was purely to ***10** prevent employers from discriminating against older workers in favor of younger ones. To read it as prohibiting the opposite-that is, as barring discrimination against younger workers in favor of older employees-did "not square with the natural reading" of the ADEA.

While three Justices dissented, arguing that the majority gave insufficient deference to the EEOC's contrary interpretation of the ADEA, the clear thrust of Cline is to accept the traditional, more narrow reading of the ADEA. As a result, Cline will allow employers, including school districts, to confer benefits on older employees without facing liability under the ADEA for failing to offer the same or similar benefits to younger employees.

B. Americans with Disabilities Act

In Raytheon Co. v. Hernandez, the Court considered whether an employer's decision not to rehire a former employee who had been terminated for failing a routine drug test gives rise to a "discriminatory treatment" claim under the Americans with Disabilities Act ("ADA"). The Court held that it does not.

Joel Hernandez was forced to resign from his employment at Hughes Missile Systems ("Hughes"), a subsidiary of Raytheon Company, after testing positive for cocaine during a mandatory drug test. Two years later, after completing a drug rehabilitation program, Hernandez applied to be re-hired by the company. Hughes rejected his application on the basis of a policy against rehiring employees who had been terminated for workplace misconduct. The human relations employee who rejected Hernandez's application testified that she did so without any knowledge of his former drug addiction or the reasons for his prior forced resignation. Hernandez sued, alleging that Hughes made its decision not to rehire him because of his status as a recovering drug addict in violation of the ADA.

A federal district court rejected Hernandez's claim, finding that the company had lawfully applied its "neutral no-rehire

policy" and that there was no evidence that the company's decision was based on Hernandez's prior drug addiction. The court refused to consider Hernandez's alternative claim that the company's "no-rehire" policy, though facially neutral, was unlawful under the ADA because it has a disparate impact on individuals with disabilities, finding that Hernandez had failed to make a timely pleading on that claim. However, the Ninth Circuit, although likewise rejecting Hernandez's disparate impact claim, concluded that Hughes's no-rehire policy, though "lawful on its face," violates the ADA when applied to former drug addicts because it "screens out persons with a history of addiction."

The Supreme Court granted certiorari and vacated the Ninth Circuit's decision. In a relatively brief opinion authored by Justice Thomas, a seven-member Court (Justices Souter and Breyer did not participate in the resolution of the case) held unanimously that Hernandez had no claim under the ADA if Hughes had made its decision not to rehire him pursuant to a neutral, nondiscriminatory policy. According to the Court, the Ninth Circuit, though claiming to approach this matter as a discriminatory treatment case, had in fact improperly used a disparate impact analysis in reviewing Hernandez's claim.

***11** The only question for the Ninth Circuit to review on remand, therefore, will be whether the district court had correctly determined that Hughes had in fact made its decision to reject Hernandez's application based on its no-rehire policy. The Court instructed the Ninth Circuit to limit its review to that question and to leave aside the disparate impact issues addressed in the lower court's original ruling.

The Court's decision in Hernandez clarifies that a neutral policy against rehiring former employees who are terminated for violating company regulations does not unlawfully discriminate against recovering drug addicts under the ADA. Where such a facially neutral policy is fairly applied, it does not violate the ADA, even where the employee's prior misconduct and termination are related to past drug use. School districts should nevertheless be cautious in crafting such policies against re-hiring employees terminated for misconduct.

C. Title VII

In Pennsylvania State Police v. Suders, the Supreme Court clarified the burden of proof applicable to claims of sexual harassment and constructive discharge under Title VII of the Civil Rights Act of 1964.

In Suders, a female police dispatcher for the Pennsylvania State Police ("PSP"), brought suit against her employer, alleging she had been the victim of sexual harassment and gender discrimination. Suders claimed she had suffered such severe and unrelenting sexual harassment by her supervisors that she had no choice but to resign from her position. According to Suders, her decision to resign therefore was a "constructive discharge."

A federal district court, although agreeing that the supervisors had created a hostile work environment, concluded that PSP was not vicariously liable for the supervisors' conduct. The court applied the Supreme Court's 1998 decisions in Burlington Industries, Inc. v. Ellerth and Faragher v. City of Boca Raton, which held that an employer may raise an affirmative defense to liability where a supervisor's harassment does not lead to a tangible employment action, such as demotion or discharge. According to the district court, the employer could not be held liable in this case because Suders had unreasonably failed to use PSP's internal procedures to report the harassment that she experienced and, therefore, had not permitted PSP to respond to her complaints.

The Third Circuit reversed, holding that constructive discharge constituted a "tangible employment action" and that, as a result, PSP could not assert the Ellerth/Faragher affirmative defense.

The Supreme Court granted certiorari to resolve a split among the federal circuit courts on this issue. Writing for an eight-member majority, Justice Ginsburg began her analysis with a review of the Court's Ellerth and Faragher decisions.

Under those cases, she explained, employers are held strictly liable for a supervisor's sexual harassment that leads to a tangible employment action. When the harassment does not result in any tangible employment action, however, the employer may assert an affirmative defense-that is, the employer will not be liable if it can show that it had a policy ***12** in place for reporting and resolving sexual harassment complaints and that the plaintiff unreasonably failed to use the existing policy.

Applying those decisions to the case at hand, the Court rejected the Third Circuit's reasoning, which would have eliminated the affirmative defense in all hostile-environment cases involving an alleged constructive discharge. Instead, the Court noted that although an employer-initiated discharge by necessity involves official conduct and may therefore be considered a tangible employment action, official conduct may or may not be the driving force behind an employee-initiated resignation. The Supreme Court therefore held that unless an employee can prove that the constructive discharge was a result of official employer action, the employer may assert the Ellerth/Faragher affirmative defense.

The Court further clarified that an employee bringing a hostile work environment claim alleging constructive discharge "must show working conditions so intolerable that a reasonable person would have felt compelled to resign." The Court agreed with the Third Circuit that fact questions precluded summary judgment for PSP on plaintiff's hostile work environment and constructive discharge claims and therefore remanded the case for further proceedings.

The Supreme Court's decision in Suders clarifies the circumstances in which employers, including school districts, may be held liable for a supervisor's sexual harassment that leads to the employee's resignation. Suders also underscores the importance of having sexual harassment policies and procedures in place and of making the internal complaint process easily available to anyone who believes that he or she may be the victim of such misconduct.

D. Statute of Limitations for Federal Claims

This Term the Court also decided another employment case involving the statute of limitations for federal claims, including certain claims of racial discrimination. In Jones v. R.R. Donnelley & Sons, the Supreme Court held that the federal four-year statute of limitations governed racial discrimination claims for hostile work environment, wrongful termination, and failure-to-transfer.

The plaintiffs in the case alleged that they were subjected to a racially hostile work environment, given inferior employment status, and wrongfully terminated or denied transfers in connection with the closing of a Chicago plant of R.R. Donnelley & Sons. They sought to bring claims for racial discrimination under 42 U.S.C. § 1981 ("§ 1981"). The issue on appeal to the Supreme Court was whether the Illinois two-year statute of limitations or the federal "catchall" four-year statute of limitations should be applied to the plaintiffs' claims.

Prior to 1990, the federal courts applied "the most analogous state statute of limitations" to federal claims arising under statutes, such as § 1981, that did not contain their own statute of limitations. In 1990, however, Congress enacted a "catchall" statute of limitations for actions arising under federal statutes enacted after December 1, 1990. The application of this "catchall" provision was in question because, although § 1981 ***13** was originally enacted before 1990, it was amended by the Civil Rights Act of 1991.

The Seventh Circuit in this case, as well as the Third and Eighth Circuits in other suits, had determined that the only actions to which the "catchall" statute of limitations applied were those based solely upon legislation initially enacted after December 1, 1990. Conversely, the Sixth and Tenth Circuits had concluded that the "catchall" statue of limitations applied to any legislation enacted after December 1, 1990 that created a new cause of action, whether or not that legislation amended a pre-existing statute.

The Supreme Court agreed with the latter view, holding that the "catchall" statute of limitations applied to the claims at issue because those claims were not available prior to the 1991 amendment of § 1981. Writing for a unanimous Court, Justice Stevens focused on Congress' intent-to settle statute of limitations disputes. The application of the "catchall" statute of limitations to all new causes of action would promote this goal because many rights or actions are created by amending existing statutes. Prior to the 1991 amendment of § 1981, the Court had held that that statute did not protect against harassing conduct that occurred after the formation of an employment contract. The plaintiffs could state their claims under § 1981 only after the amendment "enlarged the category of conduct subject to ... liability." By applying the statute of limitations to any new right or claim available after 1990, but not applying it retroactively, the Court gave effect to the Congressional intent for broad application of the "catchall" statute of limitations without disturbing the settled expectations of those with claims that existed before enactment of that statute._

The Court's decision resolved the conflict between circuits, making it clear that the four-year federal statute of limitations applies whenever a claim arises under a federal law enacted, or amended, after 1990. Potential defendants, including school districts, may now be subject to challenge during this four-year period and may lose the benefit of potentially shorter limitation periods for analogous state law claims. On the other hand, the Court's decision provides a greater degree of clarity and uniformity in this area.

E. Cases the Court Declined to Review

The Court declined to review several employment cases, leaving in place lower court decisions with direct implications for school districts in their role as employers.

In Otto v. Pennsylvania State Education Association, a suit under 42 U.S.C. § 1983 ("§ 1983"), the Third Circuit considered two issues likely to be of significant interest to public school districts: (1) must a local collective bargaining unit obtain annual independent audits of the fees it charges non-member public school teachers pursuant to a state law that requires non-members to pay the union for their pro rata share of costs associated with the union's collective bargaining activities related to the work site; and (2) in calculating a non-member's pro rata charges, may a local union include litigation costs incurred by a separate bargaining unit with which the local union has a cost-sharing agreement? The Third Circuit answered both questions in the affirmative. First, the court concluded that the Supreme ***14** Court's decision in Chicago Teachers Union Local No. 1 v. Hudson (1986) established a per se rule that any union charging fair-share dues, no matter its size or geographic scope, must provide non-members with an annual independent audit. Second, the Third Circuit determined that fair-share dues may include the costs of litigation by a partner union because the benefits of such cost-sharing arrangements are likely, over time, to inure to the non-members' benefit.

In Melzer v. Board of Education of the City School District of the City of New York, the Second Circuit rejected a high school teacher's § 1983 action against his former employer. In that highly publicized case, Melzer alleged that his dismissal after the public revelation of his extensive and longstanding involvement with the North American Man/Boy Love Association ("NAMBLA") violated his First Amendment rights of free speech and free association. In reviewing Melzer's claim, the court of appeals applied the balancing test outlined in Pickering v. Board of Education. The Second Circuit assumed that Melzer had satisfied the first prong of the Pickering inquiry-demonstrating that the suppressed speech or association relates to a matter of public concern-but concluded that his membership in NAMBLA was so disruptive to the district's educational operations that the district's interest in terminating Melzer's employment far outweighed whatever First Amendment interest Melzer had in associating with NAMBLA.

The Court likewise declined to review three employment discrimination suits:

• In Weinstock v. Columbia University, the Second Circuit held that Columbia University did not discriminate against the

plaintiff, a female assistant professor, when it denied her tenure based on the quality of her scholarship. The court held that Columbia's reason for denying tenure was legitimate and non-discriminatory and that the plaintiff could not prove that the proffered reason for denial was a pretext for gender discrimination in violation of Title VII.

• In Murphy v. University of Cincinnati, the Sixth Circuit held that a female assistant swimming coach did not prove that her dismissal was a result of gender discrimination. The court found that the plaintiff had not proved a prima facie case of discrimination under Title VII, in part because she had failed to demonstrate that she was qualified for her position. The Sixth Circuit further held that certain offensive statements made by the male head coach showed some animosity between the parties, but did not rise to the level of direct evidence of discrimination in violation of Title VII.

• In Lautermilch v. Findlay City Schools, the Sixth Circuit found that the plaintiff, a substitute teacher, had not been the victim of gender discrimination when he was fired from his teaching position in part because school officials thought he was "too macho." The court found that Lautermilch had not proved that the school replaced him with someone outside of his protected class, and therefore had not made a prima facie case of discrimination. The Sixth Circuit further found that the plaintiff had not proved that he was the victim of direct discrimination, because the evidence suggested he was fired because of his conduct rather than his gender.

***15** IV. FREEDOM OF SPEECH

The Supreme Court this Term revisited the Child Online Protection Act ("COPA") and also decided an important free speech case affecting federal elections. The Court also declined to review several lower court decisions in this area that have direct implications for school districts.

A. Child Online Protection Act

The Supreme Court in Ashcroft v. American Civil Liberties Union prevented enforcement of the Child Online Protection Act, ruling 5-4 that the Act likely violates the First Amendment. As a result, COPA cannot be implemented unless the federal government can prove the constitutionality of the statute during a full trial on the merits.

Congress enacted COPA to protect minors from being exposed to sexually explicit materials on the Internet after the Supreme Court's 1997 decision in Reno v. American Civil Liberties Union struck down the Communications Decency Act of 1996. COPA imposes criminal penalties of up to a $50,000 fine and six months in prison for anyone who, for commercial purposes, knowingly posts on the Internet material that is harmful to minors. The statute defines material "harmful to minors" as material that is either obscene or that meets each of the following three criteria: " '(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, [that the material] is designed to appeal to, or is designed to pander to, the prurient interest' "; " '(B) [the material] depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast' "; and " '(C) [the material] taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.' " Any speech that meets this definition is deemed "criminal speech," unless the poster takes specific measures-such as using age verification certificates or requiring credit card information-to prevent minors from gaining access to the materials.

The constitutionality of COPA first came before the Supreme Court in 2002. In that case, the Court considered a Third Circuit decision affirming a district court's preliminary injunction barring enforcement of the statute. The district court had found that the statute would burden some protected speech and that the government could not meet its burden of demonstrating that COPA was the least restrictive means of preventing minors' access to harmful materials. The Third Circuit affirmed, but on the ground that the statute's reference to "community standards" as a basis for determining whether material was "harmful to minors" necessarily rendered COPA unconstitutionally overbroad. The Supreme Court, however, reversed the Third Circuit, finding that the statutory reference to community standards did not, in and of itself, invalidate COPA.

On remand, the Third Circuit again upheld the district court's injunction, albeit on different grounds. This time, the court of appeals found that the statute was not narrowly tailored to serve a compelling government interest because it was not the least restrictive means available to protect ***16** minors from accessing harmful materials on the Internet. The Supreme Court again granted certiorari.

In affirming the decision below, the majority emphasized that, when "plaintiffs challenge a content-based speech restriction," such as COPA, "the burden is on the government to prove that the proposed alternatives will not be as effective as the challenged statute." The majority agreed with the court of appeals that the government had not met its burden of demonstrating the lack of "plausible, less restrictive alternatives" to COPA. For example, the Court stated that blocking and filtering software may well be such an alternative. According to the majority, such software imposes "selective restrictions on speech at the receiving end, not universal restrictions at the source," is less likely to chill protected speech because it would not "condemn as criminal any category of speech," and may be more effective than COPA at preventing minors from accessing harmful materials. For example, filters would block all pornography, not just pornographic materials posted from America, and would apply to all forms of Internet communication, including e-mail as well as website materials.

Justice Kennedy, writing for the majority, recognized that filtering software was "not a perfect solution," and that Congress may not require universal implementation of filtering software. Nevertheless, he found that these factors did not mean that filters should not be considered "an available alternative." He noted that, even if Congress could not require use of filters, it could undoubtedly promote their use. For example, Congress currently, through the E-rate program, offers "strong incentives" to encourage the use of filters by schools and libraries. In addition, Congress could "take steps to promote their development by industry, and their use by parents."

The majority also cited several "important practical reasons" for upholding the preliminary injunction pending a full trial on the merits. For example, the danger of chilling protected speech in the interim, the substantial factual issues regarding the effectiveness of filtering software or other potentially less restrictive alternatives, and the discrepancies between the "factual record" and "current technological reality" rendered it more harmful to reverse the injunction than to allow it to stand until a full trial could be held. Justice Kennedy noted, however, that the Court's opinion did not foreclose the possibility that lower courts might conclude, "upon a proper showing by the Government, ... that COPA is the least restrictive alternative available to accomplish Congress' goal."

Justice Stevens wrote a separate concurrence, joined by Justice Ginsburg, in which he expressed "a growing sense of unease when the interest of protecting children from prurient materials is invoked as a justification for using criminal regulation of speech as a substitute for, or a simple backup to, adult oversight of children's viewing habits."

In dissent, Justice Breyer, joined by Chief Justice Rehnquist and Justice O'Connor, stressed that "we must interpret the Act to save it, not to destroy it," and argued that the lower courts had interpreted COPA to impose a far more onerous burden on speech than was warranted by the language of the statute. In particular, Justice Breyer contended that COPA's definition of material "harmful to minors" limited the Act's scope to "material that does ***17** not enjoy First Amendment protection, namely legally obscene material, and very little more." Moreover, Justice Breyer stated, COPA "does not censor the material it covers," but merely requires providers of that material "to restrict minors' access to it by verifying age."

Justice Scalia separately dissented from the Court's opinion. He contended that both the majority and the other dissenters erred in subjecting COPA to strict scrutiny, because the material addressed by COPA "could, consistent with the First Amendment, be banned entirely."

Until COPA's constitutionality is finally resolved, the injunction barring its enforcement will remain in effect. Therefore, it

remains essential for school districts to use filters to protect students from potentially harmful material on the Internet.

B. Campaign Finance Reform

The Supreme Court, in a 5-4 decision in McConnell v. Federal Election Commission, upheld key provisions of the Bipartisan Campaign Reform Act of 2002 ("the BCRA"). Also known as the McCain-Feingold bill, the BCRA was intended to address Congress' concerns that the use of soft money and issue advertising has unduly influenced federal elections.

"Soft money" refers to political contributions raised by national and state parties and used for issue advocacy or party-building activities such as voter registration and generic party advertising. Soft money donations constituted 42% of all funds raised by political parties in 2000. Prior to the BCRA's enactment, these soft money contributions were not subject to the Federal Election Campaign Act's ("FECA") requirements as to source and amount of funding. Through these contributions, therefore, party candidates could evade FECA's restrictions on campaign contributions that applied to "hard" money (i.e., money given directly to political candidates to advocate expressly for a particular candidate) and could legally obtain large sums of money from corporations and unions to aid federal candidates.

In a complex series of opinions, shifting majorities of the Court upheld the key provisions of the BCRA against First Amendment challenges while striking down some other parts of the Act. In particular, the Court upheld provisions that make it a criminal offense for corporations, unions, and individuals to give "soft money" donations to political parties.

Although the Court acknowledged that campaign finance restrictions implicate First Amendment rights to free speech and association, it held that such restrictions are justified by the important governmental interest in preventing political corruption and the "appearance of corruption." The Court found that soft money contributions could unduly influence political candidates and therefore held that all donations to national parties may be subject to the source, amount, and disclosure limitations of FECA.

The Court also upheld the BCRA provision relating to disclosure requirements for "issue advertisements" and the manner in which for-profit and non-profit corporations may fund such issue advertisements. Issue advertisements, which support or oppose a given candidate on an issue (i.e., gun control) but do not expressly advocate or oppose any particular candidate, were previously exempt from FECA regulations. Under the BCRA, corporations ***18** and unions cannot use soft money to pay for any television or radio broadcast that runs 60 days before a general election, or 30 days before a primary, and that references a federal candidate by name or likeness.

The Court struck down other BCRA provisions, including a provision that banned all political contributions from minors 17 years old or younger. The Court held that a total ban on contributions from minors triggered heightened scrutiny. The Court found the total ban unconstitutional, noting that the government had provided scant evidence to show that contributions from minors allowed wealthy parents to circumvent FECA's contribution limits.

The McConnell decision will undoubtedly affect how candidates' political parties conduct and fund their election campaigns. Because the ability to raise campaign funds affects a candidate's chances of winning an election, the decision could even influence the outcome of some elections and indirectly the direction of educational policy.

C. Cases the Court Declined to Review

The Court declined to review several free speech cases of interest to school districts, leaving in place the lower court rulings described below:

• In Walz ex rel. Walz v. Egg Harbor Township Board of Education, the Third Circuit held that an elementary school's prohibition of a student's distribution of pencils and candy bearing religious messages, such as "Jesus _ The Little Children"

did not violate the student's First Amendment rights. The Court concluded that the school's restrictions reasonably prevent proselytizing speech that would be at odds with the school's educational goals.

• In S.G. ex rel. A.G. v. Sayreville Board of Education, the Third Circuit held that a public school's three-day suspension of a kindergarten student for saying "I'm going to shoot you" to his friends while playing during recess did not violate the student's First Amendment rights. The school's decision to suspend the student related to reasonable pedagogical concerns in prohibiting speech that threatened violence and the use of firearms.

• In Scott v. School Board of Alachua County, the Eleventh Circuit held that suspension of a high school student who brought a Confederate flag on school grounds did not violate the First Amendment where the school board found that the student's action caused racial tensions.

V. FEDERALISM

This Term, the Supreme Court decided three cases addressing the scope of states' sovereign immunity. In each case, the Court permitted the claim at issue to go forward, and thus seemed to slow a trend toward recognizing states' immunity under a growing list of federal statutes.

A. State Consent Decrees

In Frew ex rel. Frew v. Hawkins, the Court unanimously held that the Eleventh Amendment does not preclude enforcement of a consent decree entered into by state officials, even if that decree imposes obligations not ***19** otherwise specifically required by federal law. In 1993, mothers of children eligible to participate in Medicaid's Early and Periodic Screening, Diagnosis, and Treatment ("EPSDT") program brought suit against various state officials, alleging that Texas's EPSDT program did not comply with federal law. In 1996, the parties agreed to a consent decree, approved in federal district court, which imposed specific procedural requirements on Texas officials. Two years later, several mothers sued to enforce the decree, arguing that the State officials had not complied with its terms. The district court found that Texas officials had violated the decree and rejected the argument that the Eleventh Amendment barred enforcement even if they were out of compliance.

The Fifth Circuit reversed, concluding that the Eleventh Amendment precluded enforcement of the consent decree against State officials unless the violation of the decree also contravened the underlying federal statute. Because the State's EPSDT program met the requirements of federal law, the Fifth Circuit found, the district court lacked jurisdiction to remedy any violations of the more demanding requirements of the consent decree. The Fifth Circuit's decision conflicted with rulings of the Second and Seventh Circuits in prior cases, and the Supreme Court granted certiorari to resolve this split among the federal courts of appeals.

In a brief opinion authored by Justice Kennedy, the Court rejected the Fifth Circuit's reasoning, concluding that the Eleventh Amendment did not bar enforcement of a consent decree against state officials. First, the Court noted that the Texas official did not contend that the terms of the consent decree were inconsistent with Ex parte Young (1908), which permits suits for prospective injunctive relief against state officials who violate federal law, or that the terms of the decree did not protect legitimate federal interests. Despite imposing specific obligations not found in the statute itself, the Court concluded that the decree reflected "a choice among various ways that a State could implement the Medicaid Act." Accordingly, the decree to be enforced-"a remedy the state officials themselves had accepted"-was "a federal decree entered to implement a federal statute," and its enforcement did not violate the Eleventh Amendment. As the Court explained, federal courts "are not reduced to approving consent decrees and hoping for compliance. Once entered, a consent decree may be enforced."

The Court's decision in Frew emphasizes that public officials who enter into court-approved consent decrees to resolve disputes under federal law will be required to comply with the terms of those decrees, even if they impose specific

obligations not found in federal law.

B. Title II of the ADA

In contrast to the Court's unanimity in Frew, in Tennessee v. Lane, the Court was sharply divided. In a 5-4 decision, the Court held that Eleventh Amendment immunity did not preclude the recovery of money damages from a state for a violation of Title II of the Americans with Disabilities Act ("the ADA"). In Lane, a paraplegic brought suit under the ADA against the State of Tennessee and numerous Tennessee counties, alleging that he had been denied access to state court facilities because of his disabilities. The district ***20** court, without opinion, denied Tennessee's motion to dismiss the case on Eleventh Amendment grounds. The Sixth Circuit affirmed.

The Court majority held that the Eleventh Amendment does not bar suits under Title II of the ADA alleging infringement of an individual's right of access to the courts. The Court reaffirmed that Congress has the power to abrogate states' Eleventh Amendment immunity from suit in federal court if the statute in question, first, "unequivocally" expresses that intent and, second, was enacted pursuant to Section 5 of the Fourteenth Amendment ("§ 5"). Because the ADA explicitly provides that states' Eleventh Amendment immunity shall not bar enforcement actions in federal court, the Court focused its analysis on the second question-i.e., whether Congress actually had the power to give effect to this intent.

Justice Stevens, writing for the majority, noted that § 5 grants Congress powers not only to provide remedies for discrimination, but also to deter violations through "prophylactic legislation" that is congruent and proportional to the targeted injury. In enacting Title II of the ADA, Congress had sought not only to prohibit public entities from engaging in irrational discrimination on the basis of disability, but also "to enforce a variety of other basic constitutional guarantees," including the right of access to the courts. Reviewing the evidence before Congress at the time of the ADA's enactment, the majority concluded that that evidence documented "pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." Given the extent of this discrimination, the Court concluded that Congress' preventive legislative efforts were justified under § 5. Finally, the majority determined that the remedy imposed in Title II of the ADA, which requires states to take "reasonable measures" to remove barriers that limit the accessibility of the courts, was proportional to the statute's goal of ensuring a meaningful right of access to the courts.

Chief Justice Rehnquist, in dissent, questioned the majority's conclusions on several grounds. In particular, the dissent argued that most of the historical evidence cited by the majority was not tied to the particular right-that of access to the courts-upon which the majority relied in upholding the application of Title II to States. In addition, the Chief Justice questioned what he called the majority's "as-applied analysis" of Title II. The dissent argued that it was inappropriate to consider the validity of the statute only as applied to cases involving the accessibility of the courts since Title II was drafted much more broadly.

The Court's decision in Lane clears the way for lawsuits against states under Title II of the ADA, at least to the extent that those suits allege the denial of access to the courts. Moreover, as the dissent noted, other courts may find that Title II validly abrogates state sovereign immunity where violations of other fundamental due process rights are alleged. Indeed, the Court has already remanded six cases, including Parr v. Middle Tennessee State University and Feaster v. Florida, for further consideration in light of its decision in Lane.

Depending on how these and other courts apply the Lane decision to other rights implicated under Title II of the ADA, all school districts, even ***21** those normally protected by Eleventh Amendment immunity, may potentially be subject to claims for money damages for Title II violations. Under the Court's decision in Board of Trustees of the University of Alabama v. Garrett (2001), however, suits by state employees alleging violations of Title I of the ADA remain barred by states' Eleventh Amendment immunity.

C. Bankruptcy Clause

Finally, in Tennessee Student Assistance Corporation v. Hood, the Court granted review to determine whether the Bankruptcy Clause granted Congress valid authority to abrogate state sovereign immunity. In a 7-2 opinion authored by Chief Justice Rehnquist, the Court declined to decide the Eleventh Amendment issue, instead concluding that a bankruptcy proceeding to determine the dischargeability of a student loan debt was not a "suit against the State" for purposes of the Eleventh Amendment.

Between July 1988 and February 1990, Pamela Hood received educational loans guaranteed by the Tennessee Student Assistance Corporation ("TSAC"), a state entity created to administer student aid programs. Nearly a decade later, Hood filed for bankruptcy. Under federal law, student loan debts guaranteed by a governmental entity are not dischargeable unless failure to discharge the debts would pose an "undue hardship" on the debtor. Hood therefore filed a complaint against TSAC, seeking a determination that her student loan debts were dischargeable as an undue hardship. TSAC filed a motion to dismiss the petition for lack of jurisdiction based on its Eleventh Amendment immunity. The bankruptcy court, a unanimous Bankruptcy Appellate Panel of the Sixth Circuit, and the Sixth Circuit on appeal each concluded that, under the Bankruptcy Clause, Congress had the necessary authority to abrogate state sovereign immunity.

The Supreme Court affirmed the Sixth Circuit's judgment allowing the suit to proceed, but on different grounds. According to the Court, the discharge of a debt in a bankruptcy court is based on that court's "exclusive jurisdiction over a debtor's property," not any personal jurisdiction over the creditors themselves. Moreover, a "debtor does not seek monetary damages or any affirmative relief from a State by seeking to discharge a debt; nor does he subject an unwilling State to a coercive judicial process." Accordingly, the Court held, sovereign immunity concerns were not implicated and "the undue hardship determination sought by Hood in this case [was] not a suit against a State for purposes of the Eleventh Amendment." The Court acknowledged, however, that TSAC could again challenge the bankruptcy court's authority if, as Hood's claims proceeded, that court exceeded its grant of jurisdiction over the debtor's property and instead sought to exercise personal jurisdiction over TSAC itself.

Hood will without question affect higher education institutions and lenders by generally permitting students to sue state entities in bankruptcy court for discharge of their student loan debts without implicating states' Eleventh Amendment immunity. On the other hand, Hood is not likely to have much significance for public schools.

***22** The Supreme Court declined to review several cases that addressed Eleventh Amendment issues of possible interest to school districts, including the decisions noted below:

• In Savage v. Glendale Unified High School District No. 205 of Maricopa County, the Ninth Circuit held that an Arizona public high school district was not an arm of the state and therefore was not entitled to state sovereign immunity. In reaching its conclusion, the Ninth Circuit distinguished the status of school districts in Arizona from those in California, which the court of appeals had previously held to be entitled to Eleventh Amendment immunity.

• In Brewer v. Board of Trustees of University of Illinois, an intermediate state appellate court concluded that Illinois had not waived its sovereign immunity by consenting to suit in state court of claims arising under federal antidiscrimination laws.

• In Fresenius Medical Care Cardiovascular Center Corp. v. Puerto Rico & Caribbean Cardiovascular Center Corp., the First Circuit held that a public hospital corporation created under Puerto Rico law did not share in Puerto Rico's immunity under the Eleventh Amendment. The court applied a two-step analysis, considering first, how the state has structured the entity to share its sovereignty and second, whether a judgment against the entity would be paid from the state treasury.

• In Tennessee v. United States Department of Transportation, the court let stand a Sixth Circuit decision holding that the federal statutory process for U.S. Department of Transportation proceedings to determine whether state laws on hazardous waste were preempted by federal law did not implicate state sovereign immunity under the Eleventh Amendment. The Sixth

Circuit concluded that the preemption determination was not an "adjudication," and therefore sovereign immunity could not apply to bar the action against the state.

VI. VOTING RIGHTS

During this Term, the Supreme Court decided an important voting rights case that may affect public school districts, and also affirmed without opinion two lower court decisions in the area. The Court also declined to review a number of other voting rights decisions, including a case directly involving a school district as a party.

A. Redistricting

The Supreme Court's principal decision this Term in the area of voting rights was Vieth v. Jubelirer. In that case, voters challenged the constitutionality of a Congressional redistricting plan, claiming that its extreme partisanship violated the one person-one vote requirement of the Fourteenth Amendment's Equal Protection Clause.

The lower court in Vieth found that partisan gerrymandering does not violate the Equal Protection Clause in the absence of facts indicating that the persons complaining of redistricting have been shut out of the political process.

The Supreme Court, in a plurality opinion, reversed the lower court, deciding instead that political gerrymandering claims are entirely nonjusticiable. ***23** Writing separately in dissent, Justices Stevens, Souter (joined by Ginsburg), and Breyer argued that political gerrymandering claims were justiciable, and each proposed a different standard for adjudicating such claims.

The plurality opinion in Vieth suggests that claims that school board election districts have been gerrymandered based on purely political reasons would likely not be justiciable, meaning that complaints about them should not be heard by federal courts.

In addition, in Barrientos v. Texas, the Supreme Court affirmed without opinion the decision of a three-judge district court considering whether alterations to the process by which state legislators considered redistricting bills implicated the Voting Rights Act. The court recognized that these processes do affect voting but held that, because they do not affect voters directly, they do not implicate the Voting Rights Act.

B. Minority-Influence Districts

The Supreme Court also affirmed without opinion the decision of a three-judge district court in Parker v. Ohio that held that, in jurisdictions where courts have already decided that the Voting Rights Act does not require the creation of minority-influence districts, district courts may not allow claims seeking establishment of such districts to proceed. In Parker, minority voters had brought an action to invalidate an apportionment plan for the election of the Ohio General Assembly, claiming that the plan violated the Voting Rights Act. Because the Sixth Circuit had previously determined that influence-district claims were not valid under the Voting Rights Act, the district court concluded that it was bound by that holding and dismissed the plaintiffs' claims. The Supreme Court affirmed without opinion.

C. Cases the Court Declined to Review

The Supreme Court declined to review Puffer-Hefty School District v. DuPage Regional Board of School Trustees, leaving in place a lower court decision upholding an Illinois statute that allowed for the dissolution of school districts of less than 5,000 residents in certain circumstances. Under that statute, such school districts can be dissolved either by board of education resolution or by petition signed by the majority of registered voters in the district seeking dissolution. An Illinois appellate court upheld the statute, rejecting arguments that permitting dissolution by petition unconstitutionally infringed residents' right to vote. The court found that the petition provisions did not infringe upon the right to vote, but rather regulated the manner in which the Puffer-Hefty citizens exercised that right. Because the statute merely affected the time, place, and

manner of voting, the legislature's interest in promoting local control of education provided a sufficient rational basis to support the statute's constitutionality.

The Supreme Court also declined to review several other voting rights cases:
• The Seventh Circuit, in Frank v. Forest County, rejected an Indian tribe's arguments that a local redistricting plan deprived it of equal protection and violated the Voting Rights Act. The court found that the ***24** tribe's prima facie case of discrimination was rebutted in part because the county was very large in area and was both sparsely and unevenly populated.
• In McNeil v. Legislative Apportionment Commission of the State of New Jersey, the New Jersey Supreme Court invalidated a state constitutional provision that established a political boundary requirement for election districts and prohibited the division of counties or municipalities among state assembly districts unless they contain more than one-fortieth of the total number of state inhabitants. The court held that the political boundary provision violated the Voting Rights Act.
• In Old Person v. Brown, the Ninth Circuit upheld a lower court's finding that Montana's state legislative redistricting plan did not violate the Voting Rights Act. The Ninth Circuit found that the "totality of circumstances" did not establish vote dilution and held that the proportionality analysis inquiry of the Supreme Court's decision in Johnson v. De Grandy (1994)-which compares the percentage share of legislative districts in which the population of the protected class has a majority with the protected class's percentage share of the relevant population-should apply.

VII. AFFIRMATIVE ACTION AND OTHER RACE-CONSCIOUS DECISION-MAKING

The Supreme Court declined to review a number of lower court rulings dealing with race-conscious decision-making in light of last Term's landmark decisions in Grutter v. Bollinger and Gratz v. Bollinger. In those two decisions, the Court concluded that the educational benefits of diversity constitute a compelling governmental interest that may support narrowly tailored race-conscious university admissions processes.

This Term, in Concrete Works of Colorado, Inc. v. City and County of Denver, for example, the Court denied certiorari in a case from the Tenth Circuit concerning racial preferences for minority-owned businesses. The plaintiff, a non-minority firm, had initially persuaded a federal district court to conclude that Denver's participation goals for racial minorities and women were unconstitutional because they were not based upon sufficient evidence of past discrimination and therefore could not be justified as remedial measures. In reversing the district court, the Tenth Circuit held that Denver needed only to demonstrate strong evidence from which an inference of past or present discrimination could be drawn, not that discrimination actually existed. By declining to review this decision, the Supreme Court left the court of appeals' decision in effect.

In a fairly unusual move, Justice Scalia, joined by Chief Justice Rehnquist, published a written dissent from the denial of certiorari, arguing that Denver should have been required to prove actual discrimination. Furthermore, Justice Scalia argued that the deference given to the judgment of educators in Grutter should not be extended to "simple legislative assurances of good intention." Finally, he argued that a split exists between, on the one hand, circuits that review the evidence supporting racial classification as a matter of law (interpreted independently by the appellate court) and, on the ***25** other hand, those that review the evidence as a factual determination by the district court (to be overturned only in cases of clear error).

The Supreme Court also denied certiorari_in Sherbrooke Turf Inc. v. Minnesota Department of Transportation, in which the Eighth Circuit upheld the constitutionality of preferences for disadvantaged businesses, including those owned by racial minorities, in the allocation of federal highway funds. As the Tenth Circuit had done in Concrete Works, the Eighth Circuit reviewed the evidence of past discrimination and made its own determination as a matter of law. The court found that Congress had a "strong basis in the evidence to support its conclusion" to justify remedial action.

In Williams v. Hansen, the Supreme Court also declined to review a case in which the Fourth Circuit determined that the

Fayetteville, North Carolina Police Department did not discriminate against black officers when it only interviewed them, and not white officers, during an investigation of alleged racial discrimination within the department. The court found that there was no constitutional violation because for the purpose of the interviews, the black and white officers were not similarly situated. Rather, the purpose of the interviews was to determine how black officers were discriminated against, and for that purpose, only interviews of black officers were relevant.

Finally, in Petit v. City of Chicago, the Court denied certiorari in a case in which the Seventh Circuit revisited the constitutionality of an examination administered in the mid-1980s that formed the basis for promotions to sergeant in the Chicago Police Department. The court of appeals reconsidered, in light of the Supreme Court's decisions in Grutter and Gratz, a prior decision, which had struck down an adjustment of exam scores designed to promote diversity. The Seventh Circuit found that diversity in a police force is an even more compelling governmental interest than is diversity in higher education. Following the Supreme Court's lead in Grutter, the Seventh Circuit deferred to the specialized expertise of law enforcement officials in determining their unique needs. Furthermore, the court of appeals found that the score adjustments used by the police department were narrowly tailored. The court explained that because there was no proof that a higher score on the exam would result in better performance as a sergeant and because there was no objective reason to assume race should affect performance on the test (although it did in practice), the adjustment of scores was not "an arbitrary advantage given to minority officers, but rather eliminat[ed] an advantage the white officers had on the test." Although denial of certiorari does not represent an endorsement by the Supreme Court, this approach may be of particular interest to educational institutions that rely upon standardized tests on which minorities consistently score differently than their non-minority peers.

VIII. FOURTH AMENDMENT

The Supreme Court declined to review one Fourth Amendment case of particular interest to public school districts this Term. In Dubbs v. Head Start, Inc., parents of eight preschool children enrolled in Tulsa County's Head Start program brought suit to challenge "intrusive physical examinations, including genital examinations and blood tests," that had been given "on school premises without parental notice or consent." The parents argued, in ***26** part, that the physical examinations constituted unlawful searches and seizures in violation of the Fourth Amendment and that the examinations violated their substantive due process rights and their children's privacy rights under the Fourteenth Amendment.

The Tenth Circuit found that the physical examinations in question constituted "searches" under the Fourth Amendment; that the "special needs" doctrine, which permits random searches without consent based on special school needs, did not excuse the County's failure to obtain consent from the preschoolers' parents; and that there were genuine issues of material fact regarding whether the parents had consented to the physical examinations. In particular, the Tenth Circuit noted that the County's consent forms did not describe the type of physical examination at issue or seek parental consent for such examinations. The federal appeals court also reaffirmed a parent's substantive due process right under the Fourteenth Amendment to direct and control the medical treatment of their children. The Tenth Circuit remanded the case to the district court for further proceedings on the Fourth and Fourteenth Amendment claims.

Dubbs confirms that school districts must be careful to notify parents of any required physical examinations of their children and to obtain written parental consent before conducting any such examinations.

IX. TITLE IX

This Term the Court did not decide any cases that directly involved Title IX. Instead, the Court declined to review Neal v. California State University Board of Trustees, which alleged sex discrimination in violation of that statute. In Neal, the plaintiff, a male athlete, sued the university, alleging that its reduction of the number of spots for male athletics to achieve "substantial proportionality" between each gender's participation in college athletics violated Title IX. The Ninth Circuit,

without oral argument, ruled that the district court had correctly granted summary judgment to the university on the plaintiff's Title IX claims. The court based its decision on its earlier opinion in that case, which affirmed the denial of a preliminary injunction. In that earlier decision, the Ninth Circuit, like other federal courts before it, concluded that a university may bring itself into compliance with Title IX either by increasing the athletic opportunities available to women, typically the underrepresented gender in college athletics, or by reducing the athletic opportunities of men.

X. SCHOOL FINANCE

In the area of school finance, the Supreme Court declined to review, and thereby left undisturbed, the Ohio Supreme Court's decision in State ex rel. State v. Lewis. In Lewis, the Ohio Supreme Court, which had previously found the State's system of school finance to violate the Ohio Constitution and ordered the State to "enact a school-funding scheme that is thorough and efficient," rejected the efforts of the plaintiff school districts to obtain active judicial monitoring of the State's compliance. The Ohio court declined to supervise the school-finance reform process, taking a hands-off approach and leaving the issue to the legislature's discretion. As a result, while the Ohio legislature has a mandate to reform the school-finance system, the ***27** plaintiffs are left without the ability to monitor the State's progress. Instead, the school districts must wait for the legislature to act before challenging the adequacy of any legislation enacted.

The U.S. Supreme Court left this ruling undisturbed. While the number of state school-finance systems under legal challenge continues to grow, these challenges, for the most part, proceed in state courts (although the State of California recently settled a high-profile federal court challenge to its education funding). The Supreme Court reinforced that pattern to some extent by declining the invitation to second-guess the Ohio Supreme Court's decision about how its rulings should be implemented.

XI. STUDENTS WITH DISABILITIES

During its 2003-2004 Term, the Supreme Court again declined to decide any cases pertaining directly to students with disabilities. Instead, the Court denied certiorari in three cases, leaving in place the lower court rulings described below:

• In CJN v. Minneapolis Public Schools, the Eighth Circuit held that the school district had provided the required "free and appropriate public education" ("FAPE") to the plaintiff, a special education student with severe behavioral difficulties, despite the district's inability to prepare a Behavioral Intervention Plan. Moreover, the court found that an independent hearing officer's prior determination that the student had not received FAPE did not create an agreement to change his "stay-put" placement to another school under Minnesota law, and therefore determined that the school district was not required to reimburse the parent for unilateral placement of the student in private school.

• In Carpenter v. Children and Youth Services, the Third Circuit affirmed without opinion a district court dismissal of an Individuals with Disabilities Education Act ("IDEA") suit brought by a pro se parent. The court found that the plaintiff father could not bring suit on behalf of his children because he was not their legal guardian and therefore not their "parent" under IDEA.

• In Colombini v. Members of the Board of Directors of the Empire School of Law, the Ninth Circuit in an unpublished opinion affirmed the lower court's grant of summary judgment for the defendants on plaintiff's Rehabilitation Act claims. The court held that the plaintiff law student had failed to present any evidence that he was disabled or that the defendant law school discriminated against him solely-or at all-because of his disability.

XII. PREVIEW OF 2004-2005 TERM

Just as the 2003-2004 Term had relatively few decisions directly affecting public education, there are few such cases currently on the Court's docket for 2004-2005. Of course, the Court continues to accept new cases throughout the Term, which will begin next month. The Court has already accepted two cases of great significance for school districts, and is also considering whether to review another case directly affecting public education.

First, the Supreme Court has decided to review Smith v. City of Jackson to resolve a split among the federal courts of appeals regarding whether the ***28** Age Discrimination in Employment Act ("ADEA") permits disparate impact claims. In Smith, the Fifth Circuit sided with the First, Seventh, and Tenth Circuits, and against the Second, Eighth, and Ninth Circuits, in finding that such claims are not permissible under the ADEA. The Fifth Circuit acknowledged the significant textual similarity between the ADEA and Title VII, which has been interpreted to permit disparate impact claims of employment discrimination based on race, religion, sex, or other prohibited factors. Nevertheless, the Fifth Circuit noted that the ADEA includes a safe harbor against liability for employers who can show that an employment decision that adversely affects older workers is "based on reasonable factors other than age," an exception not present in Title VII, and concluded that that exception should be read to preclude disparate impact claims under the ADEA. The Fifth Circuit's decision, if affirmed by the Supreme Court, could insulate school districts from liability under the ADEA where application of facially neutral employment policies has a disproportionate, but unintentional, impact on older employees.

Second, the Court has also agreed to hear Jackson v. Birmingham Board of Education, which presents the question whether Title IX creates a private right of action for individuals who, although not themselves the victims of gender discrimination, suffer retaliation because they complained about gender discrimination experienced by others. In that case, Roderick Jackson, a male coach of a girl's basketball team, filed suit under Title IX, alleging that he was fired for complaining about funding disparities between girls' and boys' athletic teams. The Eleventh Circuit held that neither Title IX nor its implementing regulations permit private suits by individuals alleging retaliation, "let alone a private cause of action for retaliation against individuals other than direct victims of gender discrimination." After Jackson petitioned for certiorari, the Supreme Court requested the views of the United States Solicitor General. In May 2004, the United States Solicitor General filed a brief urging the Court to grant certiorari to reverse the Eleventh Circuit's decision. The Court's decision in Jackson next Term will resolve a split among the federal courts of appeals regarding the availability of retaliation claims under Title IX and other civil rights statutes.

Finally, the Court is currently considering whether to review Baker v. Adams County/Ohio Valley School Board, a case involving the separation of church and state. In Baker, the Sixth Circuit considered the permissibility under the Establishment Clause of a school district's display, at four newly constructed high schools, of monuments inscribed with the Ten Commandments. After county residents sued to challenge the monuments, the school district erected additional monuments inscribed with excerpts from the Justinian Code, the Magna Carta, the Declaration of Independence, and the U.S. Constitution. The school district also installed plaques at the base of each monument describing the importance of the excerpted texts. The Sixth Circuit concluded that the display violated the Establishment Clause. In particular, that court noted that there was no evidence that the Ten Commandments monuments were initially erected with a secular purpose. Rather, the monuments were paid for by a Christian group, which also agreed to indemnify the school district in connection with any legal challenges to the monuments, and the district did not offer a secular explanation for the monuments until after suit was filed.

***29** APPENDIX: CASES AND OTHER AUTHORITIES DISCUSSED IN THIS SUMMARY

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Ashcroft v. American Civil Liberties Union, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004) ..... ---- - ----

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846 So.2d 1238 (Fla. Dist. Ct. App. 2003) ..... ---- -

Frank v. Forest County, 336 F.3d 570 (7th Cir. 2003), cert. denied,

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& Caribbean Cardiovascular Center Corp., 322 F.3d 56 (1st Cir.),

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L.Ed.2d 855 (2004), aff'd in part, appeal dismissed in part sub.

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(2003) ..... ---- -

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