

FEDERAL / LEGISLATIVE UPDATES



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AGENDA

1. Gun Control Legislation
2. Child Nutrition Updates
3. Upcoming Congressional Action
4. Title IX (Draft) Rule
5. Carson v. Makin
6. Kennedy v. Bremerton

GUN CONTROL LEGISLATION AND SCHOOL SAFETY

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Congressional Process



- Bipartisan Safer Communities Act
- Passed 6/24, signed 6/25
- Focus is on additional limitations for firearms purchases
- Some funding for violence prevention (including at schools)

Firearms Provisions

- Enhanced background checks for purchasers between ages 18-21, including State juvenile records
- Partially closes “boyfriend loophole” for individuals convicted of domestic abuse
- Codifies prohibitions on interstate gun trafficking and straw purchases
- Requires convention vendors to register and sellers and conduct background checks

Funding Provisions

- \$750 million for States to implement “Red Flag Laws” and similar interventions
- \$250 million for community-based violence intervention
- \$31 for pediatric mental health grants through HHS
- Provisions designed to simplify use of school-based Medicaid services for mental health

Federal Clearinghouse

- Codify requirement for a federal clearinghouse for evidence-based school safety practices
- Housed at Department of Homeland Security
- Mandate to offer recommendations on how to improve school safety
- Serving SEAs, LEAs, IHEs, State and local law enforcement, health care professionals
- DHS must review and identify federal grant programs that can be used to implement recommended practices

School Funding Provisions

- \$1 billion for Title IV, Part A
 - Available through 2027
 - Bypasses other allowable uses, only for “Safe and Health Students” activities
 - Allocated by formula to States, then competitively to districts



School Funding Provisions

- \$1 billion over 5 years for Safe Schools and Citizenship Program (Title IV, Part F)
 - School-Based Mental Health Services Grants
 - Competitive grants to SEAs “to increase the number of qualified mental health service providers that provide school-based mental health services to students in local educational agencies with demonstrated need.”
 - Mental Health Services Professional Demonstration Grants
 - Competitive to “innovative partnerships to train school-based mental health service providers for employment in schools and LEAs.

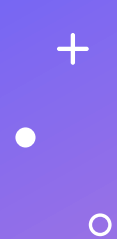
Programmatic Conditions



- Amends Sec. 8526 of ESEA to prohibit funds provided under any ESEA program from being used for the purchase of weapons or weapons training
- Why? Debate in 2018 after Parkland about whether weapons and training were allowable under ESEA Title IVA

Programmatic Conditions

- Statutory language: meant to keep schools “free of weapons”
 - But also doesn’t explicitly prohibit these costs
- States ask ED: can we use IVA funds for “official” weapons?
Training?
 - DeVos letter to Congress: “I have no intention of taking any action concerning the purchase of firearms or firearms training for school staff under the ESEA...Congress did not authorize me or the Department to make those decisions.”
 - Some lawmakers attempted to introduce amendments that would restrict such uses



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CHILD NUTRITION UPDATES



Background

- Congress provided USDA authority to waive a number of requirements from March 13, 2020 to June 30, 2022
- USDA allowed meal programs to run through “Seamless Summer Option” with:
 - No eligibility threshold (meals free for all) → no applications
 - No formal requirements for meal pattern
 - Waiver of “congregate feeding” rule
 - Parent pick-up
 - Various administrative flexibilities

But supply chain issues persist

- [USDA survey](#) says “approximately 92 percent of all SFAs reported challenges with procuring or receiving food, beverages or supplies in SY 2021-2022.”
 - Most acute for meal service supplies, meat substitutes, chicken, whole grain rich items, “mixed dishes” (i.e. pizza, lasagna, sandwiches)
 - SFAs cite:
 - Limited product availability
 - Orders arriving incomplete
 - Increased costs
 - Vendors giving preference to other businesses

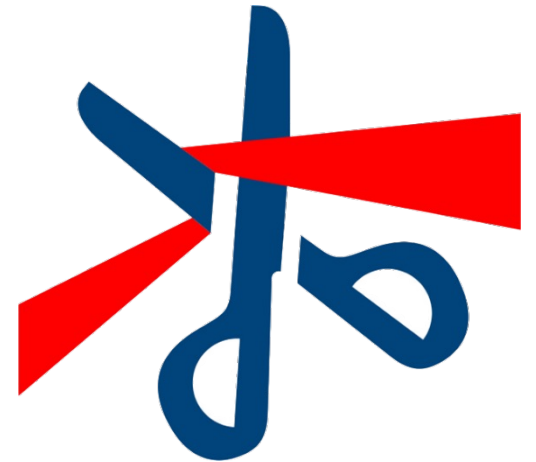


So what happened?

- Some lawmakers pushed for extension on 2022 Omnibus appropriations bill
- Others strongly opposed extension
 - Primarily Senate Minority Leader Mitch McConnell (R-KY)
 - President Biden didn't include it in FY 2022 budget request
 - “emergency measure”
 - Desire to rein in spending – costs \$8-11 billion for one year of waivers
 - Rep. Virginia Foxx (R-NC): “taxpayers’ unprecedented support of these programs over the last two years cannot be unlimited”

USDA Waiver Authority Limited

- USDA has limits on what it can waive per 42 U.S.C. 1760(I)
 - No changes to eligibility
 - No increases in reimbursement rates
 - No amendments to nutritional content of meals
 - No changes to price for reduced-priced meals
- Can still waive some administrative provisions



Keep Kids Fed Act of 2022

- Passed in late June (just before 6/30 deadline)
- Keeps existing waivers through 9/30
 - Allows summer programs to continue under current status
 - Extends waivers of congregate feeding, parent-pickup, service time, etc.
- Transition back to application-based meal programs in fall 2022
 - Resume categories of free, reduced-price, and paid meals
- Cost of \$3 billion but “budget-neutral” through clawbacks from ED, Agriculture funds

Keep Kids Fed Act of 2022



- Increased Reimbursements
 - Extra 15 cents per breakfast
 - Extra 40 cents per lunch
 - On top of 7.4% inflation adjustment
 - Effective July 1, 2022 - June 30, 2023
- Additional 10 cents for CACFP meals/supplements
 - Effective July 1, 2022 - June 30, 2023

Keep Kids Fed Act of 2022

- Content flexibilities for SY 2022-23
 - USDA has authority to allow for waivers that do not increase costs
 - But USDA says they are not planning for nationwide waivers of nutrition status
 - But will extend waiver of requirement to apply fiscal action where there is a reason, e.g. supply chain disruption
 - States to provide technical assistance instead of fiscal action
 - Encourage SFAs to plan for “most nutritious meals possible”

New Considerations

- School meal applications are a brand new thing for many parents
 - Lack of administrative capacity
- Paid or reduced-price meals will go up in price from 2019-20 to 2022-23, with some SFAs estimating increases of about \$1 per meal
- Taking away price controls? Studies [say](#) universal free meals reduce grocery costs in surrounding area by reducing demand and increasing competition





UPCOMING CONGRESSIONAL ACTION



Appropriations

- FY 2023 Labor-HHS-ED bill passed subcommittee and committee
- Heads to House floor now
- 13% increase in Department of Education programs
- Some policy riders
 - Closing “90/10” loophole to 85/15 for HEA
 - Allowing DACA recipients to access federal student aid

Appropriations

Program	FY 2022 Appropriation	Proposed FY 2023 Appropriation	Difference
Title I, Part A	\$17,536,802	\$20,536,801	\$3,000,000
IDEA Part B	\$13,343,704	\$16,259,000	\$2,915,000
Title II, Part A	\$2,170,080	\$2,270,080	\$2,000,000
Title IV, Part A	\$1,280,000	\$1,355,000	\$75,000
Title IV, Part B	\$1,289,673	\$1,410,000	\$120,000
McKinney-Vento	\$114,000	\$121,500	\$7,500
Career and Technical Education	\$1,379,848	\$1,425,000	\$45,000
AEFLA	\$704,000	\$733,000	\$29,000
Impact Aid	\$1,557,112	\$1,614,000	\$57,000

(in thousands of dollars)

Build Back Better-er?



- Potential revival of reconciliation bill
 - Depends on negotiations with swing votes
- Contents:
 - Environmental provisions?
 - Tax provisions?
 - Childcare subsidies?

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DRAFT TITLE IX RULE

Basis for Regulations

- Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex
 - Extends to conduct on the part of a recipient entity that inhibits access to educational programs
- ED issued “Dear Colleague” in 2014 outlining response to sexual harassment and assault
- ED issued regulations in 2020 codifying response (and changing requirements)

New Draft Regulations

- Formally [published](#) in *Federal Register* on July 12
 - 60-day comment period
- Makes some changes to adjudicatory procedures but maintains basic structures
- Biggest changes are in definitions
- ED says athletics will be addressed separately

New Definitions

- “Sex-based harassment” now includes
 - Discriminatory conduct based on:
 - sex stereotypes
 - Sex characteristics
 - pregnancy or related conditions
 - Sexual orientation
 - Gender-identity
 - ...regardless of the sex of the harasser



New Definitions

- “Sex-based harassment” can also include:
 - Sexual violence as defined in the Clery Act
 - Dating Violence
 - Domestic Violence (felony or misdemeanor)
 - Stalking
 - Creation of a “hostile environment”

New Definitions: Hostile Environment

- Unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity **OR**
- Quid pro quo harassment: employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity explicitly or implicitly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct

New Definitions

- Complainant: someone who brings a complaint → includes student, employee, parent or guardian, or someone *attempting to participate* in program
- Educational institution: definition updated to include an LEA, a preschool, a private elementary or secondary school, institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, or an institution of vocational education.

Pregnancy

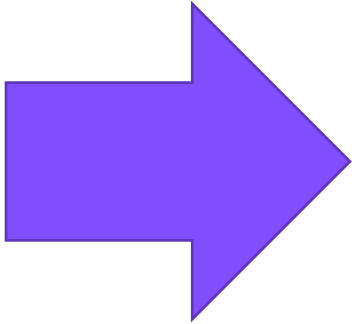


- New protections for pregnancy → treat pregnancy as a temporary disability for all purposes
 - Prohibition on sex discrimination
 - Option for reasonable modifications
 - Voluntary access to a separate and comparable portion of program
 - Voluntary access to leave of absence
 - Availability of lactation space
 - Access to grievance procedure if requirements not met

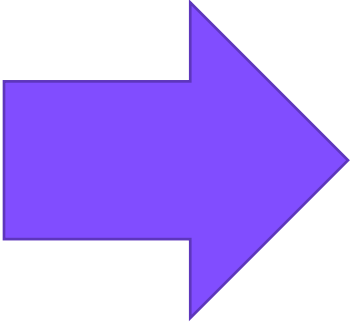
Updates on Coverage

- Applies to admissions as well as students in current program
 - No discrimination on the basis of pregnancy, marital status, etc.
- “Educational program or activity” scope can include off-campus actions to the extent that they contribute to a hostile environment
- Strengthens requirements for supportive measures

Obligation to Act

- Current: respond to “actual knowledge” in a way that is not “deliberately indifferent”
 - Proposed: take “prompt and effective” action to end any sex discrimination where facts could “reasonably be understood” to constitute discrimination
- 

New Standard of Evidence

- Current: “clear and convincing evidence” necessary for finding of individual responsibility
- 
- Proposed: use “preponderance of the evidence” unless recipient uses “clear and convincing” standard in all other comparable proceedings

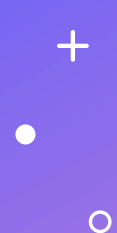
Training

- Requires training for all employees on
 - Conduct that constitutes discrimination and harassment
 - Obligation to address
 - Notice and information requirements
- Specialized training for certain categories of employees (confidential employees, Title IX coordinator and designees)



Next Steps

- Will likely receive significant number of comments
 - Last Title IX rule was over 124,000
- Maybe extended timeline for finalizing rule – Summer 2024?
- In the interim clear ED anticipates litigation
 - “severability” clauses throughout rule
 - Pending litigation that States have asked to move forward now draft rule is out



5

CARSON V. MAKIN



The Basics

- Maine “tuitioning” case before U.S. Supreme Court
 - Arguments early December
 - Decision late June
- Following on heels of *Trinity Lutheran* (2017) and *Montana v. Espinoza* (2020)
- Challenges “Blaine amendments”



Maine's System

- Many school districts are too small to support a middle and/or high school
- Students receive a “tuitioning voucher” for education, to be used at:
 - Public school (about 90% of recipients attend one of 12 major high schools)
 - Secular private school
 - BUT cannot be used for religious schools per State law
- Suit brought by parents who want to send their kids to private religious schools using vouchers
 - First amendment free exercise clause v. establishment clause

The Decision

- Supreme Court sided 6-3 with parents, saying right to free exercise is more important than State's establishment clause interest
- A State may choose to fund private education, but if it does so, it may not differentiate between religious and secular schools
- Court suggested that vouchers were provided to parents, and schools were not deputized to provide the equivalent of a public education

The Dissent

- Justice Sotomayor: brings government closer to directly funding religious practice
- Justice Breyer: “What happens once ‘may’ becomes ‘must’? Does that transformation mean that a school district that pays for public schools must pay equivalent funds to parents who wish to send their children to religious schools? Does it mean that school districts that give vouchers for use at charter schools*** must pay equivalent funds to parents who wish to give their children a religious education?”

*** Please note Justice Breyer misunderstands charter school financing

Implications

- Follow-on litigation is pending in several States on related questions
 - E.g. can States require religious schools to follow specific nondiscrimination policies?
- Some groups say they will urge Maine to repeal the program (no longer funding any sort of education through private schools)
- NO IMPACT on federal programs for now

Next Steps?

Tennessee bill would extend school vouchers to parents upset over mask mandates, virtual learning

By Marta W. Aldrich | Jan 11, 2022, 5:20pm CST

The [bill](#) would expand the law to make vouchers that are known as education savings accounts available to students in any Tennessee district that mandates masks or does not offer at least 180 days of in-person learning due to the coronavirus pandemic.

However, it does not afford the same opportunity for students whose parents are upset about the absence of a mask mandate, or would like their student to switch to virtual learning when COVID cases surge.

6 KENNEDY V. BREMERTON

School Prayer: Kennedy v. Bremerton

- Oral Argument heard in April, decision late June
- Coach suing WA school district over visible prayer on 50 yard line after football games
- District:
 - Offered him private place to pray
 - Disruption/safety concern when media and supporters involved
 - Parents worried about impact on playing time of students who didn't participate – coercive?
- Coach:
 - First amendment rights to free exercise should take precedence

The Decision



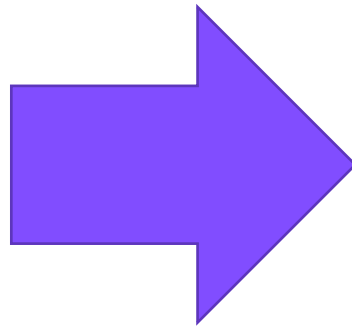
- Court sided 6-3 with the coach, saying he engaged in “brief, private” prayer during a time in his workday when he was not otherwise engaged
- Court said no coercion – students need to learn to be tolerant of speech or prayer

The New Standard

- Ruling strikes down the “Lemon Test” standard set out in 1971’s *Lemon v. Kurtzman*

The Lemon Test

Does allowing the practice cause “excessive entanglement” with religion? Does it advance or inhibit religion? Is there a secular purpose?



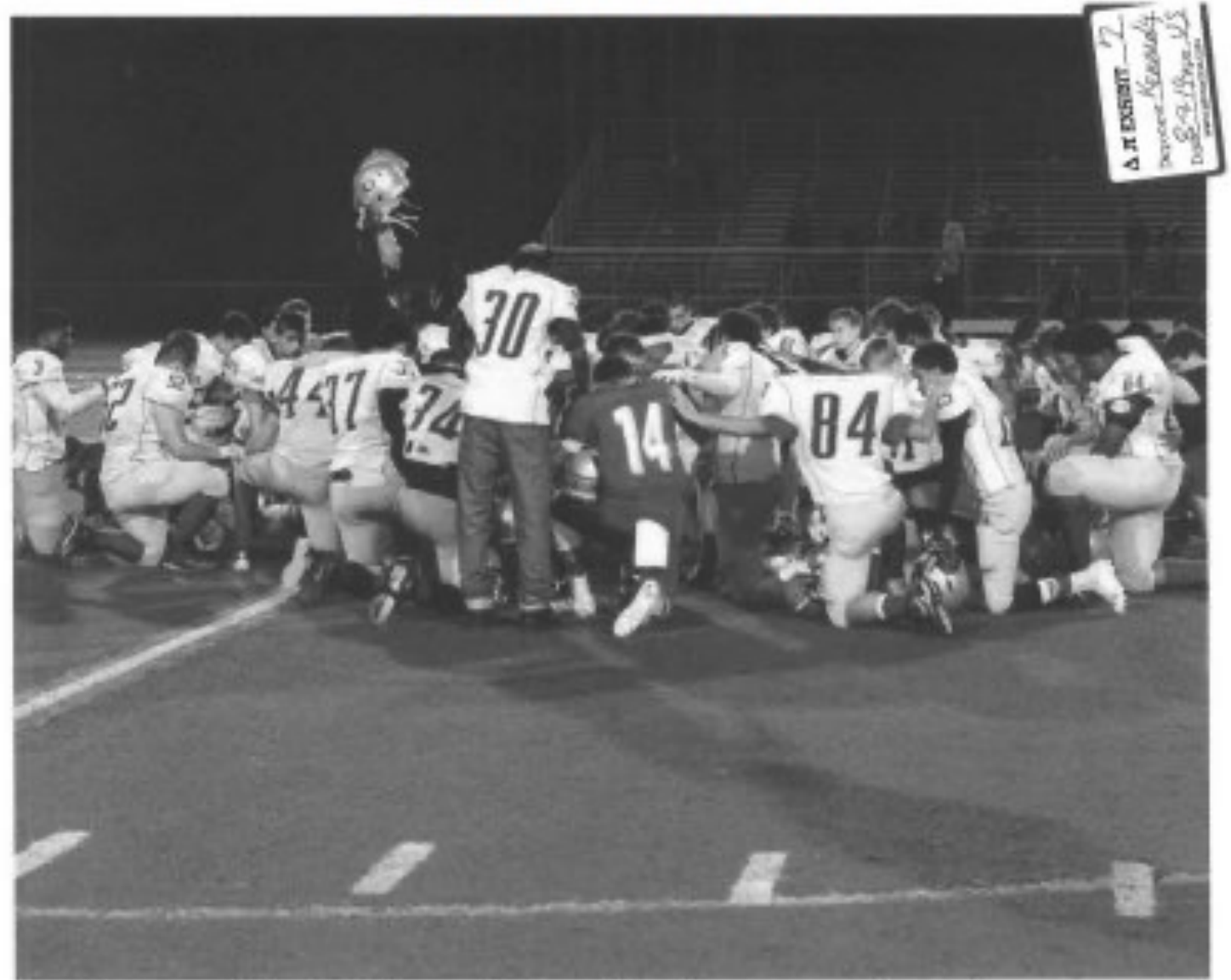
The New Test

Does the action violate the “historical practices and understanding” that would have been familiar to the drafters of the Constitution?

The Dissent

- Majority decision “elevates one individual’s interest in personal religious exercise over society’s interest in protecting the separation between church and [S]tate, eroding the protections for religious liberty for all.”
- Disputes assertion that this was a “quiet” and “private” exercise

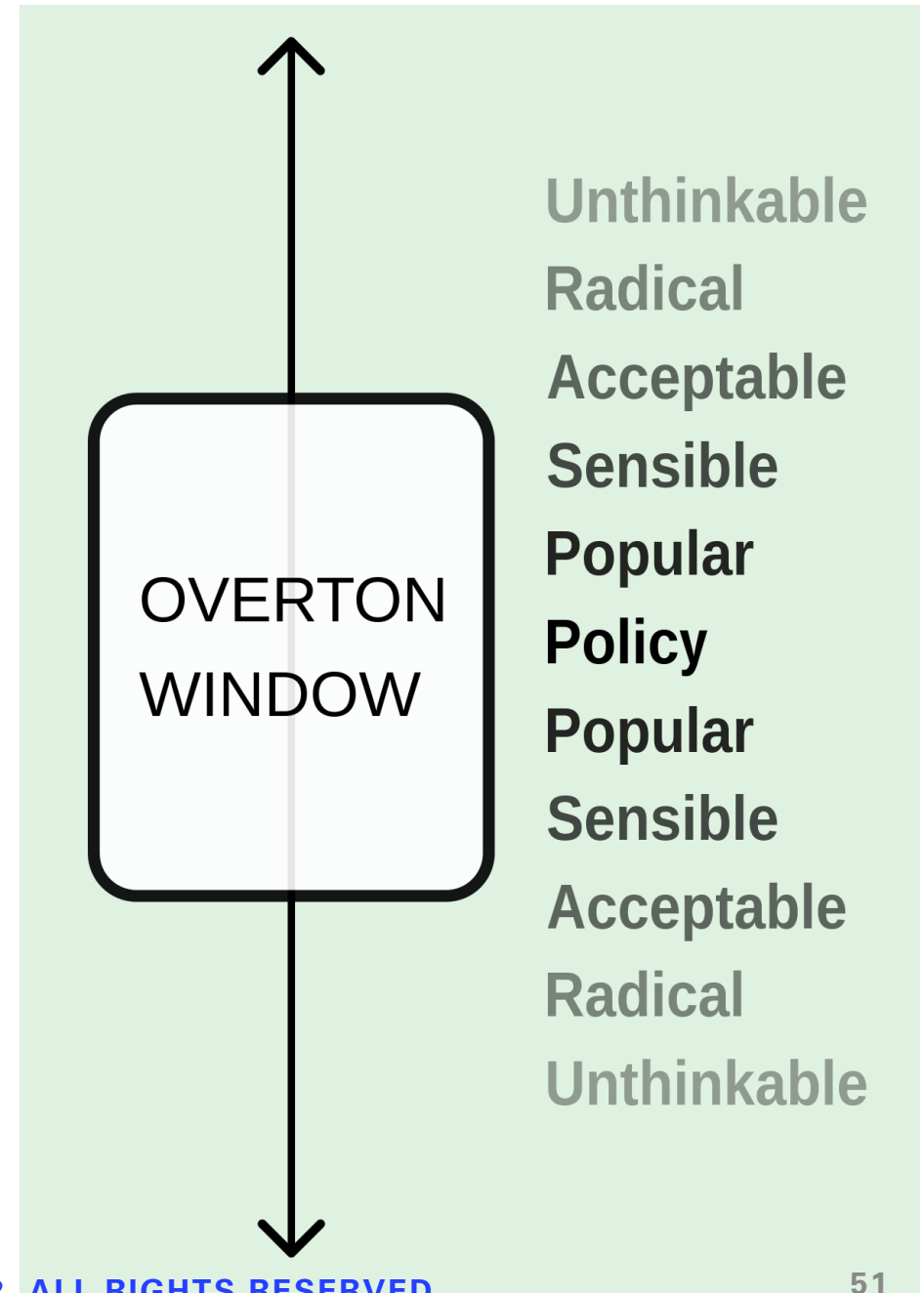
The Dissent



Photograph of J. Kennedy standing in group of kneeling players.

Shifting the Overton Window

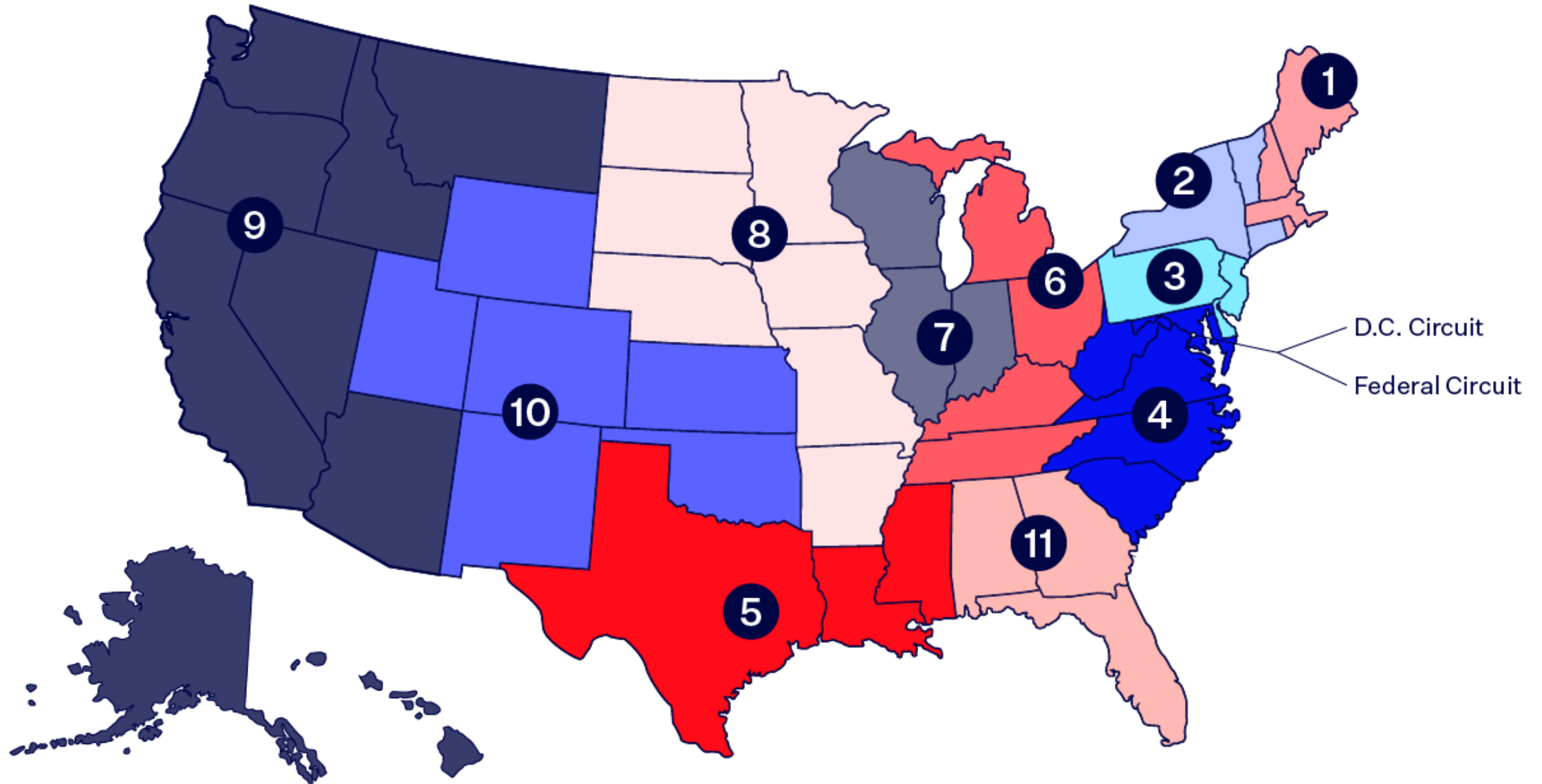
- Pandemic disrupted a lot of longstanding structures/practices
- Cases, policy, local laws on parental control and parent involvement have potential to change what national policy/attitudes look like!
- Shift in expectations



Shifting the Overton Window

- *Trinity Lutheran* (2017): State could not restrict funding to private religious entities if grant had a clearly secular purpose
- *Espinoza v. Montana Dept. of Revenue* (2020): Parents' interest in accessing public funds for private religious school education vouchers outweighed State's interest in avoiding excessive entanglement with religion (no "compelling interest")
- *Carson v. Makin* (2022): Parent's free exercise right takes precedence
- *Kennedy v. Bremerton* (2022): No more "Lemon" test, free speech and free exercise prevail based on "historical practices and understanding"

The Growth of Nationwide Injunctions




The Growth of Nationwide Injunctions

- Not explicitly authorized by Constitution/statute, but generally accepted that all federal courts may issue
- Can have multiple types of orders in similar cases:
 - CARES Equitable Services decisions in CA and WA applied to plaintiff States only
 - DC District judge issued nationwide injunction
 - Title IX NOI is nationwide injunction
- Supreme Court decisions apply nationwide
 - But lower courts may interpret standards differently until told otherwise

Shifting the Overton Window



National Conference
of Bar Examiners

 JUN 24, 2022

NCBE Statement on SCOTUS Decisions

Examinees taking the NCBE-developed July 2022 MBE, MPT, and MEE will not be required to be familiar with this term's US Supreme Court decisions.

Questions?



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