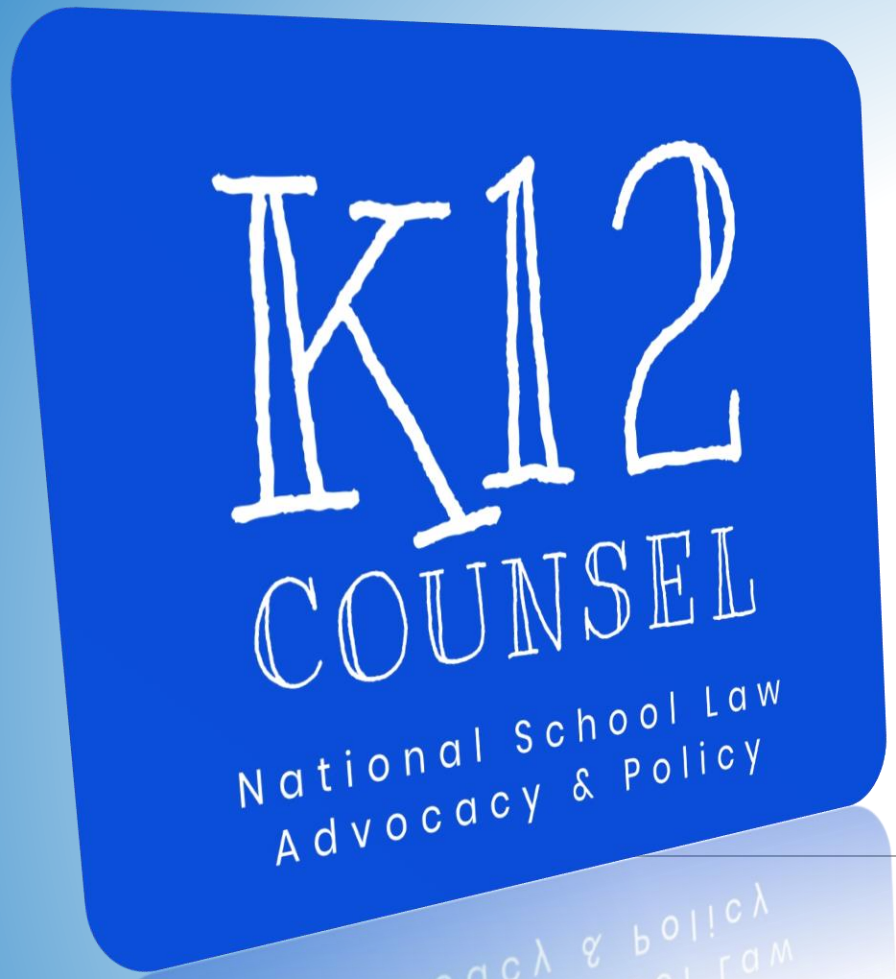

THE NATIONAL SCHOOL LAW LANDSCAPE:
A Survey of Selected Cases

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JOINT CONFERENCE

ANNIS, MA

VEMBER 11, 2023

Quick primer on the Roberts Court.

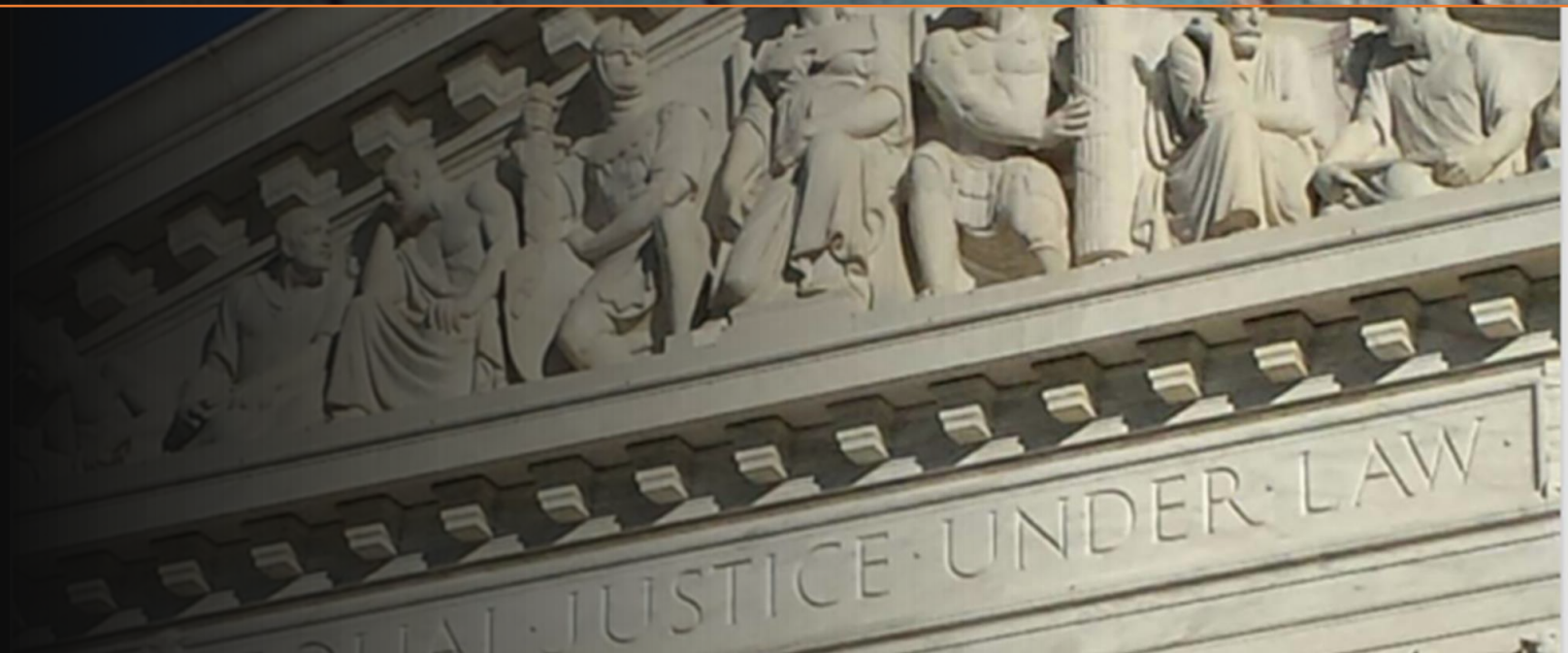
- What is the Roberts Court?
- Solidly conservative court
- Textualism vs. Originalism

- Why it matters & What it means for public schools

2022 - 2023 Term & Beyond…

- IDEA exhaustion
- Diversity policies
- Transfer Policies & Title VII (23-24 Term)
- Employee religious accommodation
- First Amendment & school officials' website

IDEA Exhaustion – What the heck is it?

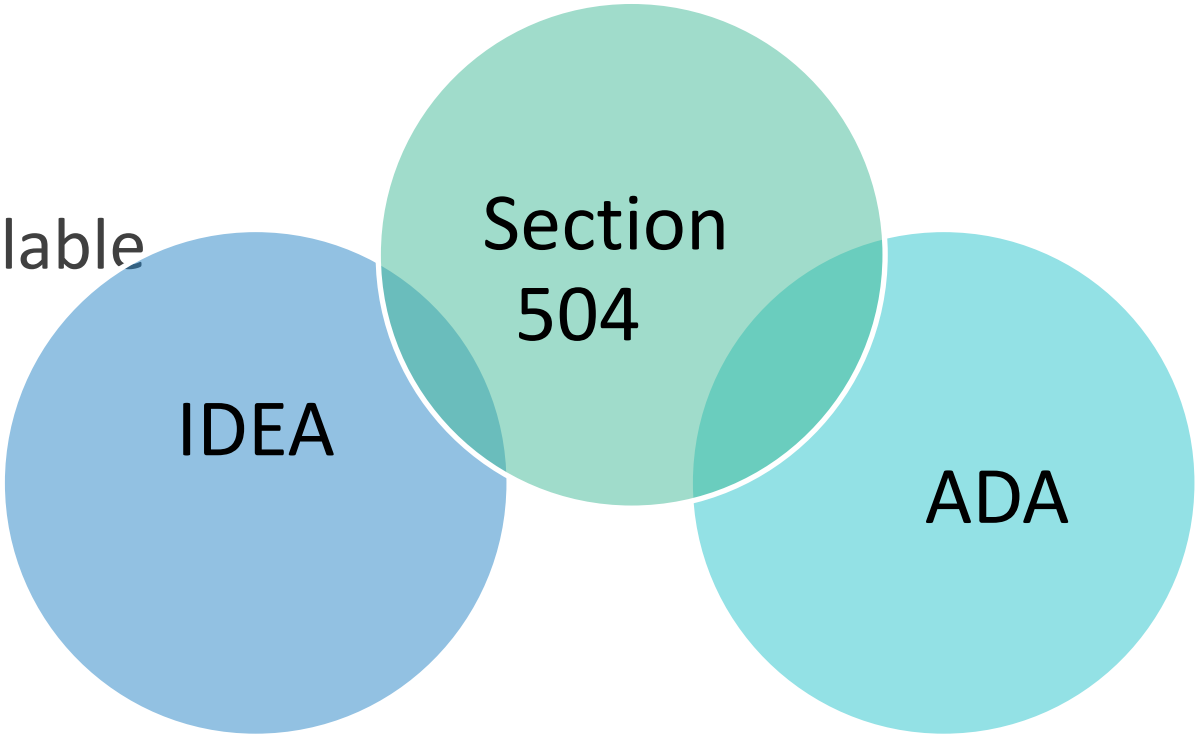


Perez v. Sturgis Public Schools, __ U.S. __, 143 S.Ct. 859 (2023)

Must a student with a disability go through an IDEA due process hearing before filing a lawsuit for when:

He's settled the IDEA matter; and

The damages he seeks are not available under IDEA?



Perez v. Sturgis Public Schools, __ U.S. __, 13 S.Ct. 859 (2023)

- Miguel Perez, who is deaf, entered the Sturgis Public Schools when he was nine, after emigrating from Mexico. He attended SPS for 12 years.
- The school district never provided Perez with a sign language interpreter, but instead provided a classroom aid who communicated a different way.
- Perez also earned honor roll-level grades despite, he alleges, not mastering the curriculum.
- Several months before graduation, the school district informed the family that Perez would not graduate with a regular diploma but would receive a certificate of completion.

- Perez filed an IDEA administrative complaint that also alleged violations of federal law based on the school district's alleged failure to provide an appropriate educational program.
- The parties settled the IDEA claims with school agreeing to private placement, family training in sign language, post-secondary compensatory education, and attorneys' fees.
- Perez then brought his ADA claim in federal court, but the district court dismissed it because he had not fully pursued it in the state administrative proceedings after settling his IDEA claims.
- The Sixth Circuit affirmed the dismissal of Perez's claim under the ADA and Section 504 because he had not "exhausted" the IDEA process first.

Perez v. Sturgis Public Schools – The legal arguments by public schools: Exhaustion of legal remedies is part of IDEA.

I. **The ultimate goal of the IDEA's due process procedures is to meet the student's educational needs.**

II. **The statute's plain text requires collaboration through and including exhaustion.**

Mediation framework is meant to encourage collaborative solutions.

When mediation is unsuccessful, IDEA hearing process is meant to maintain parent-school relationship and deliver services. I.e., stay put.

By requiring exhaustion of all these avenues, schools can remedy problems through the collaborative framework.

Exhaustion also promotes judicial efficiency through the creation of a thorough administrative record.

A separate civil litigation process:

i. Undermines IDEA's collaborative framework.

ii. Threat of litigation can force schools into settlements not student's best educational interests.

But, the Supreme Court disagreed--- *regarding compensatory damages*--- in a unanimous decision on March 21, 2023

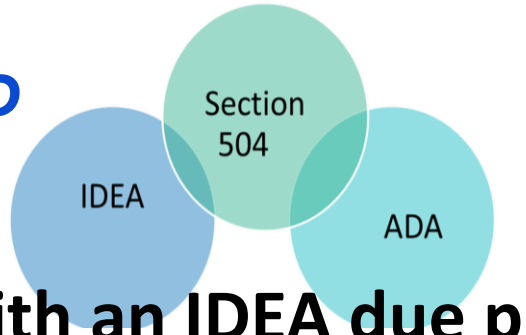
Congress meant *no exhaustion* is required when the student sues for compensatory (money) damages.

"The statute's administrative exhaustion requirement applies only to suits that 'see[k] relief ... also available under' IDEA. And that condition simply is not met in situations like ours, where a plaintiff brings a suit under another federal law for compensatory damages--a form of relief everyone agrees IDEA does not provide."

Gorsuch's textualist approach is evident in the decision.

- **The Court acknowledged the school district's concern that a ruling for the student might "frustrate Congress's wish to route claims about educational services to administrative agencies with 'special expertise' in such matters."**
- **But, that concern, Gorsuch concluded, is not enough to overcome the text of the IDEA.**

What can we expect after *Perez?*



- **More lawsuits, possibly simultaneously with an IDEA due process complaint.**
- **Lawsuits will be couched in terms of compensatory (money damages-pandemic related).**
- **Good news is that claims for emotional distress under Section 504 may be dismissed under other Supreme Court precedent (*Cummings v. Premier Rehab Keller PLLC* (2022)).**
- **Case is remanded, but Court left open question of whether damages were recoverable under the ADA, limiting to ruling to the ability to bring the case.**

Diversity Policies

Students for Fair Admissions Inc. v. President and Fellow of Harvard College and *Students for Fair Admissions, Inc.* v. *University of North Carolina et al.*, ___ U.S., ___, 143 S.Ct. 2141 (June 29, 2023)

SFFA is a "voluntary membership organization dedicated to defending the right to equality in college admissions."

It sued Harvard and UNC on behalf of its members, including Asian-American students who were denied admission to one university or the other.

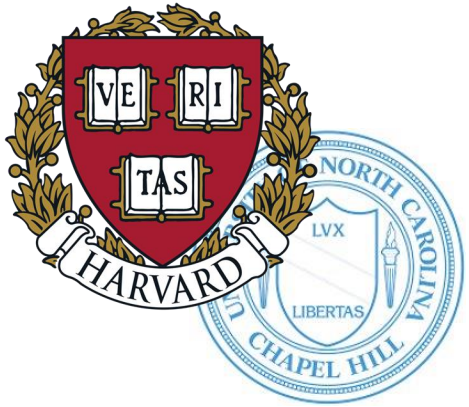
SFFA sues Harvard for violations of Title VI and UNC for violating the Fourteenth Amendment and Title VI.

Students for Fair Admissions v. Harvard and UNC

May Harvard and the University of North Carolina continue to consider race in a **holistic** student admissions process?

Before SFFA v. Harvard and UNC the Supremes had said that The Supreme Court endorsed holistic admissions programs, saying it was permissible to consider race as one factor to achieve educational diversity .

O'Connor, J., writing for the majority, Grutter v. Bollinger, 539 U.S. 306 (2003).



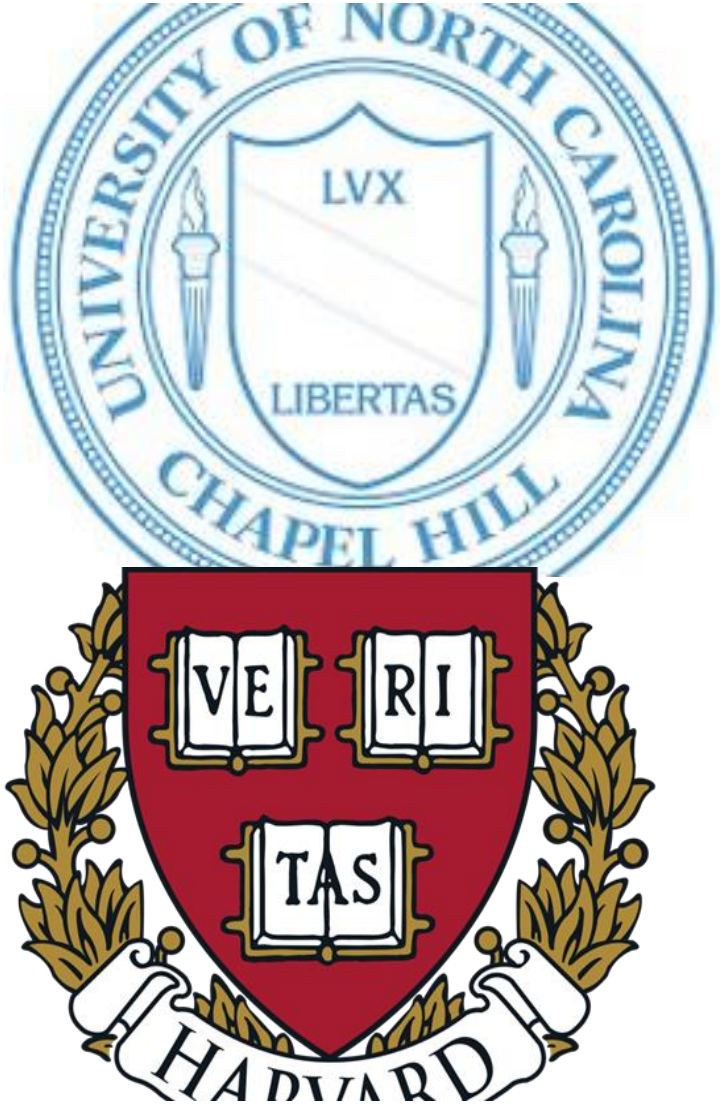
"**25 years from now, the use of racial preferences will no longer be necessary**."

What did O'Connor mean by this prediction?

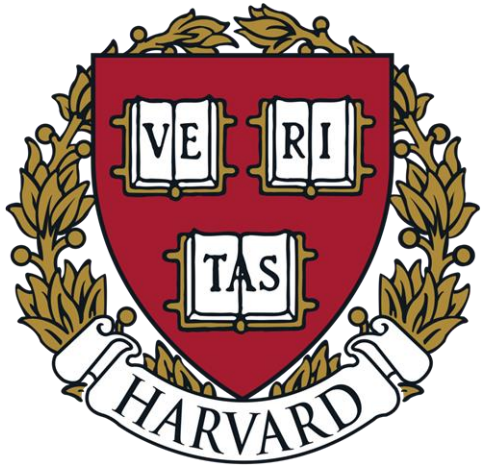
Students for Fair Admissions v. Harvard and UNC

"Simply because the school districts may seek a worthy goal does not mean they are free to discriminate on the basis of race to achieve it, or that their racial classifications should be subject to less exacting scrutiny…. **The way to stop discrimination on the basis of race is to stop discriminating on the basis of race**."

Roberts, J., writing for the plurality, *Parents Involved in community Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).



Students for Fair Admissions v. Harvard and UNC



"In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition."

Kennedy, J., concurring, *Parents Involved in community Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

The crux of SFFA's complaint was that:

1. The Court should overrule *Grutter v. Bollinger*, 539 U.S. 306 (2003), and hold that institutions of higher education cannot use race as a factor in admissions.

2. A university should not be able to reject a race-neutral alternative, penalize Asian-American applicants, or engage in racial balancing because it would change the composition of the student body, without proving that the alternative would cause a dramatic sacrifice in academic quality or the educational benefits of overall student-body diversity.

Students for Fair Admissions v. Harvard and UNC – What were the public school interests?

- DIVERSITY IS A COMPELLING INTEREST THROUGHOUT THE EDUCATIONAL SYSTEM
  - Preventing Racial Isolation And Ensuring A Diverse Student Population As Educational Goals Are Compelling Interests
  - Elementary And Secondary Education With A Diverse Student Body Provides Lifelong Benefits, Enhances Civic Participation, And Promotes Democracy
  - School Districts Face Ongoing Challenges To Achieving Diversity

SCHOOL DISTRICTS USE TOOLS THAT COMPLEMENT, BUT ARE DISTINCT FROM, THE METHODS COLLEGES USE TO ACHIEVE THE EDUCATIONAL GOAL OF DIVERSITY.

- School Districts Use A Variety Of Race-Conscious Tools To Enhance Diversity Without Classifying Individual Students By Race
- The Court Should Not Rule So Broadly As To Restrict School Districts' Authority To Use Lawful Diversity-Enhancing Tools

What did the majority rule?

- Harvard and the UNC admissions programs' use of race violate the Equal Protection Clause.
- Both programs:
  - Lack sufficiently focused and measurable objectives
  - Unavoidably employ race in a negative manner, involve racial stereotyping, and
  - Lack meaningful end points.

"We have never permitted admissions programs to work in that way, and we will not do so today."

Did the majority rule that all race-conscious programs in education are impermissible?

- No. The majority opinion did not apply its decision to any education level **other than** higher education.
- The majority's ruling was limited to the two admissions programs at Harvard and UNC. It decided that the universities had failed to show that their admissions programs' use of race met the high standard of "strict scrutiny."
- In the majority's view, the admissions programs created a zero-sum game in which students for whom race was a plus-factor were given admission, while others not of that race were not.
- Race, therefore, became a negative factor for some, which the majority found to be impermissible.

The Court cautions against intentional misreading of its decision.

… “nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise. …. But, despite the dissent's assertion to the contrary, universities may not simply establish through application essays or other means the regime we hold unlawful today. ***(A dissenting opinion is generally not the best source of legal advice on how to comply with the majority opinion.)*** (Emphasis Supplied). ‘[W]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows,’ and the prohibition against racial discrimination is ‘levelled at the thing, not the name.’

….

But, is this a door left ajar?

- “A benefit to a student who overcame racial discrimination, for example, must be tied to that student's courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to that student's unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.”
- K-12 Pedagogical goal of Diversity?

But, some justice acknowledge the Educational Benefits of Diversity in K12...

Jackson: The point of diversity is in education "…that students of every race will come to have a greater appreciation and understanding of civic virtue, democratic values, and our country's commitment to equality."

What does the ruling mean for K-12 school district policies and practices?

- The decision has no immediate or direct application to K-12 school district programs.
- The Court's most recent decision on diversity policies in K-12 public schools, *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), remains the guiding precedent on such policies.

Continued…

- Public K-12 school districts that employ “general policies to encourage a diverse student body,” as Justice Kennedy described, likely are still permissible.
- But school districts should be aware that the *Students for Fair Admissions* decision may be interpreted by some as an invitation to challenge more “general” programs than individual-based student admissions programs.
- If a majority of the Supreme Court believes the Equal Protection Clause requires race neutrality by government, it may be open to challenges of more general programs in the future.

What does this mean for future challenges?

- **Left open – whether diversity at the K-12 level provides educational benefits.**
- **Allies believe there are diversity benefits in the K-12 setting.**
- **See Jackson's dissent citing NSBA brief.**
- **Roberts didn't take that point on directly.**

Take aways…

To minimize constitutional liability, school district diversity policies should identify the specific benefits that the policy will produce, such as:

- Increased academic performance.
- Supportive school climate, leadership, and civic skill development.
- Improved graduation rates or college and career readiness measured by admissions or subsequent program/job placement.
- Increased participation in AP and IB programs.

Burden is likely to be on K-12 to support its choices. Process matters!

- Regular review and evaluation of diversity policies over time.
- What race neutral alternatives were considered and why they were deemed insufficient to achieve educational goals.
  - (Piloting race-neutral alternatives that demonstrate that particular approach's insufficiency can be one way of supporting a district's ultimate choice).
- Demonstrate how diversity policy resulted in measurable outcomes.
- If not, why not? How shifted or discarded policies?

DIVERSITY IS DEAD. LONG LIVE DIVERSITY

What the Supreme Court's latest ruling on diversity means for K-12

Francisco M. Negrón Jr.

https://nsba.org/ASBJ/2023/october/diversity-is-dead

As anticipated, the battle to apply *SFFA v. Harvard* against diversity policies in K12 level is already here!

TJ Coalition v. Fairfax County School Board


EDUCATION

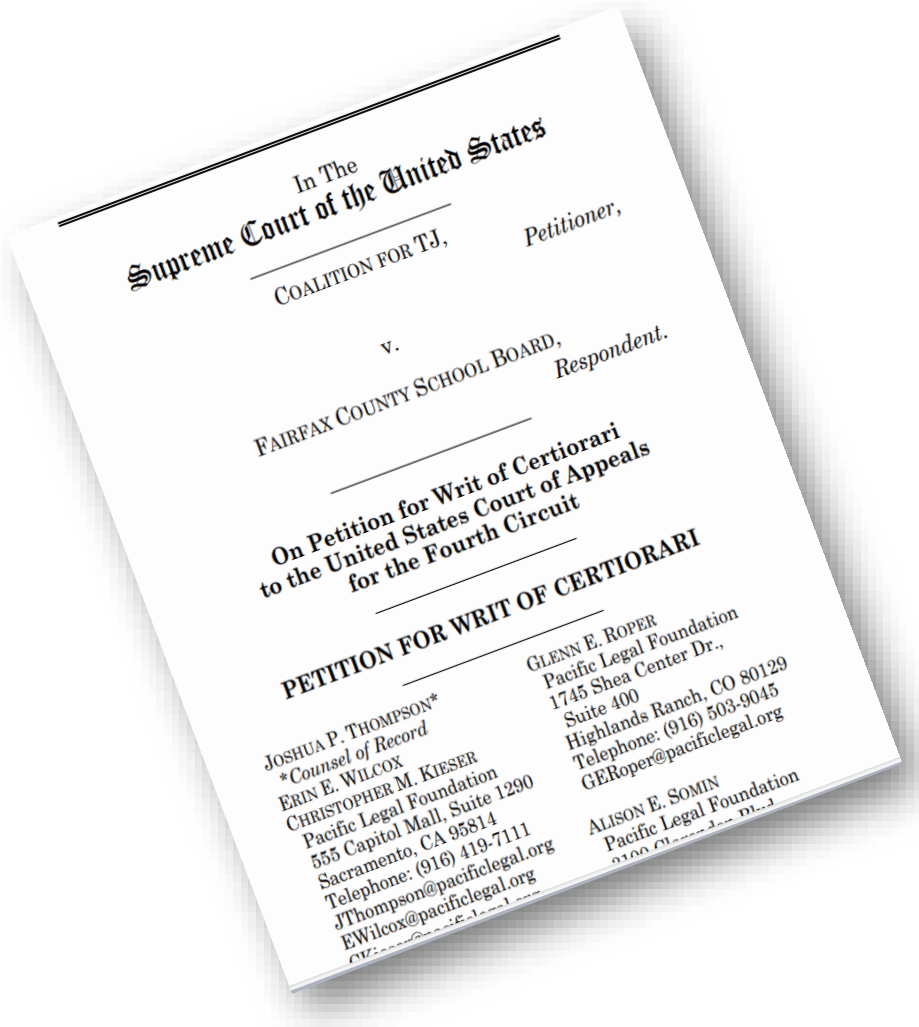
Fairfax families sue over changes to Thomas Jefferson High's admissions

- **Fairfax County Schools in Fairfax, Virginia adopted a policy to address a lack of racial diversity at Thomas Jefferson High School, which consistently ranks as one of the best schools in the country.**
- **In its attempt to make the school more diverse, the board stopped requiring standardized tests and guaranteed admission slots for students at certain eligible middle schools.**
- **The change in the policy resulted in the Asian-American population at the school going from 73% to 54%.**

TJ Coalition v. Fairfax County School Board

- A coalition of parents sued the district alleging that its policy was an unconstitutional attempt to “racially balance” the school.
- A federal district court agreed with the parents and held that the policy was unconstitutional.
- The school appealed to the 4th Circuit Court of Appeals, which held that the board had a legitimate interest in expanding the “array of student backgrounds” and ruled in favor of the school. It granted a stay allowing the school to enforce its policy pending the outcome of an appeal by the coalition.
- The coalition asked the Supreme Court to vacate the stay pending appeal and on April 25, 2022, the Supreme Court denied the stay.
- The case was remanded to the 4th Circuit, which heard the case on its merits in September of 2022 and on May 23, 2023, the Circuit court ruled in favor of the school district and restored the new admission plan.

Coalition for TJ petitioned SCOTUS August 21, 2023



In The
Supreme Court of the United States

COALITION FOR TJ, *Petitioner*,

v.

FAIRFAX COUNTY SCHOOL BOARD, *Respondent*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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Petition:

"… Despite evidence that the Board chose the new criteria to further its racial balancing goal—and evidence that the policy substantially reduced both the raw number and the proportion of Asian Americans admitted—the Fourth Circuit held that the admissions changes did not violate the Equal Protection Clause.

The question presented is whether the Board violated the Equal Protection Clause when it overhauled the admissions criteria at TJ."

Coalition for TJ, Petitioner v. Fairfax County School Board, No. 22-1280

Employee Transfer Policies

Muldrow v. City of St. Louis, 30 F.4th 680 (8th Cir. 2023), *cert. granted* 143 S.Ct. 2686 (U.S., June 30, 2023)

The High Court will consider the question of whether transfers can violate Title VII without a showing of material harm to the employee.

In other words, can an employee claim discrimination when they cannot show an injury in fact? Is the transfer itself evidence of discrimination?

Muldrow a police sergeant claimed discrimination based on sex when city transferred her out of the Department's Intelligence Division to a different position in another division, and again when it denied her request to transfer to a different position.

Regular pay and rank remained the same, but employee claims to have lost employment advantages including:

- a regular week-day schedule,
- the ability to be in plain clothes,
- an impactful and interesting case load,
- a prestigious setting in Department headquarters near the Chief with excellent networking opportunities, and
- some opportunities associated with deputization to the FBI.

Both the federal district court and 8th Circuit Ruled against Muldrow.

“A transfer that does not involve a demotion in form or substance cannot rise to the level of a materially adverse employment action.”

-In 2019, the US District Court Eastern District of Missouri ruled in favor of the SLMPD, granting summary judgment.

The court maintained that Muldrow had not provided sufficient evidence to establish that the transfer was pretextual or that it caused harm.

-The Eighth Circuit Court of Appeals upheld the lower court’s ruling, emphasizing Muldrow’s failure to demonstrate any injury or harm resulting from the City of St. Louis’s decision not to transfer her from the Fifth District.

What are the legal arguments for public schools in this case?

- Precedent and Text of Title VII plainly limits employer liability to materially adverse employment actions.
- Material adversity matters to schools because we must be able to transfer staff on a moments notice to meet our educational mission. d staff assignment practices to match teachers and other educational staff to student need.
- Court should reject any categorical rule that all “transfers” are per se actionable.

Bottom line:

1. K12 schools have a need to retain operational control over staff transfers.
2. K12 school need to be able to move quickly on transfers without fear of subjective claims.

Employee Religious Accommodation

Groff v. DeJoy, ___ U.S. ___, 143 S.Ct. 2279 (June 29, 2023)

Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 66 (1977): To require an employer "to bear more than a de minimis cost" in making a religious accommodation for an employee is an "undue hardship" under Title VII, and not legally required.

Characterizing *Hardison* as a "gutting" of Title VII's "robust protections for religious employees," Groff urged the Supreme Court to correct *Hardison*'s "egregious and consequential error." Specifically, he asked the Court to hold that an employer does not demonstrate undue hardship by showing only that the requested accommodation burdens the employee's co-workers.

Groff v. DeJoy, ___ U.S. ___, 143 S.Ct. 2279 (June 29, 2023)

Christian Rural Carrier Associate for USPS challenged discontinued accommodation to not work on Sunday.

Employee was disciplined (short of termination) for declining to work on Sundays

Parties filed cross-motions for summary judgment with district court granting USPS's motion. In part of its ruling, finding exempting employee from Sunday deliveries would cause undue hardship to USPS because it would "cause[] more than a de minimus [sic] impact on co-workers.“

3rd Circuit affirmed as undue hardship. Accommodation was not reasonable and therefore not a violation of Title VII's religious discrimination provision: imposition co-workers, disruption to workplace and workflow, made timely delivery more difficult, and diminished employee morale.

Groff v. DeJoy, ___ U.S. ___, 143 S.Ct. 2279 (June 29, 2023)

Vacated and Remanded.

Employers now must be able to show "undue hardship" that is "substantial in the overall context of the employer's business" to refuse an employee's request to accommodate a religious practice under Title VII of the Civil Rights Act of 1964.

Writing for a unanimous Court, Justice Alito stressed that the Court was clarifying a long-oversimplified view of its ruling in *Trans World Airlines, Inc. v. Hardison*, 432 U. S. 63, 84 (1977).

Burden on other employees is not enough.

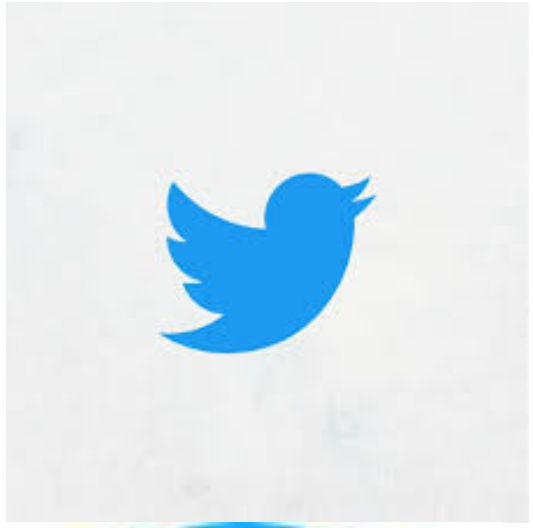
First Amendment and public officials' social media pages.

O'Connor-Ratcliff v. Garnier, 41 F.4th 1158 (9th Cir. 2022), SCOTUS No. 22-324

The 9th Circuit decided that the two school board members' blocking of two members of community from their accounts/pages was state action that violated the First Amendment.

The court applied the "close nexus" test and decided that the defendants had:

- purported to act in the performance of their official duties through the use of their social media pages,
- presented their pages as official outlets which had the purpose and effect of influencing the behavior of others, and
- managed their social media pages in a manner related in some meaningful way to their governmental status and to the performance of their duties.



Lindke v. Freed, 37 F.4th 1199(6th Cir. 2022), SCOTUS No. 22-611

The 6th Circuit decided James Freed, city manager of Port Huron, MI, did not violate the First Amendment by blocking a member of the public. The court applied a duty/authority test, and determined Freed did not

- operate his Facebook page to fulfill any actual or apparent duty of this office, or
- use his governmental authority to maintain it.

There was no state action.

O'Connor-Ratcliff and *Lindke* – present a variety of issues for school districts…

WHO can create a public forum?

Are social media pages with public comments sections the sidewalks and parks of the 21st century?

If so, will SCOTUS provide a standard(s) that public officials and entities can easily understand and apply?

If an individual board member or official, including employees, can create a public forum easily, will school districts be defending more lawsuits?

If individual officials can create public forums, they will be giving up some of their own free speech rights.

Does government really control individual officials' pages?

At oral argument the High Court explored the many iterations in which the speech could be attributed to the state.

Justices are not unaware of how social media works.

“Facebook is somewhat easier because people can be blocked from commenting, but they'll still have access to looking at the information, all right?

But let's assume that there's -- something went wrong with the city’s website and the city is now asking the council member to post all of their evacuation programs and to have comments with respect to citizens who might need assistance. They've converted it into, basically, an official site. “

-Justice Sotomayor

What is the measure for determining if the "blocking" of an individual is state action?

Percentage of Use? Chief Justice Roberts asked if it mattered how much of a personal site was used for official vs. personal communications. Do percentages matter?

Control? The government and the counsel for school district and city both argued that control of a website is important to the court's decision.

Duty to post? When is comes to an employee, a key argument is whether the employee is directed to post thus creating state control.

Does perception matter? The so-called reasonable observer test. Justice Alito asked if it mattered if 99% of visitors thought the page was an official page.

Soliciting Input? Justice Alito was particularly concerned with whether blocking people amounted to viewpoint discrimination. Linkage to liberal wing of court on 1st Amend? Justice Kagan followed same line of questioning, inquiring about President Trump's posting and blocking of people on Twitter.

Location or Function? Justice Thomas wanted to know if it mattered where speech was made. District site? Personal site?

Takeaways for districts… Caveat: *For NOW.*

Be explicit in a written policy about what the district's public channel for communications is: Is it a FB page? Is it on the district site? Do you communicate this to the public?

(Note: An official district site cannot generally bar access or comment as a public forum.)

State in policy about who controls the site (which staff) and who is allowed to post as well as who is allowed to regulate commentary from public.

Identify criteria for posting and for removal of unacceptable posts, i.e., threatening or obscene posts BUT NOT on the basis of viewpoint.

Takeaways for board members… Caveat: *For NOW.*

Be clear that a site is your personal website.

Disclaimers help.

- **I.e., these are my words not those of the board or the district.**
- **If you're sharing official information, say that is what you're doing.**
- **Refer to the official source for information on district policy.**
- **If you are soliciting input from the public, be clear about the capacity in which you are doing it.**

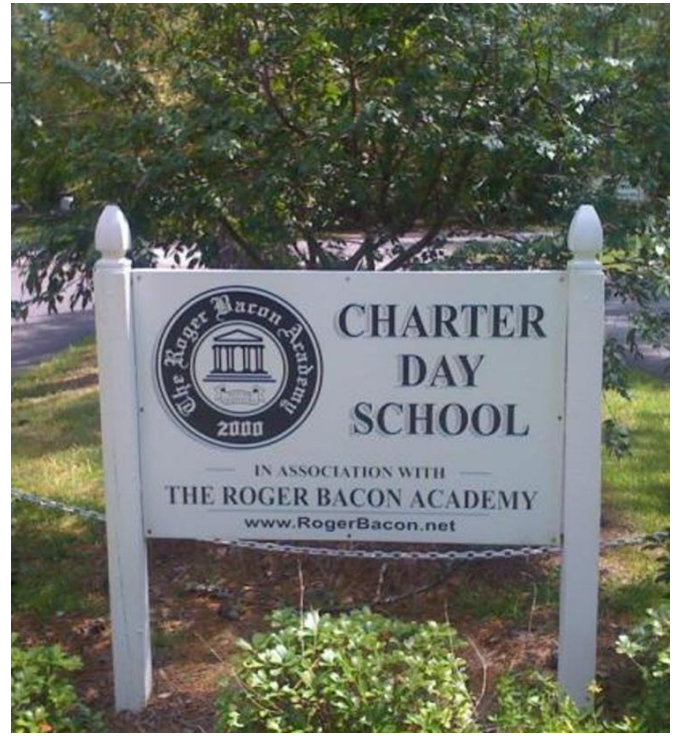
Bonus case … from the 4th Circuit…

Charter Schools as state actors. Equal Protection vs. Title IX?

Charter Day School is a NC charter school offering a "classical, traditional-values-based education. It enforces a dress code that requires girls to wear "jumpers, skirt, or skorts."

Three CDS students and parents sued, alleging that the Uniform Policy's requirement violates the Fourteenth Amendment's Equal Protection Clause, Title IX, and state law.

CDS appealed to the US Supreme Court, which denied cert in June, 2023. *Charter Day School, Inc. v. Peltier*, 37 F.4th 104 (4th Cir. 2022), *cert. denied*, June 26, 2023

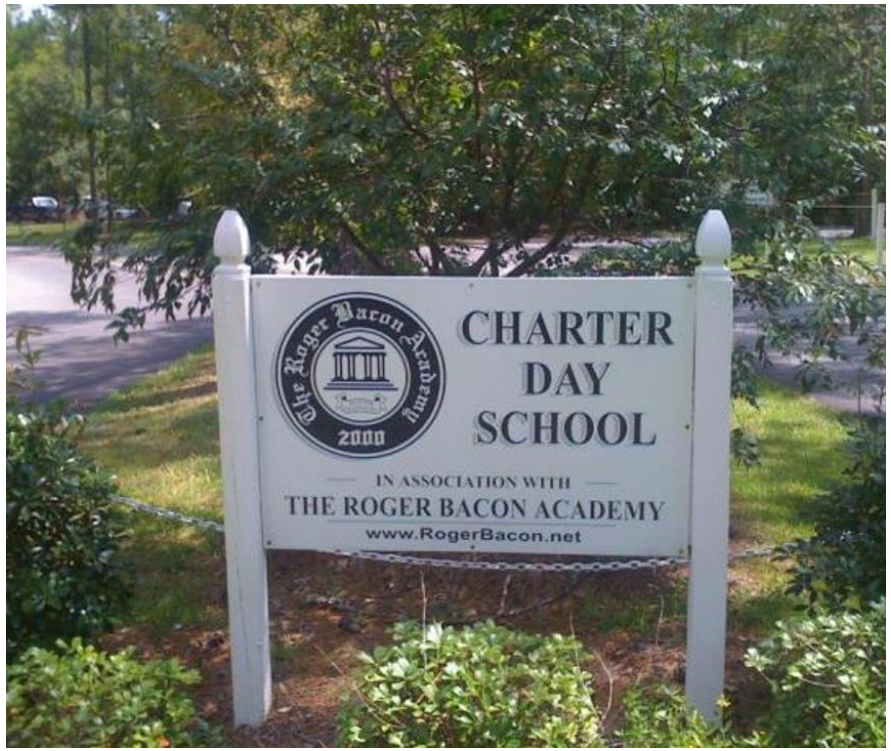


What did the 4th Circuit do?

The Court said CDS is a state actor when it enforces its dress code and Title IX applies to dress codes.

The for-profit operating corporation running the charter school is NOT a state actor (so not subject Equal Protection requirements).

But, because the charter school was a federal funding recipient it was subject to Title IX.



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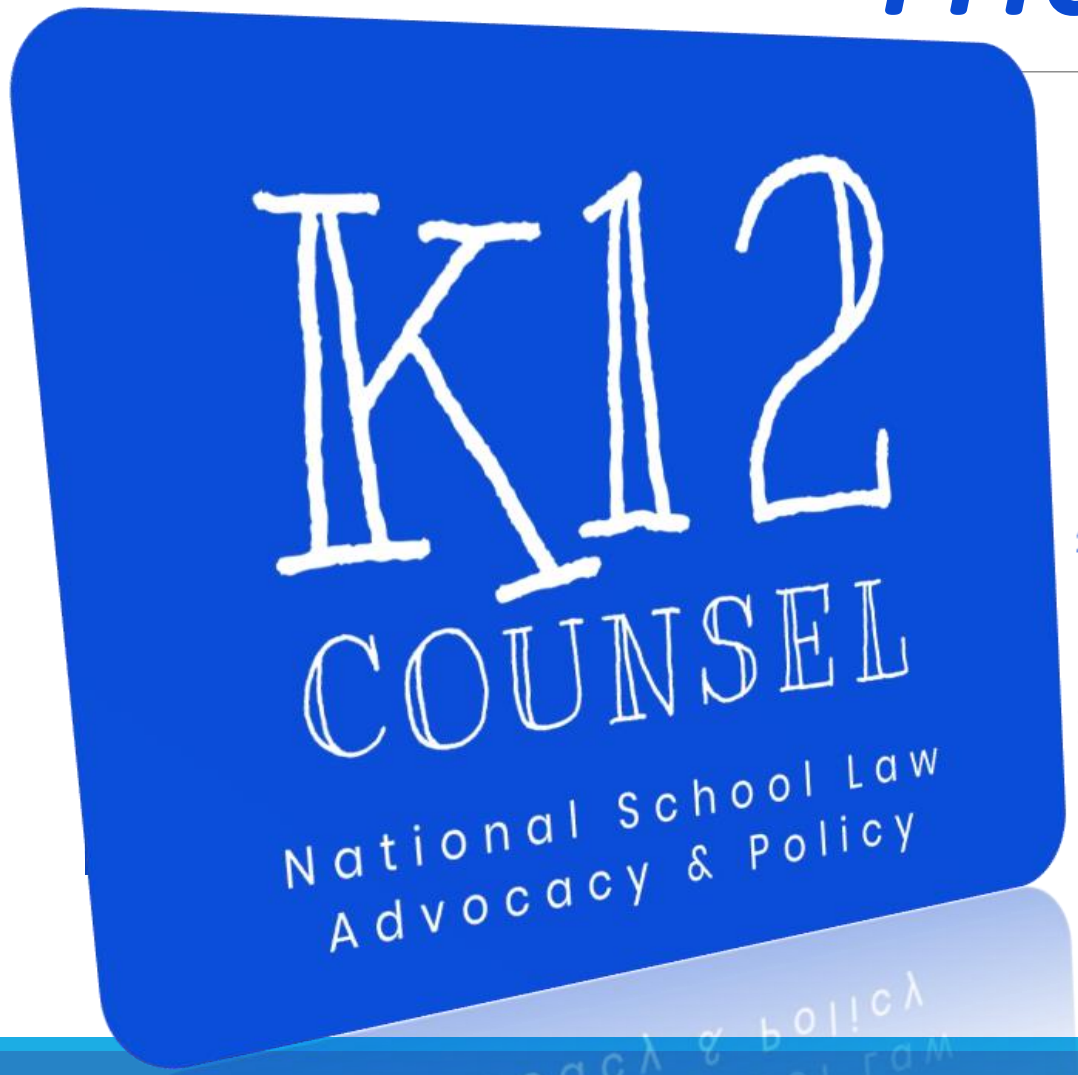

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Coming Soon!