



FEDERAL UPDATE

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Agenda

- Congress
 - Appropriations
 - Other legislation
- Administrative Action
 - New Guidance
 - What's Next?
- The Courts



Congress

Ground Rules for This Congress

- New Congress set rules in January 2023:
 - Must consider all appropriations bills individually
 - 12 separate bills, including Labor-HHS-Education
 - Allow for more amendments on appropriations, slowing process
 - “open” rule rather than “closed” or “structured” rule
 - Require 72 hours to read legislation before votes in House
 - Adding to existing 72-hour rule in Senate

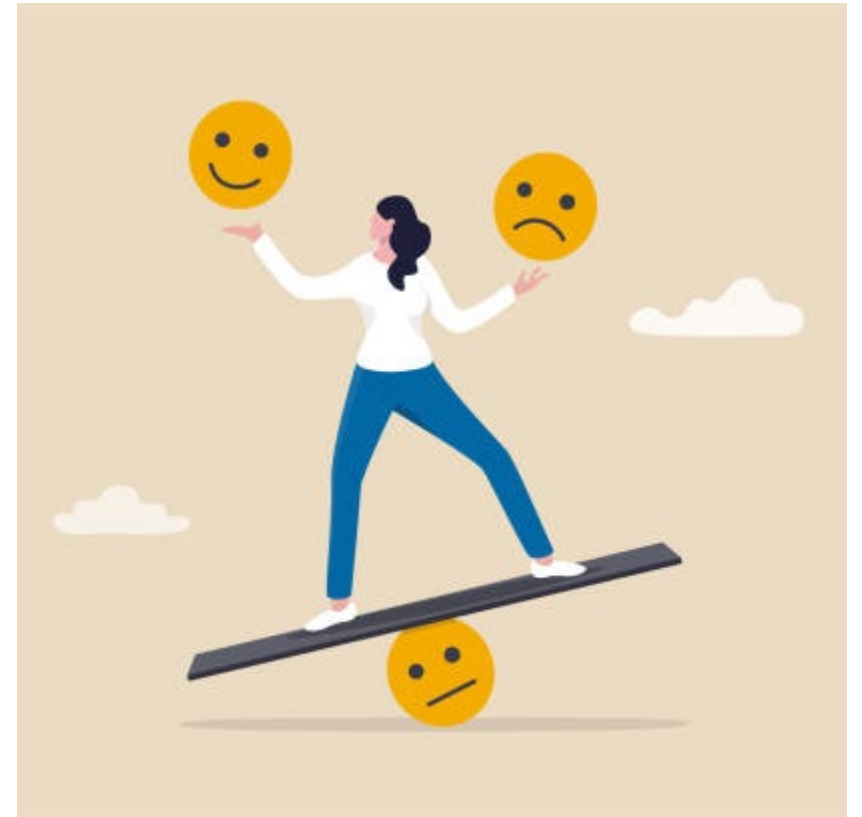


SPEAKER OUSTER AND OTHER CHANGES IN BALANCE

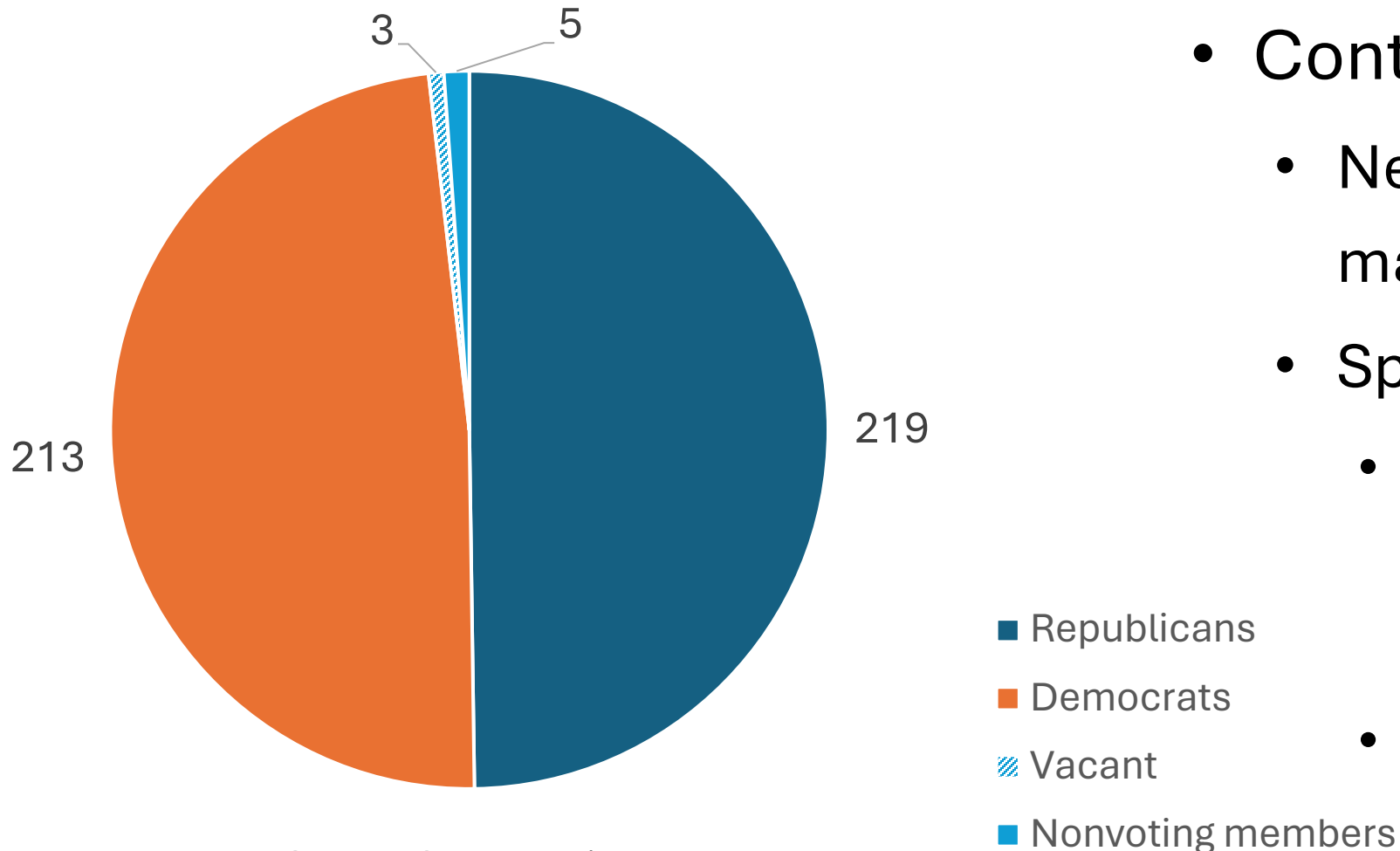
- Representative Kevin McCarthy (R-CA) ousted from speaker's chair
- Caucus cycled through several potential Speakers (Patrick McHenry-NC, Steve Scalise-LA, Jim Jordan-OH) before settling on Mike Johnson (R-LA)
- House retains rule saying that one member offer a motion to vacate the chair
 - starts removal process
 - simple majority of the House is necessary for removal

Speaker Ouster and Other changes in balance

- Rep. George Santos (R-NY) → expelled December 2023
- Rep. Kevin McCarthy (R-CA) → resigned December 2023
- Rep. Bill Johnson (R-OH) → resigned January 2024



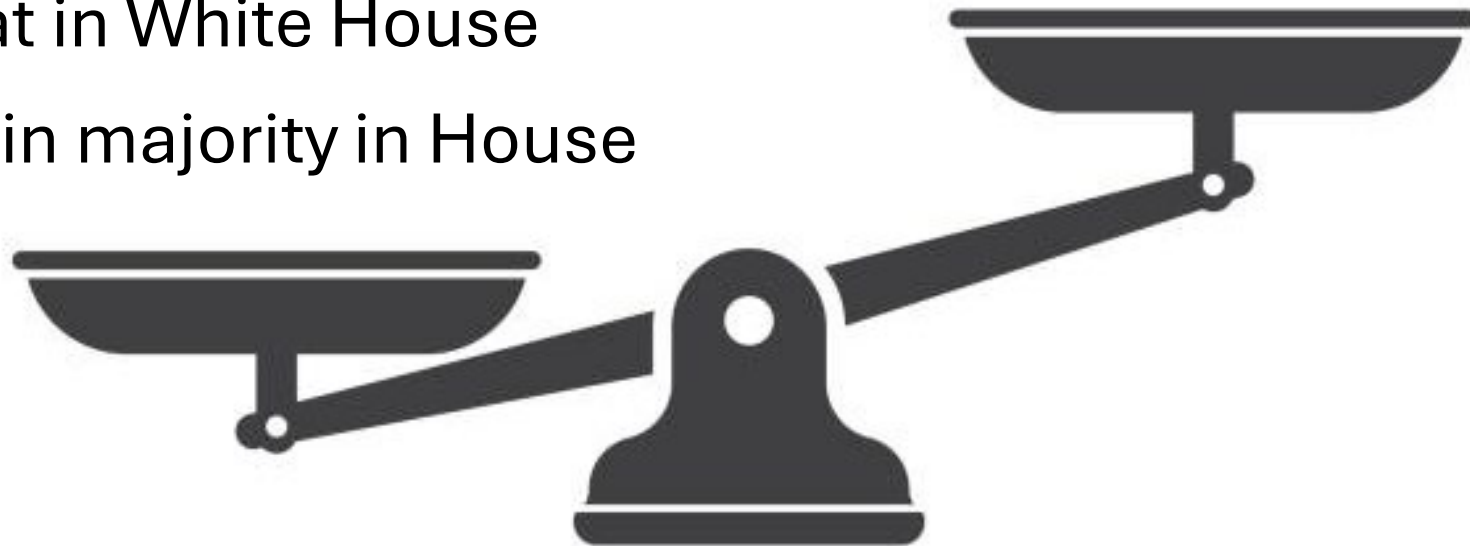
The New Balance of the House



- Controlling variables:
 - Need 218 members for a majority
- Special elections:
 - February 13 (NY) – won by Tom Suozzi (D), will be sworn in 2/28
 - March 19 (CA)

House Leadership's Choice

- Democratically Controlled Senate
- Democrat in White House
- Razor-thin majority in House
- Conservative members pushing for more conservative policies





COMPETING SPENDING PROPOSALS

Program	FY 2023 Pres. Proposal	FY 2023 Final	FY 2024 Pres. proposal	House Bill	House bill vs. 2023 Final
Title I-A	\$37,281	\$19,088	\$20,536	\$3,682*	-80%
Title I-C	\$376	\$376	\$376	\$376	--
Title II	\$2,149	\$2,190	\$2,190	\$0	-100%
Title III	\$1,075	\$890	\$1,195	\$0	-100%
21 st Century	\$1,310	\$1,330	\$1,330	\$1,330	--
Title IV-A/SSAE	\$1,220	\$1,380	\$1,405	\$1,380	--
IDEA Part B	\$16,259	\$14,194	\$16,259	\$14,194	--
CTE State Grants	\$1,355	\$1,430	\$1,473	\$1,430	--
AEFLA	\$739	\$729	\$759	\$729	--
CCDBG	\$7,562	\$8,021	\$9,000	\$8,021	--

Pushback in House Proposal

- “Approximately \$31 billion provided during the pandemic remains unspent and further investments will not be provided until these funds are used responsibly”
- Seeing proposals for targeted cuts to key formula programs for first time
 - Recissions to ESEA funding from prior year
 - Elimination of funding in Title II and Title III
- Policy riders
 - Prohibit use of funds for carrying out Title IX rule
 - Prohibit use of funds for implementing new “borrower defense” rule
 - Limits ability to waive federal student loans
 - Holman Rule limitations for agency head salaries

Progress So Far



- First CR to November 17th
- Second “laddered” CR with two deadlines:
 - January 19 for some agencies
 - February 2 for others (including ED)
 - One-year extension for Farm Bill
- Third “laddered” CR to early March
 - Some agencies to March 1st
 - Some agencies to March 8th

The Plan from Here

- Considering a long-term “date change” CR
- But concerns arose about implications for 1% debt ceiling cut, sequestration
- Individual appropriations bills at approximately FY 2023 levels
 - Recissions of IRS funding, COVID relief dollars not obligated by federal government
 - Incorporating debt ceiling agreement funding levels
 - May include a 1% across-the-board cut?
- Sticking points: policy riders, SNAP changes, foreign aid

Other Legislative Activity

- Whole Milk for Healthy Kids Act → UC blocked in Senate
- ESRA reauthorization → awaiting action on Senate floor
- WIOA Reauthorization → awaiting action on House floor
- Short-term Pell → awaiting action on House floor
- Congressional Review Act
- FY 2025 appropriations cycle starts this month!



Administration

U.S. DEPARTMENT OF
EDUCATION

Regulations Coming Up

(per fall 2023 Regulatory Agenda)

- IDEA → January 2024
 - Parental consent for insurance/Medicaid billing
- Title IX rules → March 2024
 - Including education program and activities, athletics rules
- FERPA → May 2024
 - Minor changes to definition of “educational record,” technical changes
- Impact Aid → June 2024
 - Technical corrections and updates
- UG → July 2024
 - Final rule updating program administration
- Various higher education authorization and quality rules



The Congressional Review Act

- Sets requirements for agencies to share information with Congress
- Among other things, allows Congress to pass a resolution of disapproval to strike federal rules
- Must be passed within 60 legislative days of rule's publication
- Rush to get final rules out before they would be subject to overturning under CRA
 - 60 legislative days → July 2024(ish)
- Requires signature by President to take effect
- Prohibits agency from ever issuing “substantially similar” regulations on same legislative text

ESSER/GEER/EANS Deadlines

Program	Obligation deadline	(Automatic) 120-day liquidation deadline	(Up to) 14-month liquidation extension
ESSER I	Sep. 30, 2022	Jan. 30, 2023	Apr. 1, 2024
ESSER II	Sep. 30, 2023	Jan. 29, 2024	Mar. 31, 2025
ARP ESSER	Sep. 30, 2024	Jan. 28, 2025	Mar. 31, 2026
GEER I	Sep. 30, 2022	Jan. 30, 2023	Apr. 1, 2024
GEER II	Sep. 30, 2023	Jan. 29, 2024	Mar. 31, 2025
CRRSA EANS	Sep. 30, 2023	Jan. 29, 2024	Mar. 31, 2025
ARP EANS	Sep. 30, 2024	Jan. 28, 2025	Mar. 31, 2026

Late Liquidation for ARP

- State may submit requests on behalf of itself and/or its LEAs
 - States must submit a required [template spreadsheet](#)
 - No firm deadline for applying but recommend December 30, 2024
 - Verify grantees are “low-risk” (as defined by the State), NEW: can ensure grantee capacity for proper liquidation
 - Ensure funds were obligated in a timely way
 - Maintain supporting documentation, NEW: list examples in template
 - [Updated guidance](#) (January 2024):

Late Liquidation for ARP, cont.

- NEW: Provide “explanation” for late liquidation and describe measures taken to liquidate in a timely fashion
- NEW: “Grantees must provide a cover letter that explains how the ARP ESSER and/or EANS liquidation extension request contributes to the acceleration of academic success for students, including those furthest from opportunity and with the greatest need.”
 - “In particular, we encourage grantees to highlight investments in three of the evidence-based strategies that can significantly contribute to improved student performance:
 - increasing daily student attendance;
 - providing high-quality tutoring; and
 - increasing access to before, after, and summer learning and extended learning time.”

Commitments Beyond the Liquidation Period

- ED: “Generally, it is not good stewardship of Federal funds or prudent business practice to prepay for services that will extend many years into the future.”
- “However, under limited circumstances where a grantee or subgrantee timely obligates ESSER or GEER funds, ESSER- or GEER-funded activities may continue for a reasonable time beyond the liquidation period (including an approved late liquidation period).” (ED FAQ E-3.d Dec 2022)

Commitments Beyond the Liquidation Period

- Factors to document:
 - Timely obligations and liquidations during approved periods.
 - That the activities would be allowed to extend beyond the liquidation period under applicable State and local rules.
 - That the activities constitute a reasonable and necessary use of Federal funds; and
 - That prudent business practices would support the continued activities for the length of time proposed.
- Services may extend no longer than 4 years after obligation deadline
- The SEA, LEA, or subgrantee would be responsible for returning to the Federal government the cost of any services that were paid with Federal funds but not received.

Further Guidance . . .

- Memo June 26th, 2023: <https://oese.ed.gov/files/2023/06/TA-on-activities-continuing-beyond-E3d.pdf>
- Meant to address the concerns about findings, but:
 - “It is possible that the Department would sustain an audit finding that services continuing beyond the obligation and liquidation period are unallowable if, for example, the duration that the services extended was lengthy or unreasonable; the cost is not reasonable or necessary; State law, internal controls, or prudent business practices would not support the continuation of the services; or the contemporaneous documentation from the time does not support the decision to use ESSER, GEER, or EANS funds for services that extend beyond the obligation and liquidation period”

When Obligation Occurs

If the obligation is for -	The obligation is made -
Acquisition of real or personal property	On the date on which the State or subgrantee makes a binding written commitment to acquire the property.
Personal services by an employee	When the services are performed.
Personal services by a contractor	On the date on which the State or subgrantee makes a binding written commitment to obtain the services.
Performance of work other than personal services	On the date on which the State or subgrantee makes a binding written commitment to obtain the work.
Travel	When the travel is taken.

34 CFR § 76.707

But What about Monitoring and Audits?

- Remember limitations on obligation period
- Expected reviews:
 - State monitoring, audits
 - Congressional oversight
 - Were funds spent in a timely way? On measures that addressed greatest needs? On controversial topics
 - ED Oversight
 - Fiscal and programmatic

Davis-Bacon Guidance

- Applies to federally-funded construction and building projects over \$2000, including those funded under ESSER
- Grantees must:
 - Ensure contractors pay prevailing wages for various positions
 - Collect and review weekly certified payroll, and
 - Post a Davis-Bacon poster on job site



Davis-Bacon Guidance

- ED says (February 9, 2024) they will waive requirements “in limited circumstances,”
 - e.g. “where an LEA did not include contract clauses and/or applicable wage determinations when the contract was awarded because at that time the Federal education funds had not yet been approved for that project.”
- Letter describing
 - Need for waiver
 - Any specific injustice or undue hardship that may result from the retroactive application
 - Any factors that mitigate the potential harm, like documentation that workers were paid at least prevailing way
- Request goes from LEA → State → ED → DOL

Planning for the future

- Federal stimulus funds will go away
 - No plan for reviving them
- Appropriations levels will stabilize or slightly decrease
- Ensure you can spend time-limited ESSER funds ASAP
 - But make sure expenditures can be appropriately liquidated
- Carry over Title I as needed (subject to limitations)
- Prepare for additional admin expenses to support closeout and reporting after obligation period.
- Grantees should be careful not to use federal funds to fill in the gaps → raises concerns about fiscal tests

Carryover

- Title I Carryover limited to 15% of total allocation (Sec. 1127(b) of ESEA)
 - And only if LEA's allocation is at least \$50,000
 - Equitable services carryover may not be unilaterally reduced
 - Must provide services to eligible children at that school or others, only if no more are needed may it be carried over into the general pool the following year.
 - Limitation may be waived by the SEA once every three years if reasonable and necessary
 - Waiver received in FY 2020 as part of additional flexibility allows SEAs to now waive limitation for FY 2023 funds.

ESSER enforcement?

- Expect more information on how ED will enforce (and expect States to enforce):
 - ESSER set-asides (e.g. learning loss)
 - Other ESSER requirements (timeliness, allocability)
 - MOEquity
 - Davis-Bacon
 - Transition out of ESSER
- No record of consequences to draw from so YMMV!
 - Corrective action plan
 - “adjusted” allocation
 - Withholding/recission of administrative funds
 - Repayment of funds

The Courts



Charter Schools Case

- North Carolina charter school requires different uniforms for male and female students because of belief that girls are “fragile vessels” and need to be shown courtesy/chivalry
- Argues the Equal protection clause does not apply because it is a private entity, not a “state actor”
 - Expand on Maine voucher case argument that private recipients of federal aid are not State actors
- Supreme Court DENIED CERT → will not take up the case, 4th Circuit decision stands



Charter Schools Case 2.0?

- Oklahoma Governor approved opening of a virtual Catholic charter school, St. Isidore of Seville
- Group of parents sued State of Oklahoma saying it:
 - Violated charter laws by approving a school that wouldn't attest to nondiscrimination,
 - Violated a state constitutional provision that public schools be operated "free from sectarian control," and
 - Violated a state statute requiring that charter schools be "nonsectarian."
- Secondary lawsuit from OK AG saying school violates establishment clause

Charter Schools Case 2.0?

- Oklahoma case asks which 1st Amendment right is more important:
 - Parents' right to freely express religion
 - Constitutional prohibition on public entities endorsing religion (establishment clause)
 - Following on Maine case (2022)
- Implications for federal funding/recognition of charter schools
- Won't be in Supreme Court this term, but maybe fall 2024!

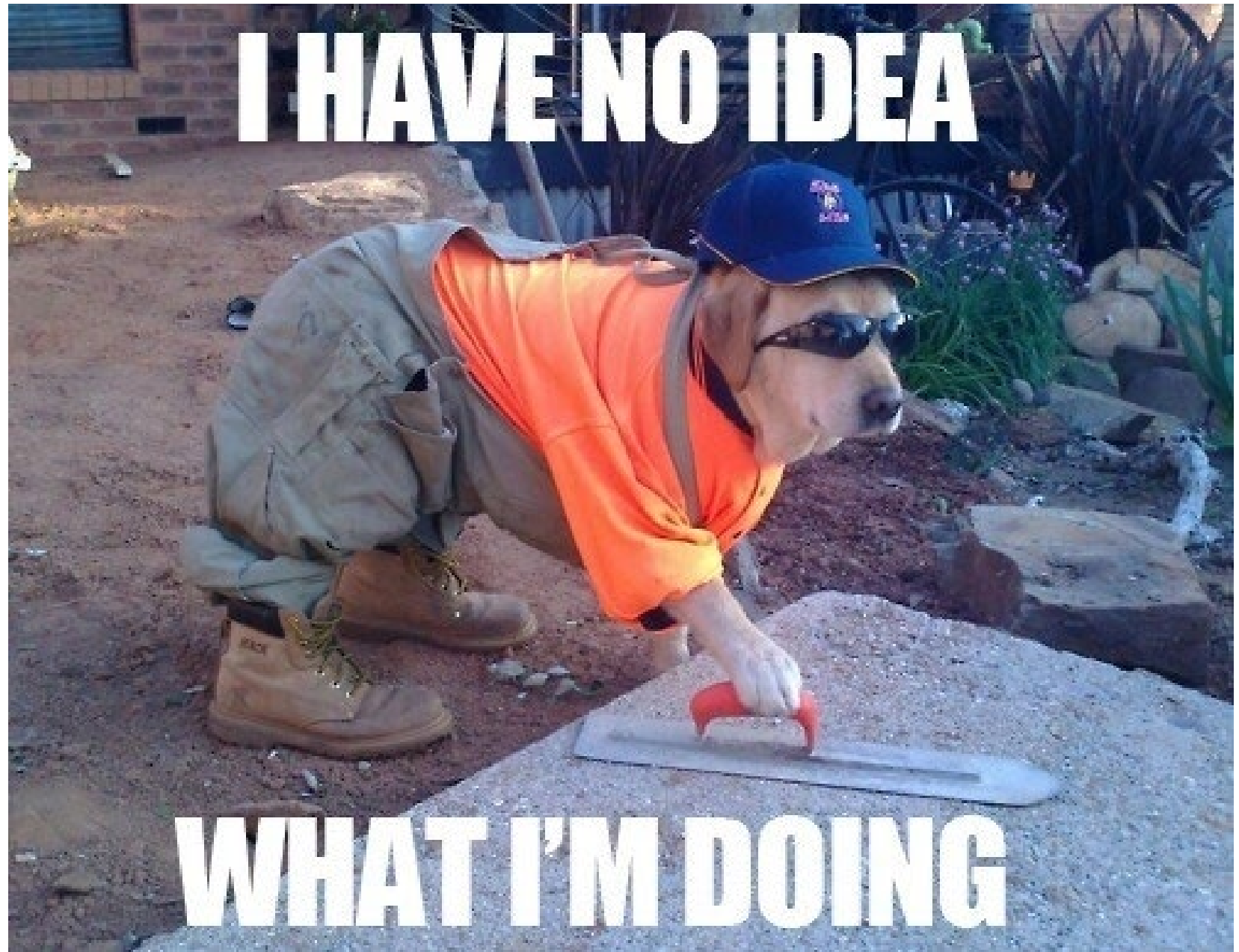
Chevron Deference?

- Loper-Bright Enterprises/Relentless (2024) challenges deference
- Canon of statutory interpretation stemming from Chevron v. NRDC (1984) suggests that agency is subject-matter expert and their interpretation should get deference.
- Magnuson-Stevens Act the National Marine Fisheries Service the power to “implement a comprehensive fishery management program.” NMFS issued a rule that requires the fishing industry to host/transport federal observers and pay for the cost (about \$700/day).
- Objections:
 - Agencies change their mind too much
 - Federal law can’t be ambiguous
 - If it is, then agency can’t be the one to decide what it means

Chevron Deference?

- If agencies can't decide what ambiguous laws mean, less teeth for agency action
 - Specifically in Title IX, e.g., or higher education
- Who then decides? Do we wait for congress to be more specific? Is it up to States?

Questions



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