Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. email	Elena Kagan to Diana Fortuna. Subject: here it is [partial] (1 page)	01/31/1997	P5 1545
001b. email attachment	Campaign Finance Reform [partial] (1 page)	01/31/1997	P5 1546
002. email	Elena Kagan to Ron Klain re Friday Night (1 page)	02/04/1997	Personal Misfile

COLLECTION:
Clinton Presidential Records
Automated Records Management System (Email)
OPD ([From Elena Kagan])
OA/Box Number: 250000

FOLDER TITLE:
[01/27/1997-02/04/1997]

Kim Coryat
2009-1006-F
kc207

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:31-JAN-1997 15:42:38.00

SUBJECT: here it is

TO: Diana Fortuna (CN=Diana Fortuna/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TEXT:
==========ATTACHMENT 1==========
ATT CREATION TIME/DATE: 0 00:00:00.00

TEXT:
Unable to convert ARMS_EXT:[ATTACH.D48]MAIL47466503G.016 to ASCII,
The following is a HEX DUMP:

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CDFDD23DA12FFBF5944B2F38B9DCF15424F9C656FA558772FB457D5EAB1F42E7D5449DB11611BF
EF7785BF5C622E42B9A99EC2EA83B2E43AD37760B53299623A1499DE95C1E7448DB9F4F600F41B
AF3D8318D3CFDA65A0AA24B4388C0572FA29774C7411A780908EFC97354136A5CBEDC3DDD5400E
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0953346CF59B3ED4457B3A62AD294645A077D31C9640CCAEE41171BF55C51CAEA3A8361097FFCB
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11F7E983F5F7D0EB29F7A1B104BFC748C18FC299C1AE775BCD2D8FAF532354F5F155583F1961D8
8AF0C7FFF902001000000000000000000000008230100000000B010000E002000000055040000000
4E000000EB03000009250100000006000000390400000B3002000000280000003F040000087701
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750072006900650072002000310032007000740000000000000031003000630070006900000028
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00F41A5C121A090000110900000060001811000010240054006900 6D006500730020004E006500
7700000052006F006D0061006E000000000000002600F41A5C121A090000110900000060001811
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000B01008B14360054006900 6D006500730020004E006500770020005 2006F006D0061006E0020
0052006500670075006C006100720000000000000000DD0A10008301040003000200311000D

movie Stand and Deliver --helped to take and pass Advanced Placement courses in Calculus when most people didn't even think they could learn algebra, to realize that we can set high expectations for all of our students.

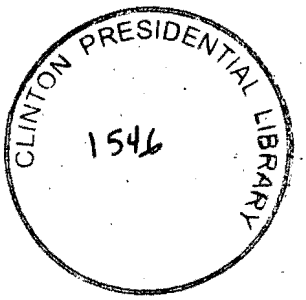
What we have learned from these tests is that the countries that outperform us do so because of what happens in the classroom, much more than what happens outside of it. They have high expectations for their students. They have a challenging curriculum that is focused on a few topics each year. They teach in depth, so that students really understand the material. There is no reason in the world that we can't do that in every school in this country, no matter where it is.

Question: *What is your view on the ongoing ebonics debate? Is this a good way to help African-American students learn English? Should federal funds for bilingual education or Title 1 be available for this?*

I am opposed to using federal funds to teach ebonics. I agree with Secretary Riley, who said several weeks ago that teaching ebonics is the wrong way to go about helping children reach high standards. All students need to learn to speak Standard English.

If there is one good thing that has emerged from this debate it is the renewed attention to the need to improve minority achievement in our schools. That is the real issue we need to focus on.

Note to the President:
Please be aware that Secretary Riley will be participating in a conference on minority achievement being organized by Jesse Jackson, to be held at the end of February. The conference does not focus on ebonics, but it has gained attention in the context of the ebonics debate. While the Education Department has declined to cosponsor the conference, it is likely that it will provide some financial support for it.



Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Elena Kagan to Sarah Wilson et al. re: President Clinton nominates Charles R. Wilson, William Joseph Haynes, Jr. [partial] (1 page)	05/27/1999	P6/b(6)
002. email	Elena Kagan to Bruce Reed re: Stanford Law and Policy Review [partial] (1 page)	06/07/1999	P6/b(6)
003. email	Elena Kagan to Bruce Reed re: reponses to letters on racial profiling [partial] (1 page)	06/08/1999	P6/b(6)
004a. email	Elena Kagan to Sarah Wilson et al. re: New Senate Form (1 page)	06/11/1999	P2, P5, P6/b(6)
004b. email attachment	Form (35 pages)	06/11/1999	P2, P5, P6/b(6)
005. email	Elena Kagan to Steven Reich et al. re: Questions (1 page)	06/11/1999	P2 1548
006. email	SSN (Partial); DOB (Partial) (1 page)	06/14/1999	P6/b(6)

COLLECTION:
Clinton Presidential Records
Automated Records Management System [Email]
OPD ([From Elena Kagan])
OA/Box Number: 250000

FOLDER TITLE:
[05/26/1999-06/14/1999]

Bevin Maloney
2009-1006-F
bm113

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

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RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:11-JUN-1999 14:49:28.00

SUBJECT:

TO: Steven Reich (CN=Steven Reich/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

CC: Sarah Wilson (CN=Sarah Wilson/OU=WHO/O=EOP @ EOP [UNKNOWN])
READ:UNKNOWN

CC: Eric S. Angel (CN=Eric S. Angel/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

CC: Mark Childress (CN=Mark Childress/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TEXT:
As you requested, here are the two possibly relevant questions:

Have you to your knowledge ever been under federal, state, or local investigation for a possible violation of either a civil or criminal statute or administrative agency regulation? If so, give full details. Has any organization of which you were an officer, director, or active participant ever been the subject of such an investigation with respect to activities within your responsibility? If so, give full details.

Have you ever been the party (whether plaintiff, defendant, or in any other capacity) to any litigation?

You and Mark should talk after you've had an opportunity to review them. Many thanks.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Elena Kagan to Ron Klain. Subject: gossip (1 page)	02/05/1996	P6/b(6)
002. email	Elena Kagan to Ron Klain. Subject: Jobs (1 page)	02/05/1996	P6/b(6)
003. email	Elena Kagan to Ron Klain. Subject: gossip (1 page)	02/05/1996	P6/b(6)
004. email	Elena Kagan to Jennifer O'Connor. Subject: [letter] (1 page)	02/12/1996	Personal Misfile
005. email	[Elena Kagan] to Kumiki Gibson at 17:24:00.00. Subject: STOMP (1 page)	02/14/1996	Personal Misfile
006. email	[Elena Kagan] to Kumiki Gibson at 17:24:50.01. Subject: STOMP (1 page)	02/14/1996	Personal Misfile
007. email	Elena Kagan to Jack Quinn and Kathleen Wallman. Subject: [representation] (1 page)	02/20/1996	P5 1549
008. email	Elena Kagan to Ron Klain. Subject: [career] (1 page)	03/06/1996	Personal Misfile
009. email	Elena Kagan to Kathleen Wallman. Subject: attached [partial] (1 page)	03/08/1996	P6/b(6)
010. email	Elena Kagan to Ron Klain. Subject: ambition (1 page)	03/10/1996	P6/b(6)
011. email	Elena Kagan to Ron Klain re: ambition (1 page)	03/11/1996	P6/b(6)

COLLECTION:
Clinton Presidential Records
Automated Records Management System (Email)
WHO ([From Elena Kagan])
OA/Box Number: 500000

FOLDER TITLE:
[2/5/1996 - 3/11/1996]

Kara Ellis
2009-1006-F
ke776

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
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RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan (KAGAN_E) (WHO)

CREATION DATE/TIME:20-FEB-1996 18:13:26.62

SUBJECT: Paula Jones representation

TO: Jack M. Quinn (QUINN_J) (WHO)
READ:NOT READ

TO: Kathleen M. Wallman (WALLMAN_KM) (WHO)
READ:20-FEB-1996 18:25:43.59

TEXT:
Richard Bernstein from Sidley & Austin called me today, "in the interests of complete 100% disclosure," to make sure we knew that Sidley represents Tyson and Blair in the Espy investigation. Neither Rex Lee nor Bernstein has anything to do with that representation.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Elena Kagan to Cheryl Mills re: Lunch 17:39:51.49 (1 page)	05/14/1996	Personal Misfile
002. email	Elena Kagan to Cheryl Mills re: Lunch 16:28:50.11 (1 page)	05/14/1996	Personal Misfile
003. email	Elena Kagan to Elena Kagan re: Appt. request - Lessig, Larry [partial] (1 page)	05/22/1996	P6/b(6)
004. email	Elena Kagan to Jack Quinn and Cheryl Sweitzer. Subject: jones brief et al. (1 page)	05/22/1996	P5 1550
005. email	Elena Kagan to Todd Stern re: letters (1 page)	05/28/1996	P6/b(6)
006. email	Elena Kagan to Elena Kagan re: Appt. request - Behan, Catharine [partial] (1 page)	05/29/1996	P6/b(6)
007. email	Elena Kagan to Todd Stern re: letters (1 page)	05/30/1996	P6/b(6)
008. email	Elena Kagan to Elena Kagan re: Appt. request - Ramo, Roberta [partial] (1 page)	06/03/1996	P6/b(6)
009. email	Elena Kagan to Elena Kagan re: Eggemeier, Tom and others 18:38:41.69 [partial] (1 page)	06/04/1996	P6/b(6)
010. email	Elena Kagan to Elena Kagan re: Eggemeier, Tom and others 18:40:35.37 [partial] (1 page)	06/04/1996	P6/b(6)
011. email	Elena Kagan to Kathleen Wallman and Stephen Neuwirth re: Contacts Problem (1 page)	06/05/1996	P5 1551

COLLECTION:
Clinton Presidential Records
Automated Records Management System [Email]
WHO ([From Elena Kagan])
OA/Box Number: 500000

FOLDER TITLE:
[05/14/1996 - 06/05/1996]

Dana Simmons
2009-1006-F
ds289

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan (KAGAN_E) (WHO)

CREATION DATE/TIME:22-MAY-1996 18:17:50.07

SUBJECT: jones brief et al

TO: Jack M. Quinn (QUINN_J) (WHO)
READ:22-MAY-1996 18:51:43.47

CC: Cheryl L Sweitzer (SWEITZER_C) (WHO)
READ:22-MAY-1996 18:39:24.16

TEXT:
I just wanted to let you know about a conversation I just had with Jane. She called to ask me to talk to Ab before he appeared on crossfire. (Ab is appearing against Hank Brown; Bill Press hadn't known this when I talked with him.) I mentioned to her that you and I had just finished talking with Press. After a long silence, she said we had a "right-hand-left-hand problem." I asked her what she meant. She said that at the same time we were talking to Press, she had been trying (and almost succeeding) in convincing the producer not to do this subject. That was about it for the conversation.
I realize now that I may have really fucked up in not mentioning to you that she spoke to me this morning to find out what the situation was. She said that press calls were coming in, which they usually referred to Bennett, but that Bennett was on a plane and they didn't know what the situation was. I gave her the gist of the situation; at her request, I also gave her a copy of the petition. (Now I realize that that may be where the leg affs guy got it from; is that what you were concerned about?) I figured when Bennett reappeared and issued his statement that that would naturally finish whatever involvement she and her folks had. I am really really sorry about not telling you about this. Frankly, it just didn't occur to me as at all important until this recent right-hand-left-hand conversation. God, do I feel like an idiot.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan (KAGAN_E) (WHO)

CREATION DATE/TIME: 5-JUN-1996 13:39:13.02

SUBJECT: contacts problem

TO: Kathleen M. Wallman (WALLMAN_KM) (WHO)
READ: 5-JUN-1996 14:55:55.18

TO: Stephen R. Neuwirth (NEUWIRTH_S) (WHO)
READ: 5-JUN-1996 14:31:57.68

TEXT:
I just got a call from Tom Jensen at CEQ presenting a contacts problem. Do you remember the guy who was arrested by the Park Police for kayaking in the Potomac during the peak of the flood? It turns out he is champion kayaker who has just qualified for the Olymics and stands a good chance of winning a gold. He was prosecuted in federal court (in Maryland?), but the judge threw out the charge on some kind of jurisdictional grounds. The US Attorney is now deciding whether to take an appeal from that ruling.

Prior to the dismissal, Tom (without telling anyone in the Counsel's office) contacted John Schmidt and Peter Koppelman (a deputy in the environmental division) and asked them to look into the matter. Schmidt and Koppelman both talked to the US Attorney and decided not to interfere with what he was doing. The attorneys for the kayaker apparently came to see Tom a few days ago. They proposed a deal of sorts: the US attorney would drop the appeal and the kayaker would agree to become a kind of Mr. Potomac -- a kind of spokesman for environmental and safety issues on the river. Tom thinks this would be a neat thing for the Potomac. He also thinks it will be politically embarassing to prosecute this Olympics kayaker (essentially for practicing his sport) at the very time the kayaker is winning a gold medal (on a course not in Georgia, but in Tennessee). Accordingly, Tom wants to initatè a discussion on this issue involving CEQ, Interior, and Justice. (I'm not sure how and why it suddenly occurred to him to call us first.)

I told Tom I would pass all this on to the people in this office who handled these questions. I also told him that they probably would not approve any such contact.

What next?

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Elena Kagan to Kathleen M. Wallman. Subject: out today. [partial] (1 page)	09/22/1996	P6/b(6)
002. email	Elena Kagan to Jack M. Quinn and Kathleen M. Wallman. Subject: [reply brief]. (1 page)	09/24/1996	P5 1552
003. email	Elena Kagan to Kenneth S. Apfel. Subject: Re: calif food stamp proposal. (1 page)	09/25/1996	P6/b(6)
004. email	Elena Kagan to Kathleen M. Wallman. Subject: staff meeting tomorrow. (1 page)	09/26/1996	P6/b(6)

COLLECTION:
Clinton Presidential Records
Automated Records Management System [Email]
WHO ([From Elena Kagan])
OA/Box Number: 500000

FOLDER TITLE:
[09/17/1996 - 10/4/1996]

Adam Bergfeld
2009-1006-F
ab818

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
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RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan (KAGAN_E) (WHO)

CREATION DATE/TIME:24-SEP-1996 11:09:24.24

SUBJECT: jones reply brief

TO: Jack M. Quinn (QUINN_J) Autoforward to: Cheryl L Sweitzer
READ:24-SEP-1996 11:20:08.17

TO: Kathleen M. Wallman (WALLMAN_KM) (WHO)
READ:24-SEP-1996 14:46:05.45

TEXT:
Our reply brief in the Jones case is due on October 9. I have been in touch with Geof, David, and Amy on the substance, and I am happy with the direction they seem to be taking. But of course it's hard to tell much about a brief without reading it -- so we need to get a copy of the brief in time for us to comment meaningfully on it.
Amy, who (under Bob's direction) is still in control of timing and mechanics, has said she is "aiming" to get us a draft on Oct. 2, but cannot promise to do so. I think Oct. 2 would be fine, but anything later is too near the weekend to give us reasonable time to comment. I have told this to Amy quite emphatically. I think it might make sense for you, Jack, to call up Bob and reiterate this message. In the end, Amy does what Bob says, and the only way we can be sure to get the brief on Oct. 2 is to make Bob commit to it.
Let me know if you decide to call and what response you get.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. email	Elena Kagan to Sara Wilson et al. Subject: tax answer. (1 page)	04/17/1999	P2, P5, P6/b(6)
001b. email attachment	ABA Personal Data Questionnaire - tax question. (1 page)	04/17/1999	P2, P5, P6/b(6)
002a. email	Elena Kagan to Sara Wilson et al. Subject: tax question. (1 page)	04/19/1999	P2, P5, P6/b(6)
002b. email attachment	ABA Personal Data Questionnaire - tax question. (1 page)	04/19/1999	P2, P5, P6/b(6)
003a. email	Elena Kagan to Sara Wilson et al. Subject: tax question. (1 page)	04/19/1999	P2, P5, P6/b(6)
003b. email attachment	ABA Personal Data Questionnaire - tax question. (1 page)	04/19/1999	P2, P5, P6/b(6)
004. email	Elena Kagan to Christopher Ashley. Subject: Form. (1 page)	04/20/1999	P2 1554
005a. email	Elena Kagan to Sara Wilson et al. Subject: new aba form. (1 page)	04/20/1999	P2, P5, P6/b(6)
005b. email attachment	ABA Personal Data Questionnaire. (26 pages)	04/20/1999	P2, P5, P6/b(6)
006a. email	Elena Kagan to Sara Wilson et al. Subject: aba. (1 page)	04/21/1999	P2, P5, P6/b(6)
006b. email attachment	ABA Personal Data Questionnaire. (27 pages)	04/21/1999	P2, P5, P6/b(6)
007. email	Elena Kagan to Christopher Ashley re: Form (1 page)	04/21/1999	P6/b(6)

COLLECTION:
Clinton Presidential Records
Automated Records Management System [Email]
WHO ([From Elena Kagan])
OA/Box Number: 500000

FOLDER TITLE:
[04/17/1999 - 04/21/1999]

Whitney Ross
2009-1006-F
wr67

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

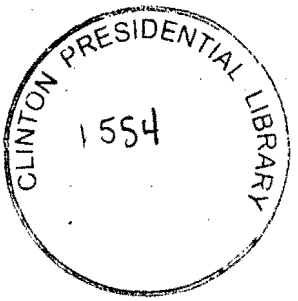
CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:20-APR-1999 21:01:41.00

SUBJECT: Re: Financial Disclosure Form

TO: Christopher L. Ashley (CN=Christopher L. Ashley/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TEXT:
Nope -- with Harvard. Didn't I list that? If not, I made a mistake.



Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Elena Kagan to Laura Emmett. Subject: Birthday. (3 pages)	05/20/1999	Personal Misfile
002a. email	Elena Kagan to Sara Wilson et al. Subject: Senate Form. (1 page)	05/21/1999	P2, P5, P6/b(6)
002b. email attachment	Biographical Information. (35 pages)	05/21/1999	P2, P5, P6/b(6)
003. email	Elena Kagan to Karen Tramontano and Bruce Reed. Subject: Re: Racial Profiling. (1 page)	05/24/1999	P6/b(6)
004. email	Elena Kagan to Sarah Wilson et al. Subject: President Clinton Nominates Charles R. Wilson, William Joseph Haynes, Jr. [partial] (1 page)	05/27/1999	P6/b(6)
005. email	Elena Kagan to Steven Reich et al. Subject: [blank] (1 page)	06/11/1999	P2 1655
006a. email	Elena Kagan to Sarah Wilson et al. Subject: new senate form. (1 page)	06/11/1999	P2, P5, P6/b(6)
006b. email attachment	Biographical Information. (35 pages)	06/11/1999	P2, P5, P6/b(6)

COLLECTION:
Clinton Presidential Records
Automated Records Management System [Email]
WHO ([From Elena Kagan])
OA/Box Number: 500000

FOLDER TITLE:
[05/19/1999 - 06/11/1999]

Whitney Ross
2009-1006-F
wr69

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

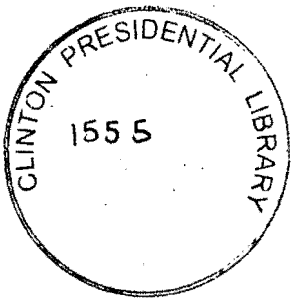
Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:11-JUN-1999 14:49:28.00



SUBJECT:

TO: Steven Reich (CN=Steven Reich/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

CC: Sarah Wilson (CN=Sarah Wilson/OU=WHO/O=EOP @ EOP [UNKNOWN])
READ:UNKNOWN

CC: Eric S. Angel (CN=Eric S. Angel/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

CC: Mark Childress (CN=Mark Childress/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TEXT:
As you requested, here are the two possibly relevant questions:

Have you to your knowledge ever been under federal, state, or local investigation for a possible violation of either a civil or criminal statute or administrative agency regulation? If so, give full details. Has any organization of which you were an officer, director, or active participant ever been the subject of such an investigation with respect to activities within your responsibility? If so, give full details.

Have you ever been the party (whether plaintiff, defendant, or in any other capacity) to any litigation?

You and Mark should talk after you've had an opportunity to review them. Many thanks.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Elena Kagan to Sarah Wilson et al. Subject: Two q&a. (1 page)	06/15/1999	P2, P5 1556
002. email	Elena Kagan to Minyon Moore. Subject: Re: President Clinton nominates three to Federal Bench. (1 page)	06/17/1999	Personal Misfile
003. email	Elena Kagan to Robert Johnson. Subject: Re: Congratulations. (1 page)	06/17/1999	Personal Misfile
004. email	Elena Kagan to Edward Hughes. Subject: Re: President Clinton nominates three to Federal Bench. (1 page)	06/17/1999	Personal Misfile
005. email	Elena Kagan to Beverly Barnes. Subject: Re: President Clinton nominates three to Federal Bench. (1 page)	06/17/1999	Personal Misfile
006. email	Elena Kagan to Michael Waldman. Subject: re: mazel tov. (1 page)	06/17/1999	Personal Misfile
007. email	Elena Kagan to Sean Maloney. Subject: Re: President Clinton nominates three to the Federal Bench. (1 page)	06/17/1999	Personal Misfile
008. email	Elena Kagan to Jordan Tamagni. Subject: Congratulations. (1 page)	06/17/1999	Personal Misfile
009. email	Elena Kagan to Eric Angel. Subject: suggested new paragraph. (1 page)	06/17/1999	P2, P5 1557
010. email	Elena Kagan to Jonathan Young. Subject: Re: Greetings. (1 page)	03/15/2000	Personal Misfile

COLLECTION:
Clinton Presidential Records
Automated Records Management System [Email]
WHO ([From Elena Kagan])
OA/Box Number: 500000

FOLDER TITLE:
[06/11/1999 - 03/15/2000]

Whitney Ross
2009-1006-F
wr70

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
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b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:15-JUN-1999 11:09:49.00

SUBJECT: Two q&a

TO: Sarah Wilson (CN=Sarah Wilson/OU=WHO/O=EOP @ EOP [UNKNOWN])
READ:UNKNOWN

TO: Eric S. Angel (CN=Eric S. Angel/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: Mark Childress (CN=Mark Childress/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TEXT:

Here are my proposed answers to the two "legal proceedings" questions. Of course, feel free to edit:

8. Have you to your knowledge ever been under federal, state, or local investigation for a possible violation of either a civil or criminal statute or administrative agency regulation? If so, give full details. Has any organization of which you were an officer, director, or active participant ever been the subject of such an investigation with respect to activities within your responsibility? If so, give full details.

I have never been under federal, state, or local investigation for a possible violation of any statute or regulation. I understand that the Executive Office of the President (my employer for four years) is currently the subject of an investigation by the Committee on Resources of the House of Representatives with respect to a matter -- the Warner Creek timber sale -- that came to my attention while I was an Associate Counsel to the President.

10. Have you ever been the party (whether plaintiff, defendant, or in any other capacity) to any litigation?

Attorneys with the Office of Independent Counsel Carol Bruce interviewed me in May 1999 to determine whether I had information relevant to their investigation of Department of Interior Secretary Bruce Babbitt. The questioning concerned two Indian gaming issues of which I had some knowledge by virtue of my work as an Associate Counsel to the President. It is my understanding that the Office does not intend to interview me further.

To the best of my knowledge, I have never been a party or otherwise involved in any other litigation or legal proceeding.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:17-JUN-1999 12:50:06.00

SUBJECT: suggested new paragraph

TO: Eric S. Angel (CN=Eric S. Angel/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TEXT:
How's this to go right after the list of my writings?

I note here that the Chicago Council of Lawyers, on whose Board of Governors I served from 1993 to 1995, routinely issues reports on judicial candidates and nominees, as well as on other matters of interest to the legal community in Chicago. I do not recall writing or editing any of these reports, although I did participate in the evaluation process for judicial candidates that formed the basis of at least one report.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Diana M. Fortuna to Elizabeth E. Drye et.al. Subject: departure. (2 pages)	01/23/1997	Personal Misfile
002. email	Jodie R. Torkelson to Elena Kagan. Subject: [hire] (1 page)	01/24/1997	P6/b(6)
003. email	Michael Cohen to Elena Kagan. Subject: press conference q's & a's. [partial] (1 page)	01/24/1997	P5 1558

COLLECTION:
Clinton Presidential Records
Automated Records Management System [Email]
OPD ([Kagan])
OA/Box Number: 250000

FOLDER TITLE:
[01/23/1997 - 01/24/1997]

Adam Bergfeld
2009-1006-F
ab814

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

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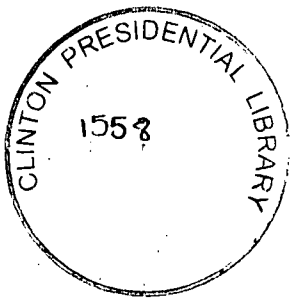

good way to help African
□
-American students learn English? Should
federal funds for bilingual education or Title 1 be available for
this?

? I am opposed to using federal funds to each ebonics. I agree with Secretary Riley, who indicated several weeks ago that teaching ebonics is the wrong way to go about helping children reach high standards. All students need to learn to speak Standard English.
? If there is one good thing that has emerged from this debate it is the renewed attention to the need to improve minority achievement in our schools. That is the real issue we need to focus on.

PRINTER FONT 12_POINT_COURIER_OBLIQUE
Note to the President:
Please be aware that Secretary Riley will be participing in a conference on minority achievement being organized by Jesse Jackson, to be held at the end of February. The conference does not focus on ebonics, but it has gained attention in the context of the ebonics debate. While the Education Department has declined to cosponsor the conference, it is likely that it will provide some financial support for it.
========== END ATTACHMENT 1 ==========

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. email	From Eddie Correia. Subject: [Single Sex Schools] [partial] (1 page)	08/12/1998	P5 1560
001b. email attachment	From Eddie Correia. Subject: [Single Sex Schools] [partial] (5 pages)	08/12/1998	P5 1561

COLLECTION:
Clinton Presidential Records
Automated Records Management System [Email]
OPD ([Kagan])
OA/Box Number: 250000

FOLDER TITLE:
[08/12/1998-08/13/1998]

Van Zbinden
2009-1006-F
vz160

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
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b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
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b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Edward W. Correia (CN=Edward W. Correia/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME:12-AUG-1998 11:10:27.00

SUBJECT: Single sex education

TO: Michael Cohen (CN=Michael Cohen/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TEXT:

Here's a memo I prepared on the single sex education investigation in case you would like some background for tomorrow's meeting (11:30 in Chuck's office).

========== ATTACHMENT 1 ==========
ATT CREATION TIME/DATE: 0 00:00:00.00

TEXT:
Unable to convert ARMS_EXT:[ATTACH.D22]MAIL46633762Z.226 to ASCII,
The following is a HEX DUMP:

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6861738064697363726D696E61746564806F6ED0011500000B00090001B00400000000012015

August 12, 1998

MEMORANDUM TO: CHARLES RUFF

FROM: EDDIE CORREIA

SUBJECT: Title IX and Single Sex Schools

The Department of Education is nearing the conclusion of its investigation of a possible violation of Title IX by New York City in its operation of a school limited to girls. In addition, Senator Kay Bailey Hutchison has requested OCR's views on her legislation to create an exemption from Title IX for certain types of single sex educational programs. Both these developments suggest that we review the administration's policy in this area.

Background

In 1997 New York established the Young Women's Leadership School, a single sex school for girls in grades 7-12 located in East Harlem. The stated purpose of the school is to create an environment in which some girls will have a better chance to improve their academic performance. Math and science are emphasized; tutors are made available; and there is an emphasis on increasing self-esteem. There is an open admissions policy, and the students represent a wide range of academic abilities. The school is one of a number of specialized alternative public schools in New York, such as those for the performing arts and math and science. The establishment of the school was prompted by a grant from a private individual. While there has been no formal assessment of the program, there are indications that attendance is high and the students perform better than comparable students across the city.[1] The concern is that, unlike all other public schools in New York City, the school admits only girls.

OCR has had extensive discussions with city officials about the fact that the school might violate Title IX. In the course of these discussions, OCR has obtained information about the city's

[1] See Susan Estrich, Time to Give Single Sex Education a Chance, Houston Chronicle, May 21, 1998. She writes that the attendance at the school is 92%, and 90% of the students are at or above grade level, compared to 50% city-wide.

justification for the school and its rationale in establishing the school only for one gender. Secretary Riley intends to talk directly with the New York Superintendent of Schools, and he would like our guidance as to the applicable legal standards and administration policy generally. This memorandum summarizes the key legal and policy issues.

What Law Applies?

There is no doubt that the Equal Protection Clause applies. However, there is some uncertainty whether Title IX applies, since it does not cover the admissions policies of elementary and secondary schools. OCR's position is that this provision excludes institutions only if equivalent or comparable opportunities are made available for each gender, e.g., two equivalent high schools, one for each sex. If, on the other hand, a state operates a well-funded, well-staffed high school open only to boys, and a poorly funded, poorly-staffed high school open only to girls, OCR concludes that Congress did not intend to preclude application of Title IX's basic bar on gender discrimination. I agree with this analysis. Since we face the question of a possible constitutional violation whether or not Title IX applies, the answer to this statutory interpretation question is not dispositive.

Our Approach to Gender Classifications

The issues raised by this investigation require an examination of our fundamental approach to gender classifications. In VMI the administration advocated that the Court apply the same level of scrutiny to race and gender classifications. However, the Court declined the invitation and used the phrase exceedingly persuasive justification to describe justifications for gender classifications. It also cited the traditional formulation of intermediate scrutiny -- a classification must advance an important state interest and be substantially related to the state's goal.

Whatever the precise standard adopted by the Court in VMI, there is no doubt that the city would have a substantial burden to justify the single sex policy in litigation. However, we are not a court. We are not obligated to impose the same burden now that a court would if it had to apply the Equal Protection Clause. Instead, as in any decision involving prosecutorial discretion, our obligation is to advance the public interest, given all the relevant considerations. Consequently, we can decide not to sue the city even if it has not "proven" certain facts, or if they cannot be established one way or the other. If we take the position that the city must definitively establish the answer to certain questions about education policy --

In VMI, the compensatory rationale was obviously not a possibility. (It rarely will be when women are disadvantaged.) The diversity argument was rejected on two grounds. First, most of the Court concluded that diversity was not the actual purpose of the state in establishing VMI. Second, even aside from the actual purpose, one way diversity is not enough. If the opportunity is truly unique, then the members of the other gender are disadvantaged unless they can take advantage of something comparable. The state's proffered comparable alternative, Mary Baldwin, was far inferior in staffing, funding and other characteristics.

In contrast to VMI and Hogan, New York has a much better argument for the comparable opportunities rationale. The city offers many educational opportunities that are open to boys with the same basic objectives -- improving academic performance, increasing self esteem, and increasing the likelihood of successfully entering the workforce. While these programs for boys do not take place in a single sex setting, it is clear that the city is not motivated by an animus against boys, that boys are disadvantaged in any significant sense, and that the school does not impose a stigma on girls. Instead, the city offers a program that appears to benefit girls, that does not burden boys, and that could be undermined if boys were admitted.

There is also an argument for the compensatory rationale in this case, though I think it is a weaker one. The requirements for assessing compensatory gender classifications are more flexible than in race cases. Moreover, there is considerable evidence that many girls do have problems learning math and science in traditional settings. We do not know whether this is because of long-term discrimination, rigid teaching techniques, or some other factors. It is conceivable that the city has traditionally used educational approaches that disadvantaged female students, but we have little or no evidence on this point. Thus, if we endorse a remedial rationale for this school, the remedy is really addressing a host of institutional and social factors for which the city is not responsible.

We should not take the position that the demanding requirements of Adarand should apply to remedies for gender classification. (For example, some of the strongest arguments against I-200 in Washington are that it would end certain education and training programs for women that might not be viewed as narrowly tailored to address specific past discrimination.) However, under the circumstances presented here, I do not believe we would be wise to emphasize the compensatory rationale given the lack of evidence on this point. Trying to justify the school as remedial could require stretching the concept of substantially related remedies too far.

Conclusion

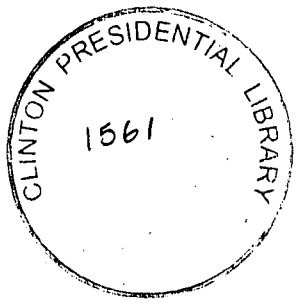
There are several possible outcomes of single sex educational programs. They can benefit mostly girls, and not boys, or vice versa. They can work well for both genders, or they can work poorly for both. In fact, we know very little about which of these possibilities is correct. It is likely that some programs work for some members of each gender under different circumstances, but this is simply an area where we need to know much more. (One thing we can have confidence about -- current coed programs, particularly in large city districts, are often abysmal.)

Assume there is evidence that a single sex educational program works well for many girls, but not particularly well for many boys. A state decides to use its scarce resources to establish the program only for girls and that the program seems to work well. It cannot (or refuses) to establish a similar program for boys but it attempts to offer the same basic benefits to boys in a coed setting. Assume also that there is no stigma associated with the program, and that there is no stereotype associated with the school because girls attend by choice. Under these circumstances, would we insist that the state close the school for girls? What would we be accomplishing? In an effort to vindicate some abstract (and incredibly rigid) view of equal protection, we would have succeeded in depriving girls of a program that could benefit them without helping boys, or anyone else for that matter.

This may very well be the case here. Arguably, the only "unique" aspect of the Leadership School is that education is offered in a single sex setting. Not only do we have research that shows that single sex education may provide a particular benefit to girls, we have actual experience with this school that shows it is working. Given the state of knowledge, New York could reasonably conclude that it prefers to devote scarce resources to offering a program to girls that appears to work, and to attempt to achieve the same basic goals for boys in some other way. Again, we are not a court. We do not have to subject the city to the same burden of proof requirements that it would face in litigation. Instead, we can consider the benefits of this program to the girls themselves and the benefit to everyone else from the experiment.

I recommend that the Secretary make an effort to resolve this matter with the city by suggesting that it take steps to establish a more directly comparable program for boys in a coed setting. If it agrees, I recommend that we simply close the case and commend the city for its actions. If it disagrees, I recommend that we still close the case. Our explanation should be that, under all the circumstances,

boys are not disadvantaged and the program offers promising academic benefits for girls. Therefore, we have decided to evaluate the school and take no further action at this time. The nation has a stake in learning what works, and the Leadership School provides an opportunity for us to do just that.



Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. email	Edward Correia to Michael Cohen and Elena Kagan re Single Sex Education [partial] (1 page)	08/12/1998	P5 1563
001b. email attachment	memo re Single Sex Schools [partial] (4 pages)	08/12/1998	P5 1564

COLLECTION:
Clinton Presidential Records
Automated Records Management System (Email)
WHO ([Kagan])
OA/Box Number: 500000

FOLDER TITLE:
[08/12/1998-08/17/1998]

Kim Coryat
2009-1006-F
kc203

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Edward W. Correia (CN=Edward W. Correia/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME:12-AUG-1998 11:10:27.00

SUBJECT: Single sex education

TO: Michael Cohen (CN=Michael Cohen/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TEXT:
Here's a memo I prepared on the single sex education investigation in case you would like some background for tomorrow's meeting (11:30 in Chuck's office).

==========ATTACHMENT 1==========
ATT CREATION TIME/DATE: 0 00:00:00.00

TEXT:
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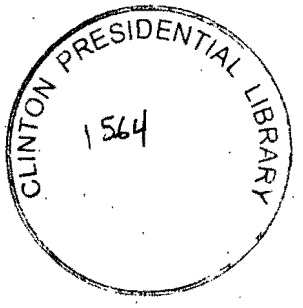

August 12, 1998

MEMORANDUM TO: CHARLES RUFF

FROM: EDDIE CORREIA

SUBJECT: Title IX and Single Sex Schools

The Department of Education is nearing the conclusion of its investigation of a possible violation of Title IX by New York City in its operation of a school limited to girls. In addition, Senator Kay Bailey Hutchison has requested OCR's views on her legislation to create an exemption from Title IX for certain types of single sex educational programs. Both these developments suggest that we review the administration's policy in this area.

Background

In 1997 New York established the Young Women's Leadership School, a single sex school for girls in grades 7-12 located in East Harlem. The stated purpose of the school is to create an environment in which some girls will have a better chance to improve their academic performance. Math and science are emphasized; tutors are made available; and there is an emphasis on increasing self-esteem. There is an open admissions policy, and the students represent a wide range of academic abilities. The school is one of a number of specialized alternative public schools in New York, such as those for the performing arts and math and science. The establishment of the school was prompted by a grant from a private individual. While there has been no formal assessment of the program, there are indications that attendance is high and the students perform better than comparable students across the city.[1] The concern is that, unlike all other public schools in New York City, the school admits only girls.

OCR has had extensive discussions with city officials about the fact that the school might violate Title IX. In the course of these discussions, OCR has obtained information about the city's justification for the school and its rationale in establishing the school only for one gender. Secretary Riley intends to talk directly

[1] See Susan Estrich, Time to Give Single Sex Education a Chance, Houston Chronicle, May 21, 1998. She writes that the attendance at the school is 92%, and 90% of the students are at or above grade level, compared to 50% city-wide.

with the New York Superintendent of Schools, and he would like our guidance as to the applicable legal standards and administration policy generally. This memorandum summarizes the key legal and policy issues.

What Law Applies?

There is no doubt that the Equal Protection Clause applies. However, there is some uncertainty whether Title IX applies, since it does not cover the admissions policies of elementary and secondary schools. OCR's position is that this provision excludes institutions only if equivalent or comparable opportunities are made available for each gender, e.g., two equivalent high schools, one for each sex. If, on the other hand, a state operates a well-funded, well-staffed high school open only to boys, and a poorly funded, poorly-staffed high school open only to girls, OCR concludes that Congress did not intend to preclude application of Title IX's basic bar on gender discrimination. I agree with this analysis. Since we face the question of a possible constitutional violation whether or not Title IX applies, the answer to this statutory interpretation question is not dispositive.

Our Approach to Gender Classifications

The issues raised by this investigation require an examination of our fundamental approach to gender classifications. In VMI the administration advocated that the Court apply the same level of scrutiny to race and gender classifications. However, the Court declined the invitation and used the phrase exceedingly persuasive justification to describe justifications for gender classifications. It also cited the traditional formulation of intermediate scrutiny -- a classification must advance an important state interest and be substantially related to the state's goal.

Whatever the precise standard adopted by the Court in VMI, there is no doubt that the city would have a substantial burden to justify the single sex policy in litigation. However, we are not a court. We are not obligated to impose the same burden now that a court would if it had to apply the Equal Protection Clause. Instead, as in any decision involving prosecutorial discretion, our obligation is to advance the public interest, given all the relevant considerations. Consequently, we can decide not to sue the city even if it has not "proven" certain facts, or if they cannot be established one way or the other. If we take the position that the city must definitively establish the answer to certain questions about education policy -- when the experts tell us there are no clear answers -- we could be preventing local governments from conducting valuable educational experiments. Not only could we be depriving the students in these institutions from excellent educational opportunities, we would be depriving educators all over the country from learning what works.

In contrast to VMI and Hogan, New York has a much better argument for the comparable opportunities rationale. The city offers many educational opportunities that are open to boys with the same basic objectives -- improving academic performance, increasing self esteem, and increasing the likelihood of successfully entering the workforce. While these programs for boys do not take place in a single sex setting, it is clear that the city is not motivated by an animus against boys, that boys are disadvantaged in any significant sense, and that the school does not impose a stigma on girls. Instead, the city offers a program that appears to benefit girls, that does not burden boys, and that could be undermined if boys were admitted.

There is also an argument for the compensatory rationale in this case, though I think it is a weaker one. The requirements for assessing compensatory gender classifications are more flexible than in race cases. Moreover, there is considerable evidence that many girls do have problems learning math and science in traditional settings. We do not know whether this is because of long-term discrimination, rigid teaching techniques, or some other factors. It is conceivable that the city has traditionally used educational approaches that disadvantaged female students, but we have little or no evidence on this point. Thus, if we endorse a remedial rationale for this school, the remedy is really addressing a host of institutional and social factors for which the city is not responsible.

We should not take the position that the demanding requirements of Adarand should apply to remedies for gender classification. (For example, some of the strongest arguments against I-200 in Washington are that it would end certain education and training programs for women that might not be viewed as narrowly tailored to address specific past discrimination.) However, under the circumstances presented here, I do not believe we would be wise to emphasize the compensatory rationale given the lack of evidence on this point. Trying to justify the school as remedial could require stretching the concept of substantially related remedies too far.

Conclusion

There are several possible outcomes of single sex educational programs. They can benefit mostly girls, and not boys, or vice versa. They can work well for both genders, or they can work poorly for both. In fact, we know very little about which of these possibilities is correct. It is likely that some programs work for some members of each gender under different circumstances, but this is simply an area where we need to know much more. (One thing we can have confidence about -- current coed programs, particularly in large city districts, are often abysmal.)

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works well for many girls, but not particularly well for many boys. A state decides to use its scarce resources to establish the program only for girls and that the program seems to work well. It cannot (or refuses) to establish a similar program for boys but it attempts to offer the same basic benefits to boys in a coed setting. Assume also that there is no stigma associated with the program, and that there is no stereotype associated with the school because girls attend by choice. Under these circumstances, would we insist that the state close the school for girls? What would we be accomplishing? In an effort to vindicate some abstract (and incredibly rigid) view of equal protection, we would have succeeded in depriving girls of a program that could benefit them without helping boys, or anyone else for that matter.

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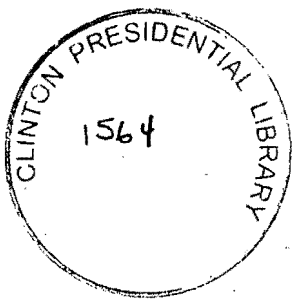
I recommend that the Secretary make an effort to resolve this matter with the city by suggesting that it take steps to establish a more directly comparable program for boys in a coed setting. If it agrees, I recommend that we simply close the case and commend the city for its actions. If it disagrees, I recommend that we still close the case. Our explanation should be that, under all the circumstances, boys are not disadvantaged and the program offers promising academic benefits for girls. Therefore, we have decided to evaluate the school and take no further action at this time. The nation has a stake in learning what works, and the Leadership School provides an opportunity for us to do just that.



Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. letter	From: Isabelle Pinzler To: Acting Solicitor General; RE: Mexican American Educators v. California (4 pages)	05/02/1997	P5 1565
002. letter	From: C. Gregory Stewart To: Walter Dellinger; RE: Mexican American Educators v. California (2 pages)	05/06/1997	P5 1566

COLLECTION:
Clinton Presidential Records
Domestic Policy Council
Elena Kagan
OA/Box Number: 14360

FOLDER TITLE:
Education - C-Best Test

Debbie Bush
2009-1006-F
db1534

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
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RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
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U.S. Department of Justice

Civil Rights Division

Education – Civil Rights Issues – C-Best Test

Office of the Assistant Attorney General

Washington, D.C. 20035

MAY 2 1997

MEMORANDUM FOR THE ACTING SOLICITOR GENERAL

Re: Association of Mexican-American Educators v. California, Nos. 96-17131, 96-17133 (9th Cir.)

I am writing to inform you of a conflict between the Equal Employment Opportunity Commission and the Department of Education as to whether the EEOC should file an amicus brief in the Ninth Circuit supporting plaintiffs-appellants on the merits in this case. The EEOC has furnished this Division a memorandum from its General Counsel to its Commissioners recommending participation in favor of plaintiffs-appellants. That memorandum is attached.[1/] The Department of Education, through its Office of General Counsel, has sent us a letter responding to EEOC's proposal. The Department of Education "strongly recommends against a Government challenge to the district court's opinion" and asserts that "if the Government were to participate, * * * it should do so in support of the State Defendants." The letter from the Department of Education is also attached. Briefing on the merits was completed on April 21, 1997. Accordingly, any amicus brief would have to be filed out-of-time.

In this case, the district court rejected plaintiffs' claim that a basic reading, writing, and mathematics skills test (the CBEST)[2/] given in California to applicants for public school teaching positions and certain other administrative jobs unlawfully discriminates in violation of Titles VI and VII of the Civil Rights Act of 1964 because it has a disparate impact on

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[1/] We understand that the Commissioners do not intend to vote on this matter until after receiving a response from the Department of Justice.

[2/] The CBEST, used since 1983, was developed by the Educational Testing Service, the organization that created the SAT. The CBEST is a pass-fail examination containing three sections — reading, writing, and mathematics. The reading and mathematics sections each contain 40 multiple-choice questions, while the writing component consists of two essays. The CBEST is administered six times a year, and there is no limit on the number of times a candidate may sit for the examination. A candidate may keep his or her best score on any given portion of the examination, and need only retake the sections failed.

African-Americans, Latinos, and Asians and is not job-related or required by business necessity. The district court, analyzing three content validity studies submitted by the State, concluded that the CBEST, while having a disparate impact on minorities, is lawful because it is job-related and justified by business necessity.

When the lawsuit was initially filed, the Employment Litigation Section of this Division investigated plaintiffs' claims. As a result of this investigation, the Division was prepared to file a pattern and practice complaint alleging that the State of California and its Commission on Teacher Credentialing (CTC) violated Title VII by requiring persons to pass the CBEST as a condition of obtaining a teaching or administrative position in the public schools. The views of the Division are set forth in the attached 1994 memorandum from the Assistant Attorney General to the Attorney General informing her that the Division intended to file a complaint. However, because the Department of Education objected, the Associate Attorney General requested the Division not to file the complaint and the Assistant Attorney General complied. DOE argued that the proposed lawsuit was inconsistent with the Administration's policy of setting standards to improve the quality of teaching and student performance.

The EEOC now recommends filing an amicus brief endorsing the concept of teacher testing, but arguing that the district court erred in concluding that the CBEST is job-related. It intends to file a brief in support of plaintiffs' on four specific points. It proposes to argue that the district court: (1) erred in allowing the superintendent to set a passing score on the written component of the examination that was higher than that recommended by professionals in the field; (2) erred in concluding that the state demonstrated content validity, that is, that the questions on the CBEST measure what the test specifications call for; (3) correctly concluded that the CBEST is not a licensing examination exempt from the requirements of Title VII; and (4) correctly concluded that the State and the CTC can properly be sued pursuant to Title VII even though teachers are hired by the school districts.

The EEOC's proposed arguments attacking the district court's findings regarding the validity of the CBEST and its passing scores do not address what this Division believes to be a major legal flaw in the district court's opinion. Indeed, this Division believes that if any amicus brief is to be filed, it should also challenge the district court's holding that the test need not have predictive validity. The district court's erroneous conclusion that the examination need not be predictive for each of the covered teaching and administrative positions is at least as vulnerable on appeal as its erroneous assumption that the individual test items actually measure certain skills. And

if the passing score on the written component of the examination is to be challenged, the equally vulnerable passing scores on the reading and mathematics components should be challenged as well. We are concerned that the EEOC's failure to address these broader issues will be interpreted by the court of appeals as a concession by the government that the district court correctly resolved these questions. We are also concerned that failure to address these issues leaves the impression that teacher tests are somehow exempt from the requirements applied to selection devices in other contexts.

Given both the lateness of the timing and the fact that the Division believes that if any brief were to be filed at all it would have to be considerably broader than the EEOC proposal, it appears unlikely that a brief can be filed.[1/]

Although the EEOC asserts in its memorandum (p. 2) that "[p]articipation as amicus in the Ninth Circuit does not require approval by the Department of Justice," it is clear that the EEOC has no authority to enforce Title VII against state and local governments. Rather, this authority belongs to the Department of Justice. The Office of Legal Counsel, in a March 1983 published opinion, correctly explained that the enforcement provisions of Title VII, 42 U.S.C. 2000e-5 and 6, and the legislative history of those provisions make clear that the EEOC's litigating authority under Title VII is limited to the enforcement of claims against private sector employers. See 7 Op. Off. Legal Counsel 57 (1983). Accordingly, we believe that the EEOC may not file an amicus brief in a Title VII case involving a public sector defendant without Justice Department approval.

Moreover, the EEOC lacks authority to decide independently whether to file an amicus brief in this case because its position conflicts with that of the Department of Education. Section 1-402 of Executive Order 12146, signed by President Carter in 1979, vests the Attorney General with authority to resolve inter-agency disputes regarding legal matters. Thus, the EEOC cannot proceed in this case without the approval of the Justice Department.

[1/] For your information, on April 7, 1997, the defendants filed a motion to dismiss in the court of appeals on Seminole grounds, arguing that Title VII does not contain an express abrogation of Eleventh Amendment immunity and that Title VI's express abrogation is invalid. On April 29, however, defendants moved to withdraw their motion to dismiss, without prejudice. Both motions are still pending.

Because I believe that Justice Department authorization is required, I am submitting this matter to you for a determination whether the EEOC should be permitted to file its proposed amicus brief.[4/]

nor DOS?

Isabelle Katz Pinzler
Acting Assistant Attorney General
Civil Rights Division

cc: Office of the Attorney General
Office of the Deputy Attorney General
Office of the Associate Attorney General
Office of the Assistant Attorney General,
Civil Division
Office of the General Counsel,
Equal Employment Opportunity Commission
Office of the General Counsel,
United States Department of Education

[4/] The line attorney assigned to the case is Lisa Stark (4-4491), and the reviewer is Dennis Dimsey (4-2195).

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
General Counsel

MAY - 6 1997

Walter Dellinger
Acting Solicitor General
U.S. Department of Justice
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Re: Recommendation of EEOC to Participate as Amicus Curiae in Mexican-American Educators v. California, Nos. 96-17131, 96-17133 (9th Cir.)

Dear Mr. Dellinger:

On May 2, 1997, the Civil Rights Division sent you a memorandum expressing its views on the Commission's proposal to participate as amicus curiae in this case. We wish to clarify our position on some of the points raised in that memorandum, and in the letter attached to it, from the Department of Education.

The Department of Education appears to agree with the Commission that the use of tests to improve academic standards and promote excellence in teaching must be done in accordance with the anti-discrimination objectives of Title VII, and that these goals are reconciled "by permitting schools only to use valid tests." DOE Letter at 2. The Department believes however, that because the district court generally articulated the correct legal standards the EEOC should not question the result in this case because the test "appears highly likely to be a valid measure of minimum teacher competence," because "it appears highly likely that the CBEST items measure the basic competency skills that the State set out to measure," and because "even if the State should have presented additional validity evidence, we could not support a challenge to what appears to be a valid test." Id. at 3 (emphasis added). In the Commission's view, appearances can be deceiving. The critical point from the perspective of Title VII enforcement, is that the State did not meet its burden of proving that the test items measure the identified skills or that the writing cutoff score was set by a professionally acceptable method. The judicial standards for test validation, which generally track the Uniform Guidelines on Employee Selection Practices (UGESP), outline the methods of establishing test validity. When a defendant fails to meet its burden of proving validity, we do not believe it is prudent to conclude that the test is nonetheless valid or that the EEOC should abstain from pointing out the failure of proof to the court of appeals.

The Civil Rights Division has the opposite concern--that the Commission's proposed amicus brief will not go far enough in attacking the district court's errors. As for the court's "erroneous conclusion that the examination need not be predictive for each of the covered teaching and administrative positions," Civil Rights Memorandum at 2, we agree that this conclusion is vulnerable on appeal. We have included an argument that the test must be job related for each position at issue, something the State did not attempt to demonstrate. The argument is not one that will assist the plaintiff class very much, since the class consists only

of applicants for teaching jobs, but we agree that it is an argument that should be advanced to demonstrate the legal defects in the district court's analysis. As for the more technical point that the test should have predictive validity, we agree that the district court's lack of concern about the absence of a correlation between performance on the test and success on the job is very troubling. However, since there are three different methods of establishing test validity--criterion-related, content, and construct validity, see 29 C.F.R. § 1607.5(A)--and the State chose to offer evidence proving the test's content validity, the absence of evidence of criterion-related validity, which is what predictive validity is, is not subject to a frontal challenge. We intend to include an argument in a footnote explaining that validity is a unitary construct and that, although the content validation used in this case does not have the same element of prediction of future job success that is found in a criterion-related validity study, the court's conclusion that it would not expect to see any correlation between successful performance on the test and on the job is tantamount to a finding that the test is not job-related for the positions in question.

The other issue the Civil Rights Division thinks the Commission's brief should address is the raising of the cutoff scores on the mathematics and reading tests. While we might add a footnote suggesting we think the court should not have endorsed the arbitrary increase in these passing scores over what the experts had recommended, we are reluctant to press the point because the appellants have not raised it on appeal. See, e.g., Swan v. Peterson, 6 F.3d 1373, 1383 (9th Cir. 1993) ("Generally, we do not consider on appeal an issue raised only by an amicus."). While exceptions to that rule exist, none of them are applicable here. Id. The Ninth Circuit's general aversion to allowing amicus to frame the issues for appeal, Sanchez-Trujillo v. INS, 801 F.2d 1571, 1581 (9th Cir. 1986), is supported by the corollary concern that issues not advanced by an appellant are deemed waived. See Maryland Cas. Co. v. Knight, 96 F.3d 1284, 1291 (9th Cir. 1996)(arguments not pressed by a party are considered waived).

Finally, we are concerned that the Civil Rights Division would suggest that the Commission should not file a brief because it is untimely. We originally intended to file by April 21, the date the appellants' reply brief was due, believing that the Court would accept the brief because it was at least partially responsive to the State's arguments (on coverage and whether the test is an employment test). To facilitate that timely filing, we sent our memorandum to the Civil Rights Division on April 2. It is unfortunate that the coordination efforts have taken this much time, but we do not think that the delay renders it fruitless to file a brief.

If you have any further questions, please contact Gwendolyn Young Reams, Associate General Counsel for Appellate Services.

Very truly yours,

C. Gregory Stewart

C. Gregory Stewart
General Counsel

cc: Isabelle Katz Pinzler
Steven Y. Winnick

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001. letter	From: Judith Winston To: Robert Kopp; RE: Helms v. Picard (3 pages)	02/02/1999	P5 1567
002a. memo	From: Barbara Underwood RE: Helms v. Picard (1 page)	09/28/1998	P5 1568
002b. memo	From: Paul Wolfson To: Solicitor General; RE: Helms v. Picard (12 pages)	09/25/1998	P5 1569
003. memo	From: Marty Lederman To: Randolph Moss; RE: Helms v. Picard (11 pages)	09/24/1998	P5 1570
004. briefing paper	Legal Brief for the Secretary of Education (33 pages)	10/1998	P5 1571

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UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE GENERAL COUNSEL

THE GENERAL COUNSEL

FEB 2 1999

Mr. Robert E. Kopp
Director
Civil Division-Appellate Staff
U.S. Department of Justice
Patrick Henry Building-Room 9002
601 D Street, N.W.
Washington, D.C. 20530

Re: Helms v. Picard, No. 97-30231 (5th Cir.)

Dear Mr. Kopp:

I am writing to recommend that the Department of Justice (DOJ) file a petition for certiorari in the United States Supreme Court in the above-captioned case. In its August 17, 1998 decision in this case, the U.S. Court of Appeals for the Fifth Circuit held unconstitutional the provision of instructional materials (other than textbooks), instructional equipment and library books for children attending sectarian schools in Jefferson Parish, Louisiana under Chapter 2 of Title I of the Elementary and Secondary Education Act (ESEA). The Court concluded that the loaning of these items to sectarian school students violated the Establishment Clause of the First Amendment and declared Chapter 2 "unconstitutional as applied in Jefferson Parish." On January 13, 1999, the Fifth Circuit denied the petition for rehearing and suggestion for rehearing en banc filed by DOJ.

The Fifth Circuit's decision adversely affects the provision of educational services for sectarian school students under Title VI of the ESEA (the successor program to Chapter 2) as well as Title III of the ESEA (the Technology for Education Act of 1994). Although Chapter 2 has been superseded by Title VI, with respect to the issues involved in this case, the new statute is not materially different from the Chapter 2 statute in effect when this lawsuit was commenced except that Title VI does not allow specifically for the purchase of instructional equipment (except for computer hardware). Title III authorizes funds to be used for a variety of technology-related purposes including computer hardware. Under both of these programs, students attending private schools are entitled to receive equitable services and benefits.

The Fifth Circuit's decision is in direct conflict with the Ninth Circuit's decision in Walker v. San Francisco Unified School District, 46 F.3d 1449 (9th Cir. 1995) which upheld similar Chapter 2 services for sectarian school students. I believe that the Ninth Circuit properly held that Chapter 2 is a neutral program serving both public and private school children without regard to religion and that the program does not have the primary

effect of advancing religion. While the Fifth Circuit concluded that the Supreme Court's decisions in Meek v. Pittenger, 421 U.S. 349, 363 (1975) and Wolman v. Walter, 433 U.S. 229, 250 (1977) were controlling, I believe that these cases are distinguishable. In contrast to the programs in Meek and Wolman that directly targeted significant aid only to private schools, Chapter 2 is a neutral statute that provides equal benefits to all school children and the overwhelming beneficiaries of the program attend public schools.

Furthermore, the Chapter 2 statute (now Title VI) and regulations contain specific protections against the use of these funds for religious purposes. The services, materials and equipment provided with Chapter 2 funds must be "secular, neutral and nonideological." 20 U.S.C. 7372(a)(1). Chapter 2 funds must supplement, and not supplant, the level of funds that, in the absence of Chapter 2 funds, would be made available for these purposes from "non-Federal sources." 20 U.S.C. 7371(b); 34 C.F.R. 299.8(a). Chapter 2 also requires that the control of all Chapter 2 funds and the title to material, equipment and property purchased with those funds must be in a public agency, and a public agency must administer the funds and property. 20 U.S.C. 7372(c)(1); 34 C.F.R. 299.9. In addition, the regulations specifically require the public agency to remove equipment and supplies that are provided in a private school if "[r]emoval is necessary to avoid unauthorized use of the equipment or supplies for other than the purposes of the program." 34 C.F.R. 299.9(d)(2). This Department is in the process of developing additional guidance that would clarify these requirements and recommend specific safeguards to ensure that these funds are used properly for secular educational purposes.

Significantly, Chapter 2 does not violate the criteria the Supreme Court currently uses to evaluate whether government aid advances religion. It "does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement." Agostini v. Felton, 117 S. Ct. 1997, 2016 (1997). Nor does the Chapter 2 program "reliev[e] sectarian schools of costs they otherwise would have borne in educating their students." Agostini, 117 S. Ct. 1997, 2013, quoting Zobrest v. Catalina Foothills School District, 509 U.S. 1, 12 (1993). The Fifth Circuit made no adverse findings with respect to the Chapter 2 program regarding any of these matters.

The Fifth Circuit's decision would have the effect of significantly limiting the options for providing Chapter 2 services for private school children. It also directly conflicts with the Ninth Circuit's decision in Walker. In light of these circumstances, and the strong legal arguments that can be presented in support of the program, I recommend that the DOJ file a petition for certiorari in this case. If you have any

questions or need further information, please contact Steve Freid of my staff at 401-6041.

Sincerely,

Judith A. Winston

U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

MEMORANDUM FOR THE SOLICITOR GENERAL

FROM: Barbara D. Underwood
Deputy Solicitor General

RE: Helms v. Picard, No. 97-30231 (5th Cir.)

DATE: September 28, 1998

I recommend REHEARING IN BANC. The Fifth Circuit has held that a federal program of financial aid to education (29 U.S.C. 7351(b)(2) violates the establishment clause because it provides for the purchase of instructional equipment and materials for use in religiously affiliated private schools. It is difficult to distinguish this program from the programs struck down in Meek v. Pittenger, 421 U.S. 349 (1975) and Wolman v. Walter, 433 U.S. 229 (1977), and for that reason OLC recommends proceeding directly to a petition for certiorari in which we ask the Court to modify the rules of Meek and Wolman. However, the Civil Division has offered two possible grounds for distinguishing those cases: (1) those cases involved statutes providing for aid only to private schools, whereas this one provides aid to all schools, public and private; (2) those cases involved services and materials that relieved the schools of their core responsibilities, whereas this one merely supplements ordinary costs of performing the educational function. Mr. Wolfson correctly notes that the first point cannot easily stand alone, because aid to private schools may be the equivalent of (and designed to correspond to) the public financing of public schools that is found in other statutes. But the two points are related, and reinforce each other. That is, a statute that provides aid to both private and public schools is probably providing aid that should count as "supplementary" (because the basic funding arrangements for public schools are normally found elsewhere in state law), while a statute aimed only at private schools might well be funding core educational functions that are financed for the public schools in different legislation. This federal statute provides aid that can fairly be characterized as a supplement, and -- consistent with that view -- provides aid to public and private schools alike.

This argument for distinguishing Meek and Wolman does not have a high probability of success with the Fifth Circuit en banc, but for the reasons set forth by Mr. Wolfson and the Civil Division, I think it is nevertheless worth making the argument to that court.

QUESTION PRESENTED

Whether Title VI of the Improving America's Schools Act of 1994, 20 U.S.C. 7351(b)(2), as applied in Jefferson Parish, Louisiana, violates the Establishment Clause because it provides for instructional equipment and materials, purchased at public expense, to be lent to religiously affiliated private schools.

STATEMENT

1. This is an Establishment Clause challenge brought to the application in Jefferson Parish, Louisiana, of 20 U.S.C. 7351(b)(2), part of Title VI of the Elementary and Secondary Education Act of 1965, as amended by the Improving America's Schools Act of 1994. (The provisions under challenge here were previously part of Chapter 2 of the Elementary and Secondary Education Act of 1965, which was comprehensively revised in 1994, and the program is referred to in the decisions below as Chapter 2). Title VI was enacted in 1994 as part of a comprehensive federal education statute. It provides federal financial assistance in block-grant form to local "innovative education program strategies," which covers a fairly broad array of programs. The federal funds may be used for eight different kinds of programs, specified at § 7351(b), including such matters as professional teacher development for use of technology, adult-literacy programs, "special education" programs, and gifted-and-talented programs. There is no requirement that a local education agency (LEA) use federal funds for all of these programs; rather, the LEA can design its own program, as long as it falls within one or more of the eight categories that are eligible for funding. Further, both the statute and Education Department guidance on Title VI emphasize flexibility, with the LEA's choice to be as unencumbered as possible by dictates from the federal and state governments.

Title VI requires that private, nonprofit schools, including religious schools, be allowed to participate in the benefits of the program.[1] Any LEA that receives federal funds, "after consultation with appropriate private school officials, shall provide for the benefit of such children in such schools secular, neutral, and

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[1] Actually, as the statute puts it, children enrolled in such private schools must be allowed to receive the benefits of the program, see 20 U.S.C. 7372(a)(1). The concept of the children, rather than the school, receiving the benefits of Title VI cannot be taken too literally, however, because Title VI permits funding for such matters as teacher-training.

nonideological services, materials, and equipment * * * as will assure equitable participation of such children in the purposes and benefits of this subchapter." 20 U.S.C. 7372(a)(1). Expenditures on children in private, nonprofit schools "shall be equal (consistent with the number of children to be served) to expenditures for programs" in public schools.

All funds must remain under the control of a public agency, and if those funds are used to purchase equipment and materials to be provided to a private school, title to all such equipment and materials must remain with the public agency. 20 U.S.C. 7372(c)(1). Thus, Title VI permits only the loan, and not the outright gift, of equipment or materials to a religious school. Funds received by a school authority or school, whether private or public, must be used only to supplement the level of funds that would, in the absence of federal funds, be made available from non-federal sources, and in no case may such funds be used to supplant non-federal funds that would otherwise be available. 20 U.S.C. 7371(b).

The Department of Education has only very limited regulations and guidance on Title VI, consistent with the emphasis on flexibility and local control. The regulations reemphasize the requirements that private schoolchildren participate on an equal and equitable basis with children at public schools, 34 C.F.R. 299.7(b), that services obtained with federal funds must supplement, not supplant, services that the private school would otherwise provide their schoolchildren, 34 C.F.R. 299.8(a), and also that the public agency must keep title to all property and equipment used for the benefit of private school children, 34 C.F.R. 299.9(a). In addition, the regulations require that the public agency "ensure that the equipment and supplies placed in a private school * * * are used only for proper purposes of the program." 34 C.F.R. 299.9(c)(1). See also Education Dept Guidance, p. 19.

2. One of the purposes for which Title VI funds may be used is to finance

> programs for the acquisition and use of instructional and educational materials, including library services and materials (including media materials), assessments, reference materials, computer software and hardware for instructional use, and other curricular materials which are tied to high academic standards and which will be used to improve student achievement and which are part of an overall education reform program[.]

20 U.S.C. 7351(b)(2). Although that provision sounds very open-ended, in practical effect it refers to (a) computer hardware and software, and (b) library materials (including library books and reference books, whether in traditional format or in new, computer-usable format, such as CD-ROM). Other forms of "instructional equipment," such as slide projectors, video projectors, tape players, television sets, and the like, were formerly eligible for funding under the old Chapter 2 (and therefore were at issue when this case was initiated), but are no longer covered under Title VI, as enacted and revised in 1994.

This case involves the implementation of § 7351(b)(2) in Jefferson Parish, Louisiana. For fiscal year 1986-87, the Parish received just over $660,000 in federal Chapter 2 (now Title VI) funds. About 32% of that, or $215,000, went to fund programs at private schools, and one may assume that the great majority of those were religiously affiliated schools. Of that amount, in turn, about $95,000 went to library materials, $16,000 went to "local improvement programs," and the rest (about $100,000) went to purchase instructional equipment for use at private schools. As explained above, however, most instructional equipment is no longer covered by the program, and only computer equipment can now be purchased.[2]

No money was ever transmitted to a private school by Jefferson Parish. Rather, the LEA purchased the equipment and then sent it (on loan) to the private schools. The public school authorities, not the Department of Education, is responsible for monitoring Title VI programs at private schools to make sure that they comply with the statute (including the requirements of secularity and neutrality), and the Department does not require anything specific in the way of monitoring. The LEA encourages, but does not require, private schools to sign pledges that they will use the materials only for secular uses. Occasionally, perhaps once every two years, officials of the LEA in Jefferson Parish make on-site visits to the private school to monitor actual use of the equipment and materials. The materials containing content, such as library books and reference material, are usually chosen from pre-

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[2] The evidence in this case indicates that "instructional materials purchased with Chapter 2 funds during 1986-87 and loaned to nonpublic, parochial schools reveals the following kinds of items: filmstrip projectors, overhead projectors, television sets, motion picture projectors, video cassette projectors, video camcorders, computers, printers, phonographs, slide projectors, etc." C.A. Op. 48. Except for computers, most of these could no longer be provided.

approved state lists (from which the public schools also get their materials) and screened by the LEA, at least superficially, to ensure that they are secular, neutral, and nonideological, as required by the statute. Nevertheless, the system was not foolproof, and at one point, the LEA had to recall 191 books from religious school libraries because they were inappropriate for funding under Chapter 2. See C.A. Op. 47-48.

3. Plaintiffs brought suit against the Secretary of Education and local school officials to challenge the constitutionality of Title VI, as applied in Jefferson Parish.[2] Plaintiffs relied heavily on Meek v. Pittenger, 421 U.S. 349, 362-366 (1975), and Wolman v. Walter, 433 U.S. 229, 248-251 (1977), in which the Supreme Court invalidated state statutes that authorized public authorities to lend instructional equipment (other than textbooks) to private schools (including religious schools), and (in Wolman) to the parents of students attending such schools. The government attempted to distinguish those two cases on two bases: first, the statutes invalidated in those cases furnished assistance only to private schools, whereas Title VI covers both private and public schools, and second, Title VI involves only supplementary assistance, and may not be used to supplant funding that schools would otherwise provide themselves.

The district court initially struck down the program, but then reversed itself, and granted summary judgment for the defendants. The district court followed the Ninth Circuit's decision in Walker v. San Francisco Unified School District, 46 F.3d 1449 (1995), which had upheld a similar Title VI/Chapter 2 program, and which had concluded that the precise holdings of Meek and Wolman did not govern because the Supreme Court had abandoned the jurisprudential basis of those decisions in favor of a principle requiring only neutrality as between secular and religious educational institutions.

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[2] Also at issue in this case is the constitutionality of Louisiana's special education statute, under which public school employees provide special-education services on the premises of both public and private schools. The program is very similar, although perhaps not identical to, the federal Title I program recently upheld by the Supreme Court in Agostini v. Felton, 117 S. Ct. 1997 (1997). Based on Agostini, the court of appeals upheld the program. See C.A. Op. 2-43. That issue does not involve the federal government, and will not be further discussed in this memo.

4. The court of appeals reversed, and struck down Title VI/Chapter 2 as applied in Jefferson Parish. C.A. Op. 43-63. The panel found the case squarely governed by Meek and Wolman, and rejected the Ninth Circuit's conclusion that those decisions were no longer good law (especially insofar as they drew a distinction between textbooks, which may, under Supreme Court precedent, be permissibly lent to religious schools, and instructional equipment, which may not). The court of appeals acknowledged that the Supreme Court "has instructed us confusingly," but nonetheless it concluded that "Meek and Wolman have squarely held that what the government is attempting to accomplish through Chapter 2, it may not do." C.A. Op. 55-56. Furthermore, the court observed, "[n]o case has struck down Meek or Wolman," and the Supreme Court has instructed that the courts of appeals may not anticipate the Supreme Court's overruling of one of its own decisions, but must continue to follow any squarely controlling Supreme Court precedent. C.A. Op. 56.

Meek and Wolman, the court found, were directly on point. Those cases and others draw boundary lines based on the character of the aid that is provided to religious schools. Purely secular textbooks may be provided, in part because their content can be readily determined in advance, but other materials -- ancillary "instructional materials" such as maps, globes, wall charts, as well as instructional equipment, such as slide projectors -- may not be so provided. In addition, the court of appeals noted, in Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646 (1980), the Court, although it upheld financial assistance to parochial schools in testing and grading standardized tests, reiterated that Meek does bar the loan of instructional materials to religious schools.

The court also rejected the Walker court's effort to distinguish Meek and Wolman on the ground that the statutes at issue in those cases provided for assistance only to private schools (mostly religious schools), and not also public schools, whereas Title VI gives assistance to both private and public schools. That point cannot be dispositive, the court stressed, because the statutes at issue in Meek and Wolman were designed with the specific purpose of providing equitable benefits to both public and nonpublic schoolchildren; there was no need for the statutes to provide assistance to public schoolchildren because they were receiving the instructional materials anyway, under the general provisions for public education.

In addition, the court rejected the suggestion that Agostini v. Felton, 117 S. Ct. 1997 (1997), eradicated the force of Meek and Wolman. "Agostini does, it is true, discard a premise on which Meek relied - i.e. that '[s]ubstantial aid to the educational

function of [sectarian] schools ... necessarily results in aid to the sectarian school enterprise as a whole. But Agostini does not replace that assumption with the opposite assumption; instead Agostini only goes so far as to 'depart[] from the rule ... that all government aid that directly aids the educational function of religious schools is invalid." C.A. Op. 61. Because Agostini "says nothing about the loan of instructional materials to parochial schools," the court declined to read it as overruling Meek or Wolman.

DISCUSSION

In my view, as I think in the view of most of the others in the government who have participated in this case, the court of appeals' decision is almost certainly compelled by the Supreme Court's decisions in Meek v. and Pittenger. There are two possibilities for distinguishing those cases, to be discussed below, but ultimately I think they will be of little avail in the Fifth Circuit. The question then is whether we should even attempt to seek rehearing en banc (since we do not want to be in the position of urging the Fifth Circuit to make untenable distinctions of, or deviations from, Supreme Court precedent), or whether we should proceed at this point to consider certiorari. Ultimately I recommend rehearing en banc because (1) we have one possible argument for distinguishing Meek and Wolman, (2) the question of whether to seek cert. is a very complex one, involving consideration of (a) the court of appeals decision's effect on other programs as well as this one, (b) the fact that the program struck down by the court of appeals has substantially changed since the record was complied in this case and the statute was amended, and (c) the possible relation of this case to the pending petition in the Court involving school vouchers (see Jackson v. Benson, No. 98-376 (filed Aug. 31, 1998)), and (3) we need to buy some time, since we cannot get an extension of time to seek cert. from Justice Scalia, who is the Circuit Justice for the Fifth Circuit.

1. The court of appeals was almost certainly correct in concluding that this case was governed by Meek and Wolman, at least as to most of the instructional equipment, although the question seems a bit closer as to library books. Meek involved a Pennsylvania statute, Act 195, that authorized the loan of instructional material and equipment (defined to include "periodicals, photographs, maps, charts, sound recordings, films, * * * projection equipment, recording equipment, and laboratory equipment," 421 U.S. at 355) directly to qualifying nonpublic schools in the state. The Court noted that the primary beneficiaries of Act 195 were parochial schools (75% of the schools receiving aid under Act 195 were religiously affiliated).

Referring to this as "massive aid" that was neither "indirect nor incidental," the Court stated that "it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools and then characterize Act 195 as channeling aid to the secular without providing direct aid to the sectarian." 421 U.S. at 365. Because the purpose of a church-related school is in large part to inculcate religious values, "Act 195's direct aid to [such schools], even though ostensibly limited to wholly neutral, secular instructional material and equipment, inescapably results in the direct and substantial advancement of religious activity, * * * and thus constitutes an impermissible establishment of religion." Id. at 366. Wolman followed Meek and extended it to invalidate an Ohio law that provided for the loan of similar materials directly to the students attending religious schools (and their parents), rather than the schools themselves. The Court found that distinction to be without a difference, and noted that the equipment "is substantially the same,[] will receive the same use by the students, [and] may still be stored and distributed on the nonpublic school premises." 433 U.S. at 250. Concurring in the judgment, Justice Powell observed that, although the Establishment Clause does not prohibit all aid to students attending sectarian schools, the case involved aid that could not be meaningfully distinguished from aid to the schools themselves, such as wall maps, charts, and classroom paraphernalia, "for which the concept of a loan to individuals is a transparent fiction." 433 U.S. at 264.

The character of most of the aid at issue in this case -- instructional equipment, including computer equipment -- is indistinguishable from the aid in Meek or Wolman, although it seems to me arguable that library books are more like textbooks, which under numerous Supreme Court decisions (including Meek and Wolman themselves) may be lent to students attending private schools, even if they are physically submitted to the private schools. The court of appeals disagreed on that point, though, and the factual question whether library books are more like textbooks (which are OK) or wall charts (which are not) does not strike me as worthy of further review. More important is the question whether Meek and Wolman can be successfully distinguished, such that we would have a plausible basis for en banc review.

Our first argument below for distinguishing those cases is that the specific statutes under review in Meek and Wolman provided for aid only to private schools, where as Title VI gives aid to private and public schools alike (or, rather, to the students attending them see note 1, supra). That is an accurate description

of the statutes at issue in Meek and Wolman, but it cannot be a basis for distinguishing those cases, because the purpose of those statutes was to bring private schools students into an equitable position with public school students, just as Title VI requires. In the Meek situation, Pennsylvania did not need to enact a statute to lend maps and wall charts to public schools because those schools were getting their maps and wall charts anyway under the general program of state and local support for public education. Moreover, in Meek, the Court, in upholding Pennsylvania's textbook loan program for private school students, rejected an effort to distinguish Board of Education v. Allen, 392 U.S. 236, 239 (1969), which had upheld a New York statute authorizing textbook loans to both private and public school students, and noted that "it is of no constitutional significance whether the general program is codified in one statute or two." 421 U.S. at 360 n.8. Thus, if this were our only argument, I would not recommend rehearing en banc.

More promising is our argument, which the court of appeals did not really address, that Title VI is different because its services must supplement, and not supplant, the services that schools, whether private or public, would otherwise provide. Indeed, this explains why Title VI specifically includes both private and public schools; since the federal government has no core authority to provide for public education, any aid to education must of necessity be supplemental to that provided by the states, even if that aid is to public schools. The states, however, routinely engage in support of public education, and so it may not be necessary for a state statute to specifically refer to public schools, if the purpose of the statute is to bring private schools into a position of equity with public schools.

The point to be made here is that the federal program, by its very nature, cannot relieve religious private schools of the core function of educating its students, and any aid it gives, by its very nature, must be supplemental -- whether the aid is given to the public schools or the private schools. Thus, there is little danger (as there was great danger in Meek and Wolman) that the government will shoulder most of the burden of educating the religious schools' students. Thus, we argued in our appellate brief (p. 18), that the Supreme Court, in Zobrest v. Catalina Foothills School District, 509 U.S. 1, 12 (1993), distinguished Meek on the basis that the religious schools in the latter case were "reliev[ed] * * * of an otherwise necessary cost of performing their educational function."

To me, this argument is sufficiently plausible to justify a rehearing en banc petition (especially since the court of appeals

did not really address it). Ultimately, however, I think it must fail, not because it is without merit, but because it seems to have made no difference to the Court in Meek or Wolman whether the aid was central or supplemental to the religious schools' core instruction. Meek rests on a broader rationale, that because the "teaching process [at religious schools] is, to a large extent, devoted to the inculcation of religious values and belief, * * * [s]ubstantial aid to the educational function of such schools * * * necessarily results in aid to the sectarian school enterprise as a whole." 421 U.S. at 366. Furthermore, the aid here does not appear to be truly "supplemental" in that it must be used for coursework other than the core instruction of the religious school; what is at issue here is additional resources. Thus, a computer provided under Title VI might presumably be used in math class or English class.

On the other hand, the Supreme Court, in Agostini, expressly disapproved the broadest reading of that principle, and noted that "we have departed from the rule * * * that all government aid that directly aids the educational function of religious schools is invalid." 117 S. Ct. at 2011. Thus, whether or not the Court has adopted a principle of neutrality, it might have adopted the view (especially in Zobrest, on which the Court relied heavily in Agostini) that Meek stands only for the proposition that the government may not relieve a religious school of a burden that it would otherwise be required to shoulder in order to educate its students -- not for the broader proposition that any aid that could be integrated into a religious school's coursework is impermissible (other than textbooks, of course, which are permissible).

2. Another reason to seek en banc is that the question whether to seek certiorari is a very difficult one that requires time for mature consideration. Favoring cert. is the fact that the court of appeals struck down a federal statute, at least "as applied," although it is not really clear what that means in this case. If the court of appeals' decision is read to hold that the government may not give computer hardware to religious schools (as I think it does hold), that probably does invalidate the statute in some of its applications, because the statute anticipates, although it does not require, the provision of computer equipment to private schools. Further, that holding has implications beyond Title VI. Title III of the same statute authorizes the Department of Education to make grants to state education agencies for technology improvements, and private schools are permitted participate in these programs (see 20 U.S.C. 8893). Further, there is a potential for an effect on the FCC's universal service internet program, under which schools (including nonprofit private, religious schools) must receive a discount from telecommunications carriers

for "access to advanced telecommunications and information services," 47 U.S.C. 254(b)(6), which discount is effectively subsidized by reimbursement to the telecommunications carrier from the federal government. See FCC Universal Service Order, p. 9083 (attached). That program requires telecommunications carriers to provide schools with a number of computer-based services at reduced price, including providing the actual wiring at the school for hookup to the internet.

On the other hand, if we consider certiorari, we must bear in mind that it will probably be necessary to ask the Court to overrule at least part of Meek and Wolman. Unless the supplant/supplement distinction made above is persuasive, it is difficult to see how the Court could uphold provision of computer hardware to religious schools without overruling those cases. It is possible that one might, even under Meek and Wolman, justify providing "locked" computer hardware (which can only be used to run certain software programs, screened in advance to guarantee their secular content) to private schools, but that would be a significant departure from the current program and might also impair Title III. (Such locked hardware was at issue in Walker, where the Ninth Circuit upheld the program.) Library books might, as discussed above, survive as being more like textbooks than computer hardware, but it is difficult to see going to the Supreme Court just on that issue.

We might, however, be able to persuade the Court that only a slight rejiggering of Meek and Wolman would be necessary to uphold the program in its current form. A core principle of the Establishment Clause may be that the government cannot furnish aid to private, religious schools when there is a realistic danger that such aid will be diverted to religious use, or where such aid would relieve the school from carrying out, under its own resources, its own instructional mission. Thus, we could argue, the Establishment Clause is not violated when the government gives supplementary aid to religious schools, and where that aid must be used for secular purposes only. In that circumstance, the government cannot be said to be advancing the core religious mission of the school, since it is not relieving the school of any of its core responsibility of providing secular education. This is not the principle for which Meek and Wolman stand, of course, but it is only a minor deviation from those cases, and it is a significantly different principle than the "neutrality" principle that, many claim, the Court is about to adopt. The real difference from Meek is that Meek presumes that even secular aid to religious schools advances their religious goals, whereas we would propose that the Court presume otherwise, but permit plaintiffs to show, on the facts of

particular cases, that there was a realistic danger that resources could be diverted to religious ends.

Furthermore, despite the Court's changes in position in the Establishment Clause, I emphasize that (even leaving aside the problem of stare decisis), there is no assurance that the Court will rule in our favor in this case, because of the slippery-slope problem. (If we can give a religious school computers, why not give it desks, blackboards, a new roof, etc.) And Justice O'Connor (the author of Agostini), who clearly is the key vote in this area, has not adopted the position that direct aid to a pervasively sectarian institution is acceptable; in her concurring opinion in Rosenberger v. Rector, University of Virginia, 515 U.S. 819, 846 (1995), she dissociated herself from the implication that the government may "use public funds to finance religious activities," and she noted that the decision "neither trumpets the supremacy of the neutrality principle nor the demise of the funding prohibition in Establishment Clause jurisprudence," id. at 852. Indeed, she concurred in the Court's decision in Grand Rapids School District v. Ball, 473 U.S. 373 (1985), insofar as that decision struck down a program that provided funding to parochial schools for instruction by parochial school teachers, notwithstanding that the coursework appeared to be secular in nature. See id. at 376-377, 399-400. It may be possible to distinguish this case from Grand Rapids but the basis for doing so is not immediately evident.[4]

The problem with going to the Supreme Court on this theory at this particular time is that there is absolutely nothing in the Education Department's regulations or guidance that realistically requires LEAs to make sure that the aid provided by Title VI is really supplemental and used for secular purposes only. In addition, it is important not to forget the "entanglement" problem that the Court considered but rejected in Agostini -- namely the danger of excessive supervision of religious schools by public school personnel. In Agostini, the danger was found to be trivial because the supplemental instruction at issue in that case, albeit carried out on the premises of private schools, was given only by public school personnel, who were subject to the supervision of other public school personnel. Here, there may indeed be an entanglement danger if the public school authorities are constantly looking over the shoulder of religious schools to make sure they are not using their Title VI equipment for religious purposes. There is something rather disturbing about having a public school

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[4] One possibility that might be explored would be to file a "hold" cert. petition, asking the Court to hold the case for the outcome of the voucher case, should cert. be granted there.

official sit in a religious school classroom to make sure that the biology class during which computers are used is not excessively religious in content.

Whatever is decided, I recommend that the Department of Education begin immediately to prepare something, be it regulation or guidance, to address these issues. It would be very difficult to go to the Supreme Court on a bare record in this case, involving a years-old program, largely superseded by changes in the statute in 1994, without any instruction from the Department giving content to the Establishment Clause concerns.

CONCLUSION

I recommend rehearing en banc.

U.S. Department of Justice

Office of Legal Counsel

Washington, D.C. 20530

MEMORANDUM [Corrected Version]

DATE: September 24, 1998

TO: Randolph D. Moss
Acting Assistant Attorney General
Office of Legal Counsel

FROM: Marty Lederman
Attorney Advisor

RE: Civil Division's Recommendation that the Department Petition for Rehearing En Banc in Helms v. Picard, 151 F.3d 347 (5th Cir. 1998)

In the above-captioned case, a panel of the United States Court of Appeals for the Fifth Circuit held that "Chapter 2" of Title I of the Elementary and Secondary Education Act of 1965 is unconstitutional as applied in Jefferson Parish, Louisiana, "to the extent that [the] program permits the loaning of educational or instructional equipment to sectarian schools." 151 F.3d at 374. That decree "encompasses such items as filmstrip projectors, overhead projectors, television sets, motion picture projectors, video cassette recorders, video camcorders, computers, printers, phonographs, slide projectors, etc." Id. The decree also "necessarily prohibits the furnishing [to such schools] of library books by the State, even from prescreened lists." Id. The Civil Division has recommended that the United States file a petition for rehearing en banc. In my view, however, the Chapter 2 loan program that the Fifth Circuit panel declared invalid as to pervasively sectarian schools cannot, on the grounds suggested by the Civil Division, be materially distinguished from the loan programs the Supreme Court invalidated in Meek v. Pittenger, 421 U.S. 349, 362-66 (1975), and Wolman v. Walter, 433 U.S. 229, 248-51 (1977). Accordingly, I would recommend that the Department not file a petition for rehearing; and that the Department should instead file a petition for certiorari if, and only if, the Solicitor General concludes that it would be appropriate for the Department to urge the Supreme Court to overrule, in part or in whole, the pertinent holdings of Meek and Wolman.

BACKGROUND[1]

1. This case involves, inter alia, a constitutional challenge to that aspect of the federal

[1] I have adapted the following factual background in large part from the Civil Division's memorandum and from the panel opinion.

Chapter 2 program in Jefferson Parish, Louisiana, pursuant to which the local educational agency (Jefferson Parish Board of Education) loaned certain educational materials (other than textbooks), instructional equipment, and library books, to pervasively sectarian schools, as part of a program also serving pupils in public and nonsectarian private schools. A panel of the Fifth Circuit has concluded that the Chapter 2 program is unconstitutional insofar as such materials are loaned to pervasively sectarian schools.

a. The "Chapter 2" Program. "Chapter 2" refers to Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965. The program and its predecessors have been amended numerous times over the last 32 years. On October 20, 1994, Congress enacted the Improving America's Schools Act of 1994, Pub. L. 103-382, 108 Stat. 3518. Former Chapter 2 is now labeled "Title VI - Innovative Education Program Strategies" and is codified at 20 U.S.C. §§ 7301-7373. However, because the district court referred to the program as Chapter 2, I will in this memorandum continue to refer to the new statute as "Chapter 2."[2] Chapter 2 provides financial assistance to state educational agencies (SEAs) and to local educational agencies (LEAs) to implement eight "innovative assistance" programs. 20 U.S.C. § 7351(a) & (b). Plaintiffs' challenge in this case is to 20 U.S.C. § 7351 (b)(2), which provides for innovative assistance programs:

> for the acquisition and use of instructional and educational materials, including library services and materials (including media materials), assessments, reference materials, computer software and hardware for instructional use, and other curricular materials which are tied to high academic standards and which will be used to improve student achievement and which are part of an overall education reform program . . . .

Federal law requires that Chapter 2 services be provided to children enrolled in both public and private nonprofit schools. 20 U.S.C. §§ 7312, 7372(a)(1). Section 7372 provides for the participation of children enrolled in private nonprofit elementary and secondary schools. That statute requires that LEAs shall "provide for the benefit of such children in such [private] schools secular, neutral, and nonideological services, materials, and equipment . . . ; or, if such services, materials, and equipment are not feasible or necessary in one or more such private schools as determined by the local educational agency after consultation with the appropriate private school officials, shall provide such other arrangements as will assure equitable participation of such children in the purposes and benefits of this subchapter." 20 U.S.C. § 7372(a)(1) (emphasis added). Chapter 2 expenditures for private school children must "be equal (consistent with the number of children to be served) to expenditures . . . for children enrolled in the public schools of the local educational agency, taking into account the needs of the individual children and other

[2] The Civil Division represents that, with respect to the issues involved in this case, the present statute is not (with one minor exception) materially different from the Chapter 2 statute in effect when the Helms suit was commenced.

factors which relate to such expenditures." 20 U.S.C. § 7372(b).[3] The law also requires that the control of all Chapter 2 funds "and title to materials, equipment, and property . . . shall be in a public agency . . . and a public agency shall administer such funds and property." 20 U.S.C. § 7372(c)(1). In addition, any services provided for the benefit of private school students must be provided by "a public agency" or by a contractor who, "in the provision of such services is independent of such private school and of any religious organizations." 20 U.S.C. § 7372(c)(2).

Furthermore, Chapter 2 funds for the innovative assistance programs must supplement, and must in no case supplant, the level of funds that, in the absence of Chapter 2 funds, would be made available for those programs from "non-Federal sources." 20 U.S.C. § 7371(b).[4]

b. Chapter 2 in Jefferson Parish, Louisiana. The Helms plaintiffs only challenged the Chapter 2 program as applied in Jefferson Parish. After Louisiana received its Chapter 2 funds from the federal government, the SEA allocated 80 percent of the funds to LEAs. Eighty-five percent of those funds were earmarked for LEAs — including that in Jefferson Parish — based on the number of participating elementary and secondary school students in both public and nonprofit private schools, and the other fifteen percent were allocated based on the number of children from low-income families. For the fiscal year 1984-85, Jefferson Parish received $655,671 in Chapter 2 funds, of which approximately thirty percent ($199,574) was used for children in nonpublic schools. In the 1986-87 fiscal year, Jefferson Parish received $661,147.94, approximately thirty-two percent of which ($214,080.49) was used for nonpublic school children. The vast percentage of the money expended in nonpublic schools was used to provide library and media materials, and other instructional equipment, including the following types of items: filmstrip projectors, overhead projectors, television sets, motion picture projectors, video cassette recorders, video camcorders, computers, printers, phonographs, and slide projectors. See 151 F.3d at 368.[5]

The Louisiana Department of Education never transmitted funds to nonpublic schools. Equipment and materials bought for the benefit of nonpublic school children with Chapter 2 funds instead were loaned to the nonpublic schools, consistent with the statutory mandate that "title to materials, equipment, and property . . . shall be in a public agency . . . and a public agency shall administer such funds and property." 20 U.S.C. § 7372(c)(1). The equipment and materials purchased with Chapter 2 funds for use by sectarian school students in Louisiana were monitored by the state, the LEA, and the federal government. The district court found that the LEA prescreened the instructional materials, library books, and other instructional equipment. Most

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[3] It is not immediately apparent whether this "equitable participation" requirement applies to each of the "benefits of this subchapter," or simply to the cumulative "benefits" of the subchapter as a whole. If the latter is the correct reading, then it is not clear that Chapter 2 actually requires that religious school students be provided the particular types of aid that are at issue in the Helms litigation: perhaps, in other words, the "equitable participation" requirement could be satisfied by providing religious school students with other forms of Chapter 2 aid that do not raise the same constitutional problems.

[4] I discuss the possible significance of this provision infra at 9-10.

[5] As indicated in note 3, supra, it is not clear whether Chapter 2 itself requires that these particular forms of aid be loaned to religious schools.

sectarian schools signed a pledge agreeing not to use the Chapter 2 materials for religious purposes, and the Chapter 2 coordinator made yearly monitoring visits to the nonpublic schools. In addition, the state made monitoring visits every two years to the nonpublic schools and monitored the LEA.

2. The Helms plaintiffs challenged the constitutionality of three state-law programs, as well as the federal Chapter 2 program of the providing instructional equipment, materials and library books to pervasively sectarian schools. The district court entertained cross-motions for summary judgment. In a judgment entered on July 25, 1994 (based on earlier Order and Reasons entered on March 27, 1990, in which the court granted plaintiffs partial summary judgment on the Chapter 2 issue), the district court (Judge Heebe) invalidated portions of the federal Chapter 2 program as administered in Jefferson Parish. The court ruled that the use of federal funds to provide instructional equipment (including computer and audio-visual equipment), educational materials, library books, and supplies to pervasively sectarian schools under Chapter 2 was unconstitutional and enjoined the lending of such items.

On reconsideration, however, the district court (Judge Livaudais) reversed itself and concluded that the Chapter 2 program is constitutional as applied in Jefferson Parish. The court relied heavily on the Ninth Circuit's then-recent Chapter 2 decision in Walker v. San Francisco Unified School District, 46 F.3d 1449 (9th Cir. 1995), agreeing with Walker's conclusion (id. at 1464-69) that the lending of neutral, secular equipment and instructional materials to sectarian schools does not have the primary or principal effect of advancing religion.

The court of appeals reversed on the Chapter 2 question, declaring the statute unconstitutional in Jefferson Parish "to the extent that [the] program permits the loaning of educational or instructional equipment to sectarian schools." 151 F.3d at 374. That decree "encompasses such items as filmstrip projectors, overhead projectors, television sets, motion picture projectors, video cassette recorders, video camcorders, computers, printers, phonographs, slide projectors, etc." Id. The decree also "necessarily prohibits the furnishing [to such schools] of library books by the State, even from prescreened lists." Id. The court held that this disposition was directly compelled by the Supreme Court's decisions in Meek and Wolman, and that a lower federal court was powerless to conclude that subsequent Supreme Court decisions had effectively overruled Meek and Wolman. Accordingly, the court rejected the Ninth Circuit's reasoning and decision in Walker.

DISCUSSION

In Meek, the Supreme Court invalidated a Pennsylvania statute that authorized the State Secretary of Education to lend to pervasively sectarian schools "instructional materials," including "periodicals, photographs, maps, charts, sound recordings, films, . . . projection equipment, recording equipment, and laboratory equipment." 421 U.S. at 354-55 & n.4. The Court reasoned that, "[e]ven though earmarked for secular purposes, 'when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission,' [such] state aid has the impermissible effect of advancing religion." Id. at 365-66 (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973)). Because the "teaching process" in such

schools "is, to a large extent, devoted to the inculcation of religious values and belief," the aid in question — which goes "to the educational function of such schools" — "necessarily results in aid to the sectarian school enterprise as a whole." Id. at 366. Notably, the aid in Meek, like the aid under Chapter 2, was "ostensibly limited to wholly neutral, secular instructional material and equipment." Id. Despite this limitation, however, the Court concluded that such aid "inescapably results in the direct and substantial advancement of religious activity, and thus constitutes an impermissible establishment of religion." Id.

Two years later, the Court in Wolman considered a constitutional challenge to an array of forms of state aid that Ohio provided to pervasively sectarian schools. The Court upheld Ohio's provision to sectarian schools of several different types of aid — such as textbooks, administration of state-required standardized tests, speech and hearing diagnostic services, and off-premises therapeutic, guidance and remedial services. 433 U.S. at 236-48. But the Court expressly reaffirmed the portion of the Meek decision invalidating the loan of instructional materials (other than textbooks) for education in pervasively sectarian schools. 433 U.S. at 248-51. At issue in Wolman was the state's loan of educational materials such as projectors, tape recorders, maps and globes, science kits, and the like, directly to students (rather than to the schools themselves, as in Meek). As under Chapter 2, the materials at issue in Wolman were required by statute to be "secular, neutral and nonideological." Id. at 248 n.15. The parties even stipulated that "'the law requires that materials and equipment capable of diversion to religious issues will not be supplied.'" Id. at 249 (emphasis added). The Court nevertheless held that this aid was unconstitutional: "In view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flows in part in support of the religious role of the schools." Id. at 250. The Court rejected the argument that the aid might "be seen as supporting only the secular part of the church-school enterprise," reasoning that "Meek makes clear that the material and equipment are inextricably connected with the church-related school's religious function." Id. at 251 n.17.

The Civil Division concedes that Helms "is a difficult case because, as demonstrated by the Fifth Circuit's decision here, as well as the dissenting opinion in Walker, 46 F.3d at 1470 (Fernandez, J., concurring and dissenting), the argument that the challenged program does not pass constitutional muster under Meek and Wolman is not without some force." Civil Division Memorandum at 5. See also Walker v. San Francisco Unified School Dist., 62 F.3d 300, 301-04 (9th Cir. 1995) (Reinhardt, J., joined by Pregerson and Hawkins, JJ., dissenting from the order rejecting the suggestion for rehearing en banc). Nevertheless, the Civil Division argues that it can, in support of a petition for rehearing, make the following "respectable" argument that Meek and Wolman are distinguishable:

> Our argument is that the decisions in Meek v. Pittenger, 421 U.S. 349 (1975), and Wolman v. Walter, 433 U.S. 229 (1977), are distinguishable. See also Public Funds for Public Schools v. Marburger, 358 F. Supp. 29 (D.N.J. 1973), aff'd, 417 U.S. 961 (1974). Meek and Wolman proceeded under analyses that appeared to treat the programs at issue as "targeted" specifically at, and to the benefit of, religious schools. Indeed, Meek distinguished the textbook provision invalidated in Marburger on the ground that the benefits of the program there were not

extended equally to public as well as nonpublic schoolchildren. 421 U.S. at 362 n.12. Thus, in Meek, the Court upheld the Pennsylvania law that authorized the provision of textbooks to nonpublic schoolchildren on the ground that the state's program included all children, both public and nonpublic. 421 U.S. at 360 n.8 ("the textbook loan program includes all schoolchildren, those in public as well as those in private schools"), while striking down those programs that appeared to target only religious schools. Chapter 2 is clearly not a targeted program but, rather, one that includes the entire school population. (And, the overwhelming majority of schools and school students that benefit from the program are public.)

Civil Division Memorandum at 6.

However, for the reasons explained below, I am of the view that the Fifth Circuit panel correctly rejected the attempt to distinguish Meek and Wolman on this ground, 151 F.3d at 373, and that the panel was correct in concluding that "Meek and Wolman have squarely held that what the government is attempting to accomplish through Chapter 2, it may not do," id. at 371.

In attempting to distinguish Chapter 2 from the programs invalidated in Meek and Wolman, the Civil Division would rely heavily (indeed, almost exclusively) on the fact that Chapter 2 is not a program "targeted" at religious schools, and that the overwhelming majority of schools and school students that benefit from the program are public.[6] I see two basic problems with this argument.

First, the same thing was true of the programs in Meek and Wolman. The "stated purpose" of the enactment in Meek was "assuring that every schoolchild in the Commonwealth will equitably share in the benefits of auxiliary services, textbooks, and instructional material provided free of charge to children attending public schools." 421 U.S. at 351-52 (emphasis added). The Pennsylvania statute "extend[ed] the benefits of free educational aids to every schoolchild in the Commonwealth, including nonpublic school students who constitute approximately one quarter of the schoolchildren in Pennsylvania." Id. at 363 (emphasis added). See also id. at 389 (Rehnquist, dissenting in pertinent part) (the Act's instructional materials and equipment program "is not alleged to make available to private schools any materials and equipment that are not provided to public schools"). Similarly in Wolman, "[a]ll disbursements made with respect to nonpublic schools have their equivalents in disbursements for public schools, and the amount expended per pupil in nonpublic schools may not exceed the amount expended per pupil in the public schools." 433 U.S. at 234.[7]

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[6] The Ninth Circuit panel in Walker proffered a similar alleged distinction, 46 F.3d at 1468-69, but only as an afterthought to its broader argument that the holdings in Meek and Wolman had been undermined by subsequent cases and were no longer binding precedent, id. at 1464-67.

[7] To be sure, achieving the equality in aid to public and private schools was accomplished in Meek and in Wolman by virtue of distinct, sequential legislative enactments, rather than (as in Chapter 2) through a single statute that simultaneously extends the aid to public and private schools alike. But the Court in both cases

(continued...)

Second, as the Fifth Circuit panel correctly noted, 151 F.3d at 373, the rationale of the Meek and Wolman decisions was expressly based, not on any "percentage" of aid that might have been received by religious schools relative to that received by nonreligious schools, but instead (as described above) on the "character of the aid provided to those schools" -- in particular, on the Supreme Court's conclusion that, "[i]n view of the impossibility of separating the secular education function from the sectarian" in such schools, aid in the form of instructional materials and equipment "inevitably flows in part in support of the religious role of the schools." Wolman, 433 U.S. at 250.

The Fifth Circuit panel essentially agreed with the assessment I have provided above, and I do not think that the Department could make a plausible argument that the Fifth Circuit erred. The Civil Division apparently would rely upon two footnotes in Meek, 421 U.S. at 360 n.8, 362 n.12, in which the Court explained why Pennsylvania's provision of textbooks to religious school students was constitutional even though the Court had affirmed the invalidation of a textbook program in Public Funds for Public Schools v. Marburger, 417 U.S. 961 (1974) (mem.), aff'g 358 F. Supp. 29 (D.N.J. 1973). But the Court in Meek and in Wolman expressly declined to extend the holding and reasoning reflected in those footnotes to the provision of instructional materials other than textbooks.

In Board of Education v. Allen, 392 U.S. 236 (1968), the Court held that provision of certain state-approved textbooks to religious schools was constitutional so long as the textbooks were provided equally to private and public schools alike. Allen was "premised on the view that the educational content of textbooks is something that can be ascertained in advance and cannot be diverted to sectarian uses." Wolman, 433 U.S. at 251-52 n.18 (discussing the relationship between the Court's holdings in Allen and in Meek). The holding in Allen was expressly reaffirmed as to textbook programs at issue in Meek, 421 U.S. at 359-62, and in Wolman, 433 U.S. at 236-38, 251 n.18. As the Meek Court noted, the textbook program in Marburger was, by contrast, invalidated because "the assistance provided — reimbursement for purchased textbooks — was not extended to parents of all students, but rather was directed exclusively to parents whose children were enrolled in nonpublic, primarily religious schools." 421 U.S. at 362 n.12 (citing Marburger, 358 F. Supp. at 36).

Thus, for purposes of state-provided textbooks, it is critical to the Establishment Clause analysis whether or not students in private schools are treated more favorably than students in public schools. And, notably, in Meek, then-Justice Rehnquist argued at great length in dissent, 421 U.S. at 387-96, that the same analysis the Court applied to textbooks in Allen and in Meek should apply to the Pennsylvania Act's instructional materials and equipment program, which -- just like the textbook program the Court upheld -- treated private-school students no better than

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[7](...continued)
indicated that, in contexts (unlike the instant one) where equality between public and private does change the constitutional analysis — namely, in the provision of textbooks — "it is of no constitutional significance whether the general program is codified in one statute or two." Meek, 421 U.S. at 360 n.8; see also Wolman, 433 U.S. at 238 n.6. I do not understand the Civil Division to be arguing that the timing or sequence of the legislative enactments materially changes the constitutional analysis.

public-school students. But the majority refused to treat the two types of aid alike. The Court in Wolman acknowledged the tension between the Court's doctrines relating to textbooks, on the one hand, and other educational materials, on the other. The Court noted that, in cases such as Meek, it had declined to extend to other educational contexts the presumption upon which the Court relied in Allen -- namely, that if instructional materials are provided to public and religious schools alike, such materials would not be diverted by the latter to religious uses. 433 U.S. at 251-52 n.18. Although the Wolman Court concluded that the Meek analysis rejecting such a presumption was correct, it decided that nonetheless it would "follow as a matter of stare decisis the principle that restriction of textbooks to those provided the public schools is sufficient to ensure that the books will not be used for religious purposes." Id. (emphasis added). However, outside the context of textbooks, "[w]hen faced . . . with a choice between extension of the unique presumption created in Allen and continued adherence to the principles announced in our subsequent cases [such as Meek], we choose the latter course." Id. In other words, outside the context of prescreened textbooks, the Court adheres to the "principle," emphasized in Meek and Wolman, that "[i]n view of the impossibility of separating the secular education function from the sectarian" in pervasively sectarian schools, governmental aid for ostensibly "secular" educational functions "inevitably flows in part in support of the religious role of the schools." Wolman, 433 U.S. at 250.

Accordingly, the grounds on which the Civil Division would rely are insufficient to distinguish the programs invalidated in Meek and Wolman from the program that the Fifth Circuit panel has declared invalid in Helms. Moreover, nothing in subsequent Supreme Court case law has purported to reverse or overrule the holdings of Meek and Wolman with respect to the types of educational materials and equipment that were at issue in the invalidated loan programs in those cases.[8]

Of course, there may be other potential bases for distinguishing Chapter 2. For example, perhaps it would be simply impossible to use some of the materials loaned under Chapter 2 for

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[8] The Civil Division (as well as the Ninth Circuit, 46 F.3d at 1466) argues that in Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646 (1980), the Court "explicitly rejected the notion that the holdings in Meek, Wolman, and Marburger per se bar the loan of materials and equipment for use by nonpublic schoolchildren." Civil Division Memorandum at 6. In Regan, the Court quoted with approval Justice Powell's statement in his separate concurrence in Wolman that "'Meek [did not] hold . . . that all loans of secular instructional material and equipment' inescapably have the effect of direct advancement of religion." 444 U.S. at 661-62 (quoting Wolman, 433 U.S. at 263 (Powell, J., concurring in part)). The proposition in that quotation is literally true; but it does not support the argument the Civil Division is trying to make. In elaborating his basis for that statement, Justice Powell simply noted that loans of textbooks for religious school education can be permissible, an unexceptional proposition that Meek and Wolman expressly reconfirm. Justice Powell expressly concurred in the Wolman majority's contrary holding with respect to the other educational materials and equipment at issue, such as "wall maps, charts, and other classroom paraphernalia." 433 U.S. at 263-64. Similarly, the Court in Regan used the Powell quotation solely as authority for the conclusion that a government may reimburse religious schools for the costs of performing state-mandated secular testing -- a proposition that comported with a plain holding of the Wolman Court itself, 433 U.S. at 238. Neither Justice Powell nor the Regan Court suggested that there was any warrant in Meek or in Wolman for the provision to religious schools of the types of educational materials and equipment at issue in Helms. See also Helms, 151 F.3d at 373; Walker, 62 F.3d at 302-03 & n.2 (Reinhardt, J., joined by Pregerson and Hawkins, JJ., dissenting from the order rejecting the suggestion for rehearing en banc).

sectarian purposes, or perhaps there are certain procedural safeguards in Chapter 2 (e.g., contractual restraints) - not present in the Meek and Wolman programs - that would ensure that the loaned materials could not be used for sectarian purposes. I do not have sufficient information about Chapter 2 to evaluate such possible distinctions.[9] I do, however, think it is worth discussing one other basis, not expressly relied upon by the Civil Division, that might distinguish the Chapter 2 program at issue in Helms from the loan programs invalidated in Meek and Wolman. Chapter 2 expressly requires that funds for the innovative assistance programs must supplement, and must in no case supplant, the level of funds that, in the absence of Chapter 2 funds, would be made available for those programs from "non-Federal sources." 20 U.S.C. § 7371(b). Thus, it would appear that schools may not receive loans of any materials or equipment on which they would otherwise have expended non-Federal funds. In other words, a Chapter 2 loan should not have the effect of "freeing up" any resources that religious schools could then expend on religious education. There does not appear to have been an analogous "supplement but not supplant" condition on the receipt of governmental funds in the programs at issue in Meek and Wolman.

As you know, the supplement/supplant distinction played an important, albeit perhaps not dispositive, role in the Court's decision in Agostini v. Felton, 117 S. Ct. 1997 (1997), where Justice O'Connor went to great lengths, id. at 2013, to dispute Justice Souter's contention in dissent (id. at 2021, 2024) that the aid at issue in that case would relieve religious schools of costs they otherwise would incur, thus freeing up funds for such schools to expend on religious education. See also Zobrest v. Catalina Foothills School Dist., 509 U.S. 1, 12 (1993). Furthermore, the Court in Agostini specifically identified the constitutional defects in Meek and Wolman in the following terms:

> In those cases, the Court ruled that a state loan of instructional equipment and materials to parochial schools was an impermissible form of "direct aid" because it "advanced the primary, religion-oriented educational function of the sectarian school," by providing "in-kind" aid (e.g., instructional materials) that [i] could be used to teach religion and [ii] by freeing up money for religious indoctrination that the school would otherwise have devoted to secular education.

117 S. Ct. at 2009 (emphasis and bracketed numerals added). See also Zobrest, 509 U.S. at 12 (emphasizing that religious schools' receipt of teaching material and equipment from the state under the program in Meek "reliev[ed] them of an otherwise necessary cost of performing their educational function").

Under this view, the Meek and Wolman programs were unconstitutional not only because the instructional materials "could be used to teach religion," but also because the programs "free[d] up money for religious indoctrination that the school[s] would otherwise have devoted to secular education." Perhaps, then, it would be possible to argue that the Establishment Clause

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[9] I note once again, however, that the reasoning in Meek and Wolman is that, because it is impossible to segregate the secular from the religious in the educational functions of such schools, aid to be used in the educational process of pervasively sectarian schools "inevitably flows in part in support of the religious role of the schools." Wolman, 433 U.S. at 250.

would not prohibit a program (such as Chapter 2) that does not raise both of these problems. That might be one way to distinguish Chapter 2 from the Meek and Wolman programs.

Nevertheless, in the end I do not think that this distinction that makes a constitutional difference. The decisions in Meek and Wolman focused on the fact that, because the religious and the secular are inextricably intertwined in the educational functions of pervasively sectarian schools, the loaned materials themselves necessarily would be used for religious education. Those decisions did not indicate (at least not expressly) that the Establishment Clause analysis was affected, let alone controlled, by the question of whether the loan programs freed up other resources for the religious schools to use. Moreover, recall that the very purpose of the supplement/supplant inquiry in cases such as Agostini is to determine whether governmental aid that is not directly used for religious purposes nevertheless could, in effect, provide religious schools with resources -- above those they already would have had -- that they could use to advance religious education. Where, however -- as the Court held with respect to the loan provisions in Meek and in Wolman -- the state aid itself "inevitably flows in part in support of the religious role of the schools," Wolman, 433 U.S. at 250, the constitutional infirmity is already present, and there is no need to inquire in addition as to whether the loan "frees up" other resources that can be used for religious education.

CONCLUSION

In sum, I do not believe that the Chapter 2 program, as applied to the educational materials and instructional equipment provided to pervasively sectarian schools in Jefferson Parish, can satisfactorily be distinguished from the programs invalidated in Meek and Wolman.[10]

Of course, the Department eventually could decide to urge the Supreme Court to overrule the pertinent portions of Meek and Wolman, just as we recently (successfully) urged the Court to overrule Aguilar v. Felton, 473 U.S. 402 (1985). See Agostini.[11] But, as we acknowledged in the Agostini litigation, lower federal courts do not have the authority to "underrule" Supreme

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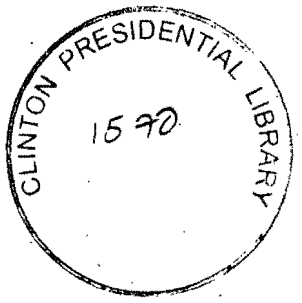
[10] The Helms court also invalidated the provision of library books to sectarian schools under Chapter 2. 151 F.3d at 374. The actual holdings of Meek and Wolman do not, of course, expressly concern library books; and it could reasonably be argued that prescreened library books are sufficiently analogous to textbooks to fall within the Allen/Meek/Wolman textbook doctrine. Nevertheless, it would be hard to reconcile such a conclusion with the express decision of the Wolman Court that, while the holding in Allen should continue to apply to textbook programs "as a matter of stare decisis," the Court should not "extend Allen to cover all items similar to textbooks." 433 U.S. at 251 n.18.

[11] I have not considered the question whether it would be appropriate for the Department to urge such an overruling. If and when the Solicitor General indicates an intent to consider that option, I would, of course, be happy to provide you further analysis and advice on that question. For present purposes, however, it is worth noting that there might be several options short of urging an outright overruling of Meek and Wolman. For example, the Department might urge the Court to overrule those decisions only with respect to the loan of certain types of materials (e.g., perhaps library books and certain forms of computer software) that cannot possibly be diverted to religious uses, and then only where - as under Chapter 2 - such materials may only supplement, rather than supplant, non-Federal resources, so that the loan does not "free up" other resources that the religious schools can expend on religious education.

Court decisions that directly control the question at issue, even if subsequent Court precedents may have undermined the rationale of those controlling decisions. See Agostini, 117 S. Ct. at 2017; Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989). Accordingly, if the Solicitor General eventually decides to urge the overruling of Meek and of Wolman, a petition for certiorari would be the appropriate vehicle, and there would be no occasion for a rehearing petition in the Fifth Circuit.



DRAFT - DO NOT CIRCULATE

Noon 4/9/98

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

_____, PETITIONERS

v.

MARY L. HELMS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE SECRETARY OF EDUCATION

Make sure to make Chuck's edit on p. 24

p. 25 - has to be more than "a risk" - There's always "a risk" - an "undue risk" Oh - Chuck said this too.

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Acting Assistant Attorney General

BARBARA D. UNDERWOOD
Deputy Solicitor General

PAUL R.Q. WOLFSON
Assistant to the Solicitor General

MICHAEL J. SINGER
HOWARD S. SCHER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED
[alternative formulations]

Whether, as applied in this case, 20 U.S.C. 7351(b)(2) -- which permits local educational agencies receiving federal financial assistance to lend secular, neutral, and nonideological instructional equipment, instructional materials, and library books purchased with that federal assistance to nonprofit, private schools for the benefit of their students, as part of a program also serving public school students and nonsectarian private school students -- violates the Establishment Clause of the First Amendment.

or

Whether the court below correctly analyzed the claim that the provision of instructional equipment and materials to sectarian schools under 20 U.S.C. 7351(b)(2) in Jefferson Parish, Louisiana, violated the Establishment Clause of the First Amendment.

or

[Use -- or adapt -- petitioners' formulation of the question presented, which we have not yet seen.]

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. ----) is reported at 151 F.3d 347. An amendment to that opinion on rehearing (Pet. App. ----) is reported at 165 F.3d 311. The opinion and order of the district court sustaining the constitutionality of the federal program at issue in this petition (Pet. App. ----) are not reported but are available at 1997 WL 35283. A previous opinion and order of the district court holding that federal program unconstitutional as applied (Pet. App. ----) are also not reported but are available at 1990 WL 36124 and 1994 WL 396199. A decision of the district court addressing constitutional challenges to other state and federal programs, which are not pertinent to the question presented by this petition, is reported at 856 F. Supp. 1102.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1998. A petition for rehearing was denied on January 13, 1999. Pet. App. ---- . The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part: "Congress shall make no law respecting an establishment of religion."

Reprinted in an appendix to the petition (Pet. App. ----) are 20 U.S.C. 7301-7373 and pertinent parts of predecessor provisions,

20 U.S.C. 3811-3976 (1982) and 20 U.S.C. 2911-2976 (1988).

STATEMENT

1. This case involves an Establishment Clause challenge to the application, in Jefferson Parish, Louisiana, of a federal program that provides federal financial assistance to local educational agencies (LEAs) for education-improvement programs, and authorizes the LEAs receiving federal financial assistance to lend instructional equipment, instructional materials, and library materials purchased with that assistance to public and private elementary and secondary schools, including nonprofit private religious schools. The federal program at issue here was amended twice during the course of this litigation and has had several titles; it is currently found at Title VI of the Elementary and Secondary Education Act of 1965 (ESEA), Pub. L. No. 89-10, as amended by the Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3707-3716. For simplicity we will refer to the program as "Title VI"; previous decisions in this case referred to it as "Chapter 2."[1]

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[1] When this lawsuit was commenced, the program was known as Chapter 2 of the Education Consolidation and Improvement Act of 1981, Pub. L. No. 97-35, 95 Stat. 469-482; see 20 U.S.C. 3811-3876 (1982) (Pet. App. ----). Subsequently, in the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary Improvement Amendments of 1988, Pub. L. No. 100-297, the program was amended and redesignated as Chapter 2 of Title I of the ESEA. See 102 Stat. 203-219; 20 U.S.C. 2911-2976 (1988) (Pet. App. ----). In 1994, the program was again redesignated as Title VI of the ESEA, as explained in the text. Unless otherwise indicated, references to provisions of Title 20 of the United States Code are to the current (1994) edition.

Title VI authorizes financial assistance to LEAs and to state educational agencies (SEAs) to implement eight kinds of "innovative assistance" programs. See 20 U.S.C. 7351(a) & (b). Among the kinds of programs that may be implemented with Title VI funds are programs "for the acquisition and use of instructional and educational materials, including library services and materials (including media materials), assessments, reference materials, computer software and hardware for instructional use, and other curricular materials which are tied to high academic standards and which will be used to improve student achievement and which are part of an overall education reform program." 20 U.S.C. 7351(b)(2). As pertinent here, LEAs may use Title VI funds to purchase computer hardware and software for instructional use, supplemental instructional materials, and library materials.[2]

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[2] When this case was commenced in 1985, the permitted purposes of financial assistance under the program were somewhat differently focused. In particular, the program then expressly permitted LEAs to use federal funds for (among other things) the acquisition and utilization of "instructional equipment and materials suitable for use in providing education in academic subjects for use by children and teachers in elementary and secondary schools." 20 U.S.C. 3832(1)(B) (1982). LEAs could, at that time, use federal funds to purchase instructional equipment such as slide projectors, cassette players, and filmstrip projectors, as well as computers. Since the 1988 amendments, the statute no longer broadly allows LEAs to use federal funds to purchase "instructional equipment," except for computer hardware, acquisition of which is still expressly authorized. 20 U.S.C. 2941(b)(2) (1988); 20 U.S.C. 7351(b)(2). Both before and after the 1988 amendments, Title VI permitted LEAs to lend computer equipment for instructional purposes to private schools. Further, computer equipment lent to private schools has been at the center of this case since the beginning. See Complaint para. 41 (Dec. 2, 1985) (challenging loan of microcomputers to private

Title VI requires that LEAs ensure that children enrolled in private nonprofit schools (as well as those in public schools) have the opportunity to benefit from programs financed with Title VI assistance. See 20 U.S.C. 7312, 7372. Moreover, Title VI expenditures by LEAs for private school children must "be equal (consistent with the number of children to be served) to expenditures * * * for children enrolled in the public schools of the [LEA], taking into account the needs of the individual children and other factors which relate to such expenditures." 20 U.S.C. 7372(b).

Any benefit provided to children in private schools, however, must be secular, and must not take the place of any services, equipment, or materials that the private school would offer or obtain in the absence of federal assistance. Thus, Section 7372 expressly provides that LEAs "shall provide for the benefit of such children in such [private] schools <u>secular, neutral, and nonideological</u> services, materials, and equipment." 20 U.S.C. 7372(a)(1) (emphasis added). Title VI also requires that the control of all Title VI funds "and title to materials, equipment, and property * * * shall be in a public agency * * * and a public agency shall administer such funds and property." 20 U.S.C. 7372(c)(1). In addition, any services provided for the benefit of

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schools for use by teachers and students); First Amended Complaint para. 43 (Jan. 13, 1987) (same); Second Amended Complaint para. 50 (Nov. 1, 1988) (same).

private school students must be provided by "a public agency" or by a contractor who, "in the provision of such services is independent of such private school and of any religious organizations." 20 U.S.C. 7372(c)(2). Further, Title VI funds for innovative-assistance programs must supplement, and in no case supplant, the level of funds that, in the absence of Title VI funds, would be made available for those programs from "non-Federal sources." 20 U.S.C. 7371(b).

Title VI exhibits a strong preference for local control in determining how Title VI funds shall be used, as long as the uses fall within the permitted ones set forth in the statute. The statute's findings and statement of purpose explain that, although "[t]he basic responsibility for the administration of funds made available under [Title VI] is within the State educational agencies," it is "the intent of Congress that the responsibility be carried out with a minimum of paperwork," and "the responsibility for the design and implementation of programs assisted under [Title VI] will be mainly that of [LEAs], school superintendents and principals, and classroom teachers and supporting personnel." 20 U.S.C. 7301(c). Although funding under Title VI is allotted to the States, the States must distribute at least 85% of that funding to LEAs, according to the relative enrollments of students in public and private schools within each school districts. 20 U.S.C. 7312(a). Finally, subject to the limitations and requirements of the statute (including its requirements that any benefit for

private school children be secular and not supplant benefits from non-federal sources), the LEAs "shall have complete discretion in determining how funds * * * shall be divided among the areas of targeted assistance" that are the permissible uses of federal funds. 20 U.S.C. 7353(c). The Secretary of Education is given authority to issue regulations "only to the extent that such regulations are necessary to ensure that there is compliance with the specific requirements and assurances required by [Title VI]." 20 U.S.C. 7373(b).

An LEA that wishes to receive federal funds for innovative-assistance programs must present an application to the pertinent SEA. The SEA shall certify the LEA's application for funds if the application explains the planned allocation of funds among the eight permitted innovative assistance purposes, sets forth the allocation of funds required to assure the participation of private school children, and provides assurance of compliance with the statute's various requirements, including the requirement of participation of private school children in secular benefits under the program. 20 U.S.C. 7353(a)(1)(A)-(B), (3). The LEA must also agree to keep records sufficient to permit the SEA to evaluate the LEA's implementation of the program. 20 U.S.C. 7353(a)(4). The statute does not provide for review by the Department of Education of the LEA's application for Title VI funds.

The Department of Education's Title VI regulations reemphasize the statute's limitations on assistance that may be provided to

children at private schools. Those regulations explain that services obtained with federal funds must supplement, and not supplant, services that the private school would otherwise provide their schoolchildren, 34 C.F.R. 299.8(a); and that the LEA must keep title to all property and equipment used for the benefit of private school children, 34 C.F.R. 299.9(a). In addition, the regulations require that the public agency "ensure that the equipment and supplies placed in a private school * * * [a]re used only for proper purposes of the program." 34 C.F.R. 299.9(c)(1). As explained below, the Department has recently issued further guidance for LEAs on the participation of private school children in Title VI, addressing in particular procedures that should be followed and safeguards imposed by LEAs to ensure that Title VI benefits afforded to private school children are secular. See pp. ---, infra.

2. In Louisiana, the State Bureau of Consolidated Educational Programs, which was headed by Dan K. Lewis during the relevant periods of this litigation, administers the Louisiana Title VI program. After Louisiana receives its Title VI funds from the federal government, the SEA allocates 80 percent of the funds to LEAs. Eighty-five percent of those funds are allocated to LEAs based on the number of participating elementary and secondary school students in both public and private schools, and 15% is allocated based on the number of children from low-income families. Pet. App. ----.

For fiscal year 1984-1985 (immediately before this lawsuit was commenced), the Jefferson Parish Public School System (JPPSS) received $655,671 in Title VI funds. Approximately 70% of that money ($456,097) was used for equipment, materials, and services at public schools in the JPPSS, and the remaining amount ($199,574) was used for Title VI programs provided to students at private schools in the district. Pet. App. ----. In the 1986-1987 fiscal year, the JPPSS received $661,148 in Title VI assistance. Approximately 32% of that amount ($214,080) was used to provide Title VI benefits to private school children in the district. Of the $214,080 budgeted for private school children, $94,758 was spent to provide library and media materials, and $102,862 was spent for instructional equipment. Pet. App. ----. With respect to the State of Louisiana as a whole, about 25% of the total Title VI funds was used for children in private schools. Pet. App. ----.

The Louisiana Department of Education "never transmit[ted] dollars to [any] non-public school." Pet. App. ----. Moreover, because the statute requires that a public authority retain title to all Title VI equipment, such equipment was only provided on loan to private schools, and the ultimate authority and control over those items always rested with the public school system, not the private schools. Pet. App. ----.

The SEA and the LEA monitor private schools' use of Title VI equipment and materials to ensure that they were used for purposes consistent with Title VI, including the requirement that they not

be used for religious purposes. Title VI Guidelines issued by the Louisiana SEA emphasize to the LEAs that "the LEA must ensure that [Title VI] equipment and materials * * * are used for secular, neutral and non-ideological purposes." Gov't Exh. D-4 in Opp. to Resp. Mot. for Summ. Judg. (State Guidelines) 22. The State Guidelines suggest that LEA representatives visit each private school site at least yearly and check the materials ordered to ensure that they are secular, neutral, and nonideological. Ibid. Representatives of the SEA visit each LEA every two years to monitor the LEA's implementation of the Title VI program, including the LEA's compliance with statutory requirements. Pet. App. ----. In those monitoring visits, the SEA examine whether the services, material, and equipment provided to private schools are secular, neutral, and nonideological. State Guidelines 22. In addition, the SEA encourages LEAs to have religious schools sign written assurances that Title VI equipment will not be used for religious purposes (although, consistent with the statute's emphasis on minimal paperwork, the State had not required written assurances). Id. at 84; Pet. App. ----. The JPPSS had required signed assurances from each private school that material and equipment would be used in "direct compliance" with Title VI. Woodward Dep. Exh. 13.

In Jefferson Parish, Ruth Woodward, the coordinator of Title VI programs in the JPPSS, notified private schools each year of the allotment of Title VI funds that would be available for students at

those schools; those notices were accompanied by a reminder from the Director of the SEA that Title VI prohibits the acquisition of religiously oriented material. Woodward Dep. 62-63; Woodward Dep. Exh. 3. Woodward also visited each private school every year to discuss use of the Title VI equipment with a school official, such as the principal or a librarian, and to make sure that logs of use of Title VI equipment were kept, and that Title VI equipment was properly marked as such. Woodward Dep. 96-98, 102-103, 111. Woodward would specifically inquire of private school officials whether the Title VI equipment and materials were used for secular, neutral, and nonideological purposes. Id. at 102, 111. Library books for use in private schools were personally selected by Woodward and another public school official from catalogues; they also personally reviewed all requests by private schools for library books and other instructional materials, such as videocassettes and filmstrips, and deleted titles that might indicate religiously oriented materials. Id. at 38, 88-89; Pet. App. ----.

This monitoring by state and local officials revealed occasional lapses from Title VI's requirement of secularity, which were corrected. For example, Woodward at one time recalled 191 books from religious school libraries because they were "in violation of the Title VI guidelines." Pet. App. ----. A monitoring visit by the SEA to JPPSS also revealed a possible inappropriate purchase of a religious book for a religious school

library, which led to a recommendation by the SEA that JPPSS be more careful in its oversight of Title VI, but investigation by Woodward disclosed that the book in question had not in fact been purchased with Title VI funds. Pet. App. ----.

3. On December 2, 1985, plaintiffs Mary Helms, Amy Helms, and Marie Schneider (hereafter respondents) brought suit in district court against federal, state, and local officials, claiming that several federal, state, and local programs as applied in Jefferson Parish, Louisiana, including Title VI, violated the Establishment Clause.[3] Respondents did not challenge Title VI on its face. Rather, they contended that one provision, allowing federal funds to be used for the purchase of instructional equipment and materials, had been unconstitutionally applied in the Parish because such equipment and materials had been "transferred to nonpublic schools for their use." Second Amended Complaint ¶ 50 (Nov. 1, 1988). Respondents argued that this loan of instructional equipment and materials to private schools violated the Establishment Clause because (a) there were allegedly no safeguards in place to prevent the property lent to the private schools from being used for religious purposes, and (b) any monitoring that would be useful in preventing the use of instructional equipment for religious purposes would create an

[3] Although the other challenged programs were the subject of extensive decisions in both lower courts, they are not directly pertinent to respondents' challenge to Title VI discussed herein, and will not be further addressed in this brief.

excessive entanglement between the government and private religious schools. Id. ¶ 52.

After discovery, the parties cross-moved for summary judgment on the constitutionality of the Title VI program in the Parish. In 1990, the district court initially concluded that the program was unconstitutional, and granted summary judgment to respondents on that issue. Pet. App. ----. The court concluded (Pet. App. ----) that the program was controlled by this Court's decisions in Meek v. Pittenger, 421 U.S. 349 (1975), Wolman v. Walter, 433 U.S. 229 (1977), and Public Funds for Public Schools v. Marburger, 358 F. Supp. 29 (D.N.J. 1973), aff'd mem., 417 U.S. 961 (1974), which had invalidated state programs that provided instructional equipment and materials to private schools.

The government moved for reconsideration, and on January 28, 1997, the district court reversed itself and upheld the Title VI program as applied in Jefferson Parish. Pet. App. ----. The court relied heavily on the Ninth Circuit's then-recent decision in Walker v. San Francisco Unified School District, 46 F.3d 1449 (9th Cir. 1995), which upheld a "virtually indistinguishable" (Pet. App. ----) Title VI program under which instructional equipment, including computers, were lent to religious private schools. The court emphasized that, as in Walker, the instructional equipment and materials lent to the private schools in Jefferson Parish were secular, that Title VI benefits were made available to students on a neutral basis and without reference to religion, and that all the

monitoring controls in effect in Walker were also in effect in Jefferson Parish: library books and other instructional materials are prescreened by the LEA; most parochial schools sign a pledge agreeing not to use the materials for religious purposes; an LEA official visits the private schools every year; the SEA also monitors the LEA's implementation of the program; and no Title VI money is ever paid directly to religious schools. Pet. App. ----. In light of those factors, the court found that the Title VI program in Jefferson Parish "does not have as its principal or primary effect the advancement or inhibition of religion." Pet. App. ----.

4. Respondents appealed to the Fifth Circuit. The court of appeals reversed, and held that Jefferson Parish's Title VI program was unconstitutional under this Court's decision in Meek and Wolman. Pet. App. ----. The Fifth Circuit expressly disagreed with the Ninth Circuit's Walker decision upholding "a [Title VI] program that was, in all relevant respects, identical to the one * * * in Jefferson Parish." Pet. App. ----.

After examining this Court's decisions regarding aid to religious schools and students, particularly Meek, Wolman, Board of Education v. Allen, 392 U.S. 236 (1968), and Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646 (1980), the court of appeals concluded that those decisions "drew a series of boundary lines between constitutional and unconstitutional state aid to parochial schools, based on the character of the aid

itself." Pet. App. ----. Whereas Allen had upheld the loan of textbooks to religious school students, Meek and Wolman, "while both reaffirming Allen, nevertheless invalidated state programs lending instructional materials other than textbooks to parochial schools and schoolchildren." Pet. App. ----. The court of appeals also concluded that the "boundary lines" between permissible and impermissible assistance based entirely on the character of the aid was reaffirmed by Regan, which upheld aid to religious schools for the administration of standardized tests developed and required by the State, and which "clarified that Meek only invalidates a particular kind of aid to parochial schools -- the loan of instructional materials." Pet. App. ----.

The court rejected two arguments that these absolute "boundary lines" based on the character of the aid are inapplicable to this case. First, it concluded that the Ninth Circuit, in Walker, had erred in attempting to distinguish Meek and Wolman on the ground that the programs struck down in those cases "directly targeted massive aid to private schools, the vast majority of which were religiously-affiliated," whereas Title VI is a "neutral, generally applicable statute that provides benefits to all schools, of which the overwhelming beneficiaries are nonparochial schools." Pet. App. ----(internal quotations omitted). That reading of Meek and Wolman was flawed, the court concluded, because the programs at issue in both cases were specifically designed to ensure that private schoolchildren would benefit from educational benefits

equivalent to the benefits otherwise received by public schoolchildren. Pet. App. ----.

Second, the Court concluded that Meek and Wolman had not been called into question by Agostini v. Felton, 521 U.S. 203 (1997), which upheld a federal program under which public school teachers may provide supplemental instruction to religious school students at those students' schools. "Agostini does, it is true, discard a premise on which Meek relied -- i.e., that 'substantial aid to the education function of the sectarian schools necessarily results in aid to the sectarian school enterprise as a whole.'" Pet. App. ----(quoting Meek, 421 U.S. at 306) (emphasis added by court of appeals; brackets and ellipsis omitted). But, the court stated, Agostini "does not replace that assumption with the opposite assumption; instead, Agostini only goes so far as to 'depart from the rule that all government aid that directly aids the educational function of religious schools is invalid.'" Pet. App. ---- (quoting Agostini, 521 U.S. at 225) (emphasis added by court of appeals; brackets and ellipsis omitted). Agostini, the court concluded, "says nothing about the loan of instructional materials to parochial schools and we therefore do not read it as overruling Meek or Wolman." Pet. App. ----.

Applying Meek and Wolman to this case, the court then concluded that Title VI was unconstitutional as applied in Jefferson Parish "to the extent that [it] permits the loaning of educational or instructional equipment to sectarian schools." Pet.

App. ----. The court's prohibitory decree "encompasses such items as filmstrip projectors, overhead projectors, television sets, motion picture projectors, video cassette recorders, video camcorders, computers, printers, phonographs, slide projectors, etc." Ibid. The decree also "necessarily prohibits the furnishing [to such schools] of library books by the State, even from prescreened lists." Ibid. The court could "see no way to distinguish library books from the 'periodicals . . . maps, charts, sound recordings, films, or any other[s] printed and published materials of a similar nature' prohibited by Meek." Ibid. (quoting Meek, 421 U.S. at 355) (brackets omitted). "The Supreme Court has only allowed the lending of free textbooks to parochial schools; the term 'textbook' has generally been defined by the case law as 'a book which a pupil is required to use as a text for a semester or more in a particular class he legally attends.' We do not think library books can be subsumed within that definition." Ibid. (quoting Allen, 392 U.S. at 239 n.1) (citation omitted).

5. The government petitioned for rehearing and suggested rehearing en banc of the court of appeals' decision. Although one of the judges on the court of appeals called for an en banc poll, the court denied both rehearing and rehearing en banc. Pet. App. ----. The panel amended its decision, however, to make clear that the acquisition of textbooks with Title VI funds for use by religious schools is not prohibited by its decree. Ibid.

6. In February 1999, the Department of Education issued

amended guidance for SEAs and LEAs on various aspects of Title VI, including the statutory requirement that all services, equipment, and materials made available to private school students be secular, neutral, and nonideological. See Pet. App. ----. The Guidance explains that LEAs "should implement safeguards and procedures to ensure that Title VI funds are used properly for private school children." Pet. App. ----. First, "it is critical that private schools officials understand and agree to the limitations on the use of any equipment and materials located in the private school." Ibid. To that end,

> LEAs should obtain from the appropriate private school official a written assurance that any equipment and materials placed in the private school will be used only for secular, neutral and nonideological purposes; that private school personnel will be informed as to these limitations; and that the equipment and materials will supplement, and in no case supplant, the equipment and materials that, in the absence of the Title VI program would have been made available for the participating schools.

Ibid.

Second, the Guidance makes clear that the LEA "is responsible for ensuring that any equipment and materials placed in the private school are used only for proper purposes." Pet. App. ----. Thus, the LEA should "determine that any Title VI materials * * * are secular, neutral, and nonideological, * * * mark all equipment and materials with Title VI funds so that they are clearly identifiable as Title VI property of the LEA[,] [and] * * * perform periodic on-site monitoring of the use of the equipment and materials[,] * * * includ[ing] on-the-spot checks of the use of equipment and

materials, discussions with private school officials, and a review of any logs maintained." Pet. App. ----. The Guidance also states that the Department of Education believes that, to monitor private schools' compliance with the requirements of Title VI, "it is a helpful practice for private schools to maintain logs to document the use of Title VI equipment and materials located in their schools." Ibid. Furthermore, the Guidance emphasizes that LEAs "need to ensure that, if any violations occur, they are corrected at once. An LEA must remove equipment and materials from a private school immediately if removal is needed to avoid unauthorized use." Ibid.

ARGUMENT

[Petitioners contend/ The Secretary agrees/[If petitioners take extreme position] It is not necessary to go so far in order to conclude that the decision below warrants review.]

The court of appeals has read this Court's decisions in Meek v. Pittenger, 421 U.S. 349 (1975), and Wolman v. Walter, 433 U.S. 229 (1977), to require invalidation of an Act of Congress, insofar as that statute has been applied to authorize the loan of instructional equipment, instructional materials, and library materials for the benefit of religious school students. Moreover, the court of appeals held that its conclusion was compelled by the character of the aid alone, irrespective of whether the aid was accompanied by safeguards designed to prevent the equipment and

materials lent to religious schools from being diverted to religious purposes. That decision substantially impairs the effectiveness of Title VI and similar programs of federal aid to education in the Fifth Circuit, and it conflicts directly with a decision of another circuit. Accordingly, while we agree that Meek and Wolman may be read as the court of appeals read them, we submit that a categorical rule prohibiting the loan of all instructional equipment and materials to religious schools, without regard to the adequacy of any attendant safeguards or whether the aid is supplementary to rather than a direct subsidy of the religious school's core educational program, is not necessary to secure what this Court has identified as the fundamental principles of the Establishment Clause.

1. The court of appeals read this Court's decisions in Meek and Wolman as establishing a categorical prohibition against lending instructional equipment or materials or library materials purchased with public funds to religious schools. The court rejected the argument that such loans could be made if they supplemented, rather than supplanting, the basic educational mission of the schools, and if safeguards were established to prevent the loaned materials from being diverted to religious purposes.

That holding does not prohibit the Secretary of Education from distributing funds under the statute to Louisiana, nor does it prohibit the state and local educational agencies from providing

other forms of Title VI assistance to religious school students in Jefferson Parish. See 20 U.S.C. 7351(b) (listing the authorized innovative-assistance programs).[4] The assistance it prohibits, however, is precisely the form of federal assistance that has in recent years been the most important to both public and private schools **[is this true? cite?]** Moreover, it is the form of assistance that will be even more important in the future, in the effort to make computer-assisted learning available to all children. Indeed, the President has recently proposed legislation that would substitute for the broad menu of aid categories in Title VI a program specifically designed to provide advanced computer technologies to every classroom. **[explain relationship of new statute to old Title 3 and to old title 6; of course we can't say this until after it is announced.]**

Because of resource constraints, it is not feasible to provide this kind of assistance by lending computers or software directly to each student, in a manner similar to the textbook-loan program upheld in Board of Education v. Allen, 392 U.S. 236 (1968).[5] Nor is it feasible to hire public school teachers to supervise the use

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[4] But other forms of innovative-assistance programs authorized under Title VI, such as grants for school reform and effectiveness programs, see 20 U.S.C. 7352(b)(3), (7), (8), might raise Establishment Clause problems if applied to religious schools, because they would result in money being provided directly to such schools for schoolwide improvement.

[5] The funding in this case was less than seven dollars per student per year. See Pet. App. ____.

of Title VI instructional equipment and materials by students at religious schools, so as to bring the program under Agostini v. Felton, 521 U.S. 203 (1997), which permits public school teachers to give instruction to religious school students on religious school premises.[6] In practical effect, therefore, the court of appeals has invalidated the kind of federal assistance that is most central to the effort to bring modern technology to all students.[7]

2. The court of appeals' decision conflicts directly with the Ninth Circuit's decision in Walker v. San Francisco Unified School District, 46 F.3d 1449 (9th Cir. 1995), which upheld a "virtually indistinguishable" Title VI program (Pet. App. ----). In that case, as in this one, private schools were lent various forms of instructional equipment and materials, including computer equipment; the schools were also lent library books and

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[6] For the same reason, it would also be difficult, if not impossible, to hire public school teachers to give religious school students benefits under other Title VI programs, such as those designed to improve higher-order thinking skills or to combat illiteracy. See 20 U.S.C. 7352(b)(4), (5).

[7] The court of appeals' ruling that the government may not provide religious schools with any aid in the form of instructional equipment or materials or library materials may have implications for other federal education programs as well. The Telecommunications Act of 1996 requires the Federal Communications Commission to develop policies to ensure that schoolrooms, including schoolrooms at nonprofit private schools, have access to computer networks at discounted rates. See 47 U.S.C. 254(b)(6), (h)(1)(B), (h)(2)(A), and (h)(5)(A) (Supp. II 1996).

instructional materials, selected from prescreened lists to ensure their secularity. Ibid. The Ninth Circuit upheld the program, concluding in particular that it did not have the primary effect of advancing religion because the benefits under the program were available on a neutral basis without reference to religion, and because "controls are in place to prevent [Title VI] benefits from being diverted to religious instruction." Id. at 1467.

The Ninth Circuit's decision is not distinguishable from the Fifth Circuit's decision in this case on the ground that the Ninth Circuit found that the San Francisco program had adequate controls to prevent the diversion of instructional equipment to religious purposes.[8] With one possible exception, those controls do not appear to have been significantly different from the controls in place in Jefferson Parish.[9] Indeed, even though the court of

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[8] The Ninth Circuit did not consider itself bound by Meek and Wolman because it read this Court's subsequent decisions as effectively overruling those decisions. [CITE] We do not suggest that the Ninth Circuit acted properly in doing so. See Agosinti, 521 U.S. at ___ (emphasizing that only this Court has the prereogative of overruling its own decisions, and that lower courts should follow those decisions unless and until they are overruled by this Court).

[9] The possible exception relates to computer equipment, for the Ninth Circuit noted that, at one point, computers lent to private schools under Title VI had been "locked" for use only with prescreened software, thus ensuring that they could not be diverted to use with religiously-oriented software. See Walker, 46 F.3d at 1464. It does not appear, however, that other instructional equipment lent to religious schools, such as overhead projectors and videocassette players, were similarly "locked" for use only with prescreened materials. See ibid.

appeals in this case was aware that the program in Walker had in place various controls, it found the two programs to be, "in all relevant respects, identical." Pet. App. ----.

More importantly, under the court of appeals' decision in this case, the existence or extent of any such controls is simply irrelevant to the constitutional question, for the Fifth Circuit read Meek and Wolman to hold that the permissibility of aid to the educational function of a religious school is dependent entirely on the nature of the aid. See Pet. App. ----. Thus, even if the JPPSS did have in place controls equivalent to those examined in the Walker decision, or even more extensive controls giving even greater assurance that instructional equipment could not be used for religious purposes, that would not have affected the court of appeals' resolution of this case. That conflict in the circuits warrants resolution by this Court. LEAs and SEAs across the Nation should know whether the Fifth Circuit's or the Ninth Circuit's decision sets forth a correct understanding of the constitutional limits on their ability to comply with Title VI's requirement of equitable participation by private school students by lending computer equipment and library books to religious schools.

3. Meek and Wolman may fairly be read as the court of appeals read them, to prohibit flatly the loan of instructional equipment and materials for use by students at religious schools, without regard to the effectiveness of any safeguards designed to prevent such aid from being diverted to religious purposes. It is

questionable, however, whether such a broad categorical rule is necessary to secure what this Court has identified as the core principle of the Establishment Clause that "[p]ublic funds may not be used to endorse [a] religious message." Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 847 (1995) (O'Connor, J., concurring); see also Bowen v. Kendrick, 487 U.S. 589, 623 (1987) (O'Connor, J., concurring) ("any use of public funds to promote religious doctrines violates the Establishment Clause").[10] Where the assistance is appropriately limited and safeguarded, the Constitution does not demand a more sweeping restriction prohibiting all loans of such equipment and materials to religious schools. Individual deviations from such safeguards resulting in Establishment Clause violations can be redressed on a case-by-case basis. Cf. Kendrick, 487 U.S. at 620-622 (opinion of the Court); id. at 623-624 (O'Connor, J., concurring). But it is not necessary to presume as a categorical matter that such safeguards can never be effective or manageable. Cf. Rosenberger, 515 U.S. at 847 (O'Connor, J., concurring) ("Reliance on categorical platitudes is unavailing. Resolution instead depends on the hard task of judging -- sifting through the details and determining whether the challenged program offends the Establishment Clause."); Committee

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[10] Both cases in effect invalidated the challenged state-aid statutes on their face. See Wolman, 433 U.S. at 251 n.18 (suggesting that safeguards are irrelevant because "Meek makes clear that the material and equipment are inextricably connected with the church-related school's religious function").

for Public Education and Religious Liberty v. Regan, 444 U.S. 646, 662 (1980) ("[O]ur decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes."). Accordingly, we submit that the rule of Meek and Wolman should be limited to cases in which, either because the public aid to a religious school is not supplementary, or because the provision of aid is not accompanied by effective safeguards, there is a risk of diversion of resources to religious purposes.

To the extent that Meek and Wolman announce a categorical rule prohibiting loans of instructional equipment and materials to religious schools, those decisions rest on two rationales, both of which are questionable in light of this Court's subsequent decisions. The first rationale is that, because religious elementary and secondary schools are considered pervasively sectarian, any aid to the educational function of such schools must be conclusively held to advance the religious and well as the secular aspects of the education that they provide, which are deemed to be inextricably intertwined. See Meek, 421 U.S. at 366; Wolman, 433 U.S. at 249-251.

More recently, however, the Court has "departed from the rule * * * that all government aid that directly assists the educational function of religious schools is invalid." Agostini, 521 U.S. at 225. To be sure, the Agostini case, and the cases on which it relied, involved the distinct situations of aid provided directly to students by public authorities in the form of cash assistance

and instructional assistance provided directly to religious school students by public personnel. Nonetheless those decisions suggest a more nuanced rule than that announced in Meek and Wolman, so that loans of instructional equipment and materials to religious schools should not conclusively be presumed illegitimate. Indeed, much earlier, in Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646 (1980), the Court upheld a state statute authorizing reimbursement to private schools for the costs of administering state-required standardized tests because "there was no substantial risk that the examinations could be used for religious educational purposes," id. at 656; see id. at 659 (noting that the law "provides ample safeguards against excessive or misdirected reimbursement"). The Court explained there that Meek should not be read to hold "'that all loans of secular instructional material and equipment' inescapably have the effect of direct advancement of religion." Id. at 661-662 (quoting Wolman, 433 U.S. at 263 (Powell, J., concurring in part, concurring in the judgment in part, and dissenting in part)).

Second, Meek and Wolman appear to rest also on the rationale that any safeguards adequate to prevent the diversion of instructional equipment and materials to religious purposes would require detailed supervision of religious schools' instruction, resulting in an impermissible entanglement between state and religion. See Meek, 421 U.S. at 366-367 n.16 (discussing Public Funds for Public Schools v. Marburger, 358 F. Supp. 29 (D.N.J.

1973), aff'd mem., 417 U.S. 961 (1974), and lower court decision in Meek). But again, in later cases, including Agostini, the Court has indicated that the stringency of its previous rules against interaction of public and religious institutions should be relaxed. Agostini observed that "[n]ot all entanglements * * * have the effect of advancing or inhibiting religion," and that "[e]ntanglement must be 'excessive' before it runs afoul of the Establishment Clause." 521 U.S. at 233 (also citing Kendrick, 487 U.S. at 615-617); see also Aguilar v. Felton, 473 U.S. 402, 430 (1985) (O'Connor, J., dissenting) ("state efforts to ensure that public resources are used only for nonsectarian purposes should not in themselves serve to invalidate an otherwise valid statute"). The danger of entanglement exists only where "pervasive monitoring" must be employed to prevent public aid from being diverted to religious purposes. See Agostini, 521 U.S. at 234.

Thus, the question is not (as the court of appeals believed) whether, this Court, having "discard[ed] a premise on which Meek relied -- i.e. that substantial aid to the educational function of sectarian schools necessarily results in aid to the sectarian school enterprise as a whole," has "replace[d] that assumption with the opposite assumption," namely that aid to religious schools is presumptively permissible. See Pet. App. ---- (internal quotation marks, brackets, and ellipsis omitted). While direct material aid to religious schools would violate the Establishment Clause if it were so extensive as to supplant the school's own resources, or if

it were not protected against diversion to religious use by adequate safeguards, each situation must be assessed on its own facts. In this case, therefore, the court of appeals should have had the opportunity to consider whether the statutory limits on the kinds of aid permissible under Title VI and the actual safeguards put in place by the SEA and the LEA are in fact adequate to prevent the diversion of resources. The court of appeals also should have the opportunity to consider the Department of Education's recent Title VI Guidance explaining the kinds of safeguards that should be employed by LEAs administering Title VI programs (see pp. ---, supra).[11] And the court of appeals should then consider whether such safeguards, if adequate, are in fact so intrusive that they inhibit the ability of the religious school to fulfill its religious mission or bring religious and public school authorities into conflict over the content of course work that may be assisted by the instructional equipment and materials.[12]

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[11] Accordingly, should the Court conclude that instead of the categorical rule applied by the court of appeals a review of the adequacy of safeguards is appropriate, the Court may wish to remand the case to the court of appeals for further consideration, rather than addressing for itself in the first instance the adequacy of the safeguards, on which no findings were made by the lower court.

[12] The task of monitoring the use of instructional equipment and materials at religious schools is not likely to require the pervasive kind of surveillance about which the Court expressed concern in Lemon v. Kurtzman, 403 U.S. 602, 619 (1971). In that case, involving state-sponsored salary supplements for religious school teachers, the Court observed that "a teacher cannot be inspected once so as to determine * * * subjective acceptance of

A further important point distinguishes Title VI from the assistance programs invalidated in Meek and Wolman. Title VI expressly requires that any assistance under that program (whether for private or public schools) supplement, and not supplant, non-federal resources available to the school -- reflecting the inherently supplementary role that the federal government plays in education. See 20 U.S.C. 7371(b); 34 C.F.R. 299.8. Moreover, the aid actually provided under Title VI on a per-student basis is quite small, compared to the other resources available to private

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the limitations imposed by the First Amendment," and that any effective means to prevent religious school teachers paid by the State from fostering religion would require "comprehensive, discriminating, and continuing state surveillance." Ibid. The same need not be true with regard to monitoring the use of instructional equipment and materials; schools can and do maintain logs documenting the classes in which such equipment and materials are used, the assignments that are carried out on them, and the teachers who use them. Such logs could be required as a condition of acceptance of the equipment and materials, and use of such equipment and materials could also be limited to classes in which the prospect of religious inculcation is relatively minimal. Cf. Allen, 392 U.S. at 248 ("Nothing in this record supports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, history, or literature, are used by the parochial schools to teach religion.").

To support its entanglement ruling, Lemon also noted the prospect of state audits of religious schools' accounts to distinguish religious and secular expenditures. See id. at 621-622. But even if that particular rationale has survived the Court's subsequent decisions in Kendrick (see 487 U.S. at 616-617) and Agostini (see 521 U.S. at 233-234), which permit some governmental review of religious institutions' compliance with statutory requirements, the same danger is not present in Title VI. An LEA would not have to examine a religious school's books to determine whether equipment was being used for improper purposes. The LEA could make that determination by examining the information maintained on logs.

schools. See Pet. App. ---- (referring to aid provided per student in San Francisco as "de minimis"). The aid provided in Meek, by contrast, was "massive" (421 U.S. at 365), and the extent of the aid in Wolman, although less clear from the Court's opinion in that case, appears to have been quite substantial as well. See 433 U.S. at 233 ($88 million biennial appropriation for all auxiliary aid to nonpublic schools).

In Meek and Wolman, therefore, it was reasonable to conclude that the aid programs "relieved sectarian schools of costs they otherwise would have borne in educating their students." Zobrest v. Catalina Foothills School Dist., 509 U.S. 1, 12 (1993) (so characterizing Meek). By contrast, because of the anti-supplantation rule of Title VI and the relatively small amount of money spent per student, it is not reasonable to conclude that Title VI effects a "direct subsidy" to religious schools (ibid.), or that participation in the Title VI program permits religious schools to divert other resources, which would otherwise be used for secular purposes, to religious use. And because, in addition, Title VI benefits are offered to all students on a neutral basis without reference to religion, Title VI does not create "a financial incentive to undertake religious indoctrination." Agostini, 521 U.S. at 231. Therefore, the categorical rule of Meek and Wolman may be limited to situations where the aid program is not required to be supplementary of the resources that the religious school would otherwise have at its disposal.

CONCLUSION

The petition for a writ of certiorari should be granted in order to establish that the categorical ban on lending instructional materials or equipment to religious schools, articulated in Meek and Wolman, is limited to circumstances where the aid to religious schools is more than supplementary, and where there are inadequate safeguards to protect against diversion to religious use.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Acting Assistant Attorney General

BARBARA D. UNDERWOOD
Deputy Solicitor General

PAUL R.Q. WOLFSON
Assistant Solicitor General

MICHAEL J. SINGER
HOWARD S. SCHER
Attorneys

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