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001. memo	From: Judith Winston To: Secretary Riley; RE: Helms v. Picard (3 pages)	03/26/1999	P5 1572
002. memo	From: Paul Wolfson To: Solicitor General; RE: Helms v. Picard (25 pages)	03/05/1999	P5 1573

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Educ - Helms v Picard

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE GENERAL COUNSEL

THE GENERAL COUNSEL

March 26, 1999

MEMORANDUM TO SECRETARY RILEY

FROM: **Judith A. Winston** JAW

RE: **Helms v. Picard**

The Solicitor General has sent us a draft of a letter that would go from the Attorney General to the Senate Legal Counsel setting forth the Department of Justice's (DOJ) justification for not filing a petition for certiorari in the Supreme Court in Helms v. Picard (copy attached). This letter is also intended to affirm DOJ support for the proposition that the Title VI program is facially constitutional and may be constitutionally applied throughout the country. Although the letter is a well-written explanation of the reasons why the Solicitor General does not want to file a petition in this case, it does not present the legal arguments that could and would be made in favor of the constitutionality of the program and it minimizes the significant practical problems that would result if the decision of the Fifth Circuit is left in place. Also, as a public statement of the Federal government's position on this matter, the letter also likely would undercut efforts by other parties to file a petition for certiorari and would undermine our relationship with the private school community. These are the very issues that were of primary concern to you during your meeting with the Solicitor General on Monday. Because of the respectable legal arguments that could be made in this case and the significant practical difficulties that would result from not filing a petition, we believe that in spite of the Solicitor's strong view that a petition should not be filed, you should continue to recommend that a petition for certiorari be filed in the Supreme Court in this case.

We believe that the draft letter does not address objectively the legal merits of the case or present a realistic strategy for an eventual favorable ruling from the Supreme Court in several respects:

1. The letter gives little, if any, weight to the Ninth Circuit decision in Walker v. San Francisco Unified School District, which upheld the provision of similar Chapter 2 services to children in private sectarian schools. The letter mentions the Ninth Circuit's decision in Walker only to note that the Fifth Circuit disagreed with Walker in rendering its decision in Helms.

2. The letter does not mention the requirement that Title VI (and formerly Chapter 2) funds used to provide services for the benefit of private school children must

supplement, and not supplant, funds that would have otherwise been spent to provide services for these children (and that Title VI therefore does not relieve private sectarian schools of any costs that they would otherwise have borne to educate their children). The supplement, not supplant provision in Title I influenced Justice O'Connor's favorable opinion in the Agostini v. Felton case.

3. In asserting that the record in Helms is too unfavorable to support a petition for certiorari, the letter emphasizes that monitoring visits by the LEA had revealed that some services provided for the benefit of private school children were not secular, neutral and nonideological. These services were recalled from the schools in question. We believe, therefore, that this is a positive indication that adequate safeguards (in this case, monitoring) can prevent the diversion of services to religious school purposes and were in place in Jefferson Parish. (We have recently issued guidance to strengthen monitoring and increase safeguards.)

4. The letter indicates that the DOJ would not be filing a petition for certiorari, in part because of the belief that a more favorable record could be developed in another challenge to Title VI. However, there is no other challenge to Title VI on the horizon.

5. The letter asserts that a petition for certiorari would "have a highly abstract quality," because it would ask the Supreme Court to approve a program that no longer exists in the form in which it was challenged (i.e., the program no longer authorizes the purchase of all of the kinds of equipment that were then allowable under Chapter 2). However, the old program, like the new Title VI program, provided loans of computer equipment and library materials. Thus, if the Supreme Court did approve the program, its approval would seemingly cover the kind of equipment currently allowable under this program (computer hardware) and other related programs.

We also believe that the draft letter understates the practical difficulties of implementing the Fifth Circuit's decision in several ways:

1. The letter states that other program activities and services allowable under Title VI can be provided for the benefit of private school children (such as services to improve higher-order thinking skills or to combat illiteracy). However, the loaning of computer equipment and library books currently constitute the vast majority of Title VI services for private school students. In addition, the Department's Title VI program officials have indicated that because of the limited amount of funds available for services for private school children, the most effective use of these funds is the purchase of instructional materials and equipment (computer hardware) and that it would be difficult to provide equitable services through other means in many instances.

2. The letter states that the only effect of the Helms decision is "to place a few restrictions" on how the LEA (Jefferson Parish) may use its Federal resources. However, the decision completely precludes the placement of computer equipment and library books in sectarian schools (at least without public school personnel being present), and it does not mention the disruption likely to occur in removing from the private schools the

equipment and library books that were lent under the Chapter 2 program. Furthermore, the decision would have to be followed not only in Jefferson Parish, but in the entire Fifth Circuit (Texas, Mississippi and Louisiana). You should note, of course, that if the case goes to the Supreme Court and is lost, we may be faced with these difficulties in school districts all across the country.

3. The letter suggests that it may be possible, even under the Fifth Circuit's decision in Helms, to continue to place instructional equipment on private school premises, but only if actual instruction on the equipment is provided by public school teachers. While this may be a legally permissible option even under the Fifth Circuit's decision, this type of program would be significantly more expensive and probably is not a realistic option in most instances.

The draft letter also does not address the underlying fact that these types of services have been provided for private school students under Title VI and predecessor statutes virtually since the inception of the Elementary and Secondary Education Act in 1965. We have been defending these programs in litigation since 1985. To fail to seek certiorari now on this issue would be viewed as a retreat in our support for services for private school students especially since our view prevailed in another circuit court of appeals (suggesting that in spite of the strong reservations of the Solicitor and his legal counsel there is a respectable legal argument supporting a petition for certiorari). Moreover, a failure to ask for Supreme Court review could seriously damage the positive relationships with the private school community that have been developed in recent years. Also, because intervenors (representing private school students) are likely to file a petition for certiorari, we would be in the uncomfortable posture of opposing their efforts in this case. Finally, the references in the draft letter to further guidance and possibly regulations restricting the manner in which Title VI services can be provided for private school students may further upset private school officials.

For all these reasons, we believe that you should continue to recommend that a petition for certiorari be filed in the Supreme Court in this case. If you decide to accept this recommendation, your views should be shared with the Solicitor as soon as possible. The deadline for filing a petition for certiorari is April 13.

Memorandum

Subject	Date
Helms et al. v. Picard et al., No. 97-30231 (5th Cir. Aug. 17, 1998)	March 5, 1999

To	From
The Solicitor General	Paul R.Q. Wolfson

TIME

A petition for a writ of certiorari would have to be filed by April 13, 1999. No extension is available for certiorari petitions in cases from the Fifth Circuit.

RECOMMENDATIONS

The Department of Education recommends certiorari.

Recommendations are expected from the Civil Division and the Office of Legal Counsel, but have not yet been received.

Although the issue is close, I recommend NO CERTIORARI.

Don't think we can win. → implicates EC juris That's not been subj to erosion —

T VI ~~dis~~ OK — but stat has been changed
nature of eq. changed
Ed guidance — to ensure
it is oper in way consist
w/ estab clause.

Ct will view request as signif.
SOC is the key
In opin in Agostini / Brennan/ [illegible] / Rosenberger / Ball — she'll not take big steps
Can convince her of little step.
• Aid-in-kind
└ no bar re "incapable of diversion"
Just assurances — won't be diverted.
But this case doesn't allow that arg

QUESTION PRESENTED

Whether Title VI of the Improving America's Schools Act of 1994, 20 U.S.C. 7351(b)(2), as heretofore 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 what is now 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, because the challenge was brought to the program in its previous incarnation. I will continue to refer to the program as Title VI, however, because the decision whether to seek certiorari depends in large part on the practical effect of the decision on the future implementation of the program as it exists under current law.

Title VI was enacted in 1994 as part of a comprehensive federal education statute. It provides federal financial assistance in block-grant form to state education agencies (SEAs) and local education agencies (LEAs) to be used in "innovative education program strategies." The federal funds may be used for eight different kinds of programs, specified at § 7351(b), including such matters as professional teacher development in the use of technology, adult-literacy programs, "special education" programs, and gifted-and-talented programs. There is no requirement that a LEA receiving federal funds use the funds for all these kinds of 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 the opportunity 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 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. 20 U.S.C. 7372(b).

All Title VI 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. Further, 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). If an LEA elects to provide services (rather than equipment or materials), such as teacher training, to a private school, then any such services must be provided either by a public agency or by a contractor who is independent of a private school and any religious organization. 20 U.S.C. 7372(c)(2).

Until very recently, the Department of Education had only very limited regulations and published guidance on the participation of

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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 programs cannot be taken too literally, however, because Title VI permits funding for such matters as teacher-training. All educational programs in a sense are intended for the benefit of the children, but it would be unrealistic in this case to argue that the public agency provides benefits directly to the children; rather, the LEA lends the private schools resources to assist them in giving educational benefits to children enrolled in their schools.

private school students in Title VI, consistent with the emphasis on flexibility and local control. The regulations largely restate the statutory requirements that children at private schools be permitted to participate in the program 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). Until recently, however, the Department has never issued detailed guidance as to how LEAs are supposed to ensure that such equipment and supplies are used only for "proper purposes," and in practical effect it has been up to each LEA to determine how that should be done.

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 and litigated), but are no longer covered under Title VI, as enacted and revised in 1994, which restricted to a considerable degree the kinds of instructional equipment that could be lent to private schools under this program. This case, therefore, was litigated largely about kinds of instructional

equipment that, under the statute, may no longer be provided to private schools (or indeed public schools).

This case involves the implementation of the predecessor provision to § 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 for 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 LEA, not the Department of Education, is responsible for monitoring the implementation of Title VI programs at private schools to make sure that the schools comply with the statute (including the statutory requirements of secularity and neutrality), and until recently the Department has not required anything specific in the way of monitoring. In the particular case of Jefferson Parish, apparently, 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 private schools to monitor actual use of the equipment and materials. Materials containing content, such as library books and reference material, are usually chosen from pre-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

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[2] The evidence in this case indicates that "the instructional materials purchased with Chapter 2 funds during 1986-87 and loaned to nonpublic, parochial schools in Jefferson Parish includes 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." 151 F.3d at 368. Except for computers, most of these may no longer be provided under Title VI.

nonideological, as required by the statute. Nevertheless, the system is 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 151 F.3d at 368.

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.[3] 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 Meek and Wolman 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 holdings of Meek and Wolman did not govern because (the Walker court opined) 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 in the provision of government benefits to education. The district court also observed that, as in Walker,

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[3] Also at issue in this case was 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, 521 U.S. 203 (1997). Based on Agostini, the court of appeals upheld the program. See 151 F.3d at 350-365. That issue does not involve the federal government, and will not be further discussed in this memo.

The library books and other instructional equipment are prescreened and title remains with the public agency. Most parochial schools sign a pledge agreeing not to use the Chapter 2 materials for religious purposes and the Chapter 2 coordinator makes yearly monitoring visits to the nonpublic schools.[4] In addition, the State makes monitoring visits every two years to the nonpublic schools. Finally, employees of a public agency provide the Chapter 2 services and no money is directly paid to the parochial schools. The Court follows Walker and finds that these controls are sufficient to prevent Chapter 2 benefits from being diverted to religious instruction.

4. The court of appeals reversed, and struck down Title VI/Chapter 2 as applied in Jefferson Parish. 151 F.3d at 367-374. The court rejected the Ninth Circuit's conclusion that Meek and Wolman were no longer good law. The court of appeals stated 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." Id. at 371. 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. Ibid.

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. 157 F.3d at 372. Thus, it summarized, under the Supreme Court's decisions in this area, a public education authority may provide purely secular textbooks to religious-affiliated schools -- in part because the secular content of such textbooks can be readily determined in advance -- but nonetheless other materials, including secular and ancillary instructional materials such as maps, globes, and wall charts, as well as instructional equipment such as slide projectors, may not be so provided. Ibid. The court of appeals suggested that the Supreme Court's decisions in this area are not readily harmonized, but it emphasized that the overarching theme of

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[4] The court of appeals' opinion, however, indicates that the LEA monitors the schools only once every two years. 151 F.3d at 368.

those decisions is that the Establishment Clause concern turns on the specific kind of aid that is provided to a religious school, and not on the neutral or non-neutral reach of the program offering benefits (i.e., whether the state offers benefits only to religious schools, or to all educational institutions, religious and secular). Thus, for example, the court of appeals noted that in Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646 (1980), even though the Court upheld financial assistance to religious schools in testing and grading standardized tests, the Court also reiterated that Meek does bar the loan of instructional materials to religious schools. See 157 F.3d at 373.

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. "Thus, the percentages [of aid that flowed to religious schools] discussed in Meek and Wolman were completely irrelevant to the constitutionality of the programs at issue there, as was the fact that the general aid programs might have been implemented by two separate statutes." 157 F.3d at 373.

In addition, the court rejected the suggestion that Agostini v. Felton, 521 U.S. 203 (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.'" 157 F.3d at 373. Because Agostini "says nothing about the loan of instructional materials to parochial schools," the court declined to read it as overruling Meek or Wolman.

5. You authorized a petition for rehearing, which was denied by the Fifth Circuit. In the meantime, the Department of

Education, in consultation with the Department of Justice, including the Solicitor General's Office, prepared amended published guidance on the participation of private schools in Title VI. That guidance (like all of the Department's Guidance on Title VI) "does not impose any requirements beyond those in the Title VI statute and other applicable Federal statutes and regulations, but encourages varying views and focuses on what should and can be done, rather than setting limits." Guidance iii (Feb. 1999).[5]

The Guidance explicates the Department of Education's view as to what constitutes compliance with Title VI's statutory requirements that benefits be secular and neutral in the context of participation of private schools. The Guidance states that LEAs should employ several safeguards to ensure that aid will not be diverted to religious purposes. For example, the LEA should obtain from the private school a written assurance that the equipment and materials placed in the private school will be used only for secular purposes. In addition, the LEA should ensure that such equipment and materials are in fact secular by, for example, reviewing the content of any library books provided to private schools, conducting periodic on-site monitoring, and requiring the use of logs to ensure that the private school uses the equipment and materials only for secular purposes. Third, the LEA should ensure that any violations are corrected at once and must remove equipment and materials if necessary to prevent unauthorized use. See Guidance 19-20.

DISCUSSION

The decision whether to seek certiorari in this case is a difficult one. There are three separate considerations that bear on this decision. First, is the court of appeals' decision correct under <u>current</u> Establishment Clause law, and therefore would a certiorari petition require us to argue that <u>Meek</u> and <u>Wolman</u> should be overruled? Second, if we were to argue that those cases should be overruled, what are the possible bases on which we might reasonably make such an argument? And third, even if we assume in

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[5] Because the statute emphasizes flexibility in the LEAs and SEAs' administration of the program rather than centralized micro-management by the Department of Education, the Department of Education expressed to the Department of Justice a preference for issuing guidance rather than binding regulations in response to the court of appeals' decision.

the abstract that certiorari might be warranted, what is the significance of the fact that the record in this case was compiled before the statute was amended and before the Department of Education issued guidance on the participation of private schools in the Title VI program?

1. a. In my view, the court of appeals correctly concluded that this case was governed by Meek and Wolman, at least as to the loan of instructional equipment to private schools, although the question is 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 (emphasis added).

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.[6] The Court found that distinction to

[6] In my discussion of Supreme Court cases involving aid to "religious schools," or "religiously affiliated schools," such references refer only to primary and secondary schools, and not postsecondary schools, such as religiously affiliated universities, which the Supreme Court has viewed as categorically different because such institutions are generally not pervasively

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, that 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. Justice Powell also emphasized that the Court in Meek had reaffirmed Board of Education v. Allen, 392 U.S. 236 (1968), which had upheld a program in which a public school authority loaned textbooks to students attending private (including religious) schools). Justice Powell drew from Meek and Allen the principle that "at least some such loans of materials helpful in the educational process are permissible - so long as the aid is incapable of diversion to religious uses * * * and so long as the materials are lent to the individual students or their parents and not to the sectarian institutions." 433 U.S. at 263.[7] Justice Powell's narrower reading of Meek in Wolman -- although not the above-quoted sentence setting forth his two conditions for permissibility of state aid to religious schools -- was cited by the Court with approval in Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646, 661-662 (1980).

The character of most of the aid at issue in this case -- instructional equipment, including computer equipment -- is indistinguishable from the aid invalidated in Meek or Wolman, and falls even under Justice Powell's reconciliation of Allen, Meek, and Wolman. Under a broad reading of those two cases, of course, including the interpretation that the Court apparently gave in those cases themselves, the aid clearly falls. The rationale for the majority opinion in Wolman was that even secular educational aid to religious schools is impermissible, with the exception of textbooks; the majority opinion noted, in fact, that the parties had stipulated that the challenged law required "that materials and

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sectarian. See Bowen v. Kendrick, 487 U.S. 589, 612 (1988).

[7] Justice Powell at this point cited Committee for Public Education v. Nyquist, 413 U.S. 756 (1973), in which the Court (per Justice Powell) held that several provisions providing financial aid to religious schools and to parents of students attending those schools violated the Establishment Clause.

equipment capable of diversion to religious issues will not be supplied." 433 U.S. at 249. Nevertheless the court found the aid impermissible on the basis of Meek, and held that the loan of equipment to private schools, although ostensibly "limited to netural and secular instructional material and equipment," nonetheless "inescapably had the primary effect of providing a direct and substantial advancement of the sectarian enterprise." Id. at 250; see ibid. ("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").

The original rationale of Meek, therefore, was that any aid to religious schools, with the exception of textbooks, necessarily advances the sectarian mission of those schools. If this broad reading of Meek is correct, then it is difficult to see how the aid that is challenged in this case could be permissible.[8] If the Supreme Court continues to believe that any direct aid to the instructional mission of a religious school necessarily advances the religious aspect of that mission, then the aspect of the statute challenged in this case cannot possibly be constitutional.

If, however, we assume that the Court no longer adheres to such a broad reading of Meek, but (since its decision in Regan) has adhered rather to Justice Powell's somewhat narrower reading of Meek in Wolman, then the question is whether the aid challenged in this case survives Justice Powell's reading of Meek. The answer is that it probably does not. Under the rule of Justice Powell's concurring opinion, educational assistance to religiously affiliated schools is proper only if, at a minimum, the assistance is incapable of diversion to religious uses.[9] It is true that in

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[8] The same might be true of other aid made available under Title VI as well. Teacher training in technology made available to religious school teachers, for example, would seem to advance both the secular and religious mission of a religious school, if it makes the teachers more effective. Perhaps one could argue that such aid is simply more indirect in its effect on the instructional mission of the school than is the aid made available in Meek and Wolman.

[9] Justice Powell also required that any aid be given to the students themselves rather than the schools, and he voted to invalidate the statute in Wolman on the ground that the aid did not satisfy that condition. 433 U.S. at 248. It is not clear

Wolman, the parties had stipulated that the law permitted only the loan of material that was incapable of diversion to religious use, and as to much of the material at issue that was probably correct (such as science equipment). See 433 U.S. at 248 n.15, 249. It is also true that (1) the majority probably did not rest its decision in Wolman on a factual disagreement with the parties as to whether the material at issue there was incapable of diversion to religious use, but rather adopted a broader rule, and (2) Justice Powell appeared to accept the statute's facial representation that loans were limited to materials that were incapable of diversion to religious use (433 U.S. at 263).[10]

Nevertheless, it is difficult to say with a straight face that computers, slide projectors, tape players, and the like are inherently "incapable" of diversion to religious ends. Plainly they can be used for instruction in religious subjects. A computer can be used to run a religious instruction program; a slide projector can be used to run religious slides. Nothing inherent in that equipment limits its use to secular subjects, unlike,

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whether Justice Powell's second condition survived Regan, which upheld the use of public funds to reimburse religiously affiliated schools for the costs incurred in administering state-required standardized tests, rather than direct assistance to parents. Regan might be distinguishable from Wolman, however, on the ground that it did not involve instructional equipment or materials, and therefore did not involve direct aid to the instructional mission of the school.

[10] Justice Powell voted to invalidate the Ohio statute because it de facto permitted loans of materials and equipment to religiously affiliated schools rather than parents. 433 U.S. at 263. Because he concluded that the ostensible loans of equipment such as charts and wall maps to parents were, in effect, loans to the schools, that conclusion was sufficient for him to invalidate the statute, and he did not address the specific significance of loans of instructional equipment such as cassette recorders and record players. He did observe that the statute "makes no attempt to separate" certain other instructional materials, such as charts and wall maps, "from others meaningfully lent to individuals," although he also suggested that he would find no defect "in a properly limited provision lending to the individuals themselves only appropriate instructional materials and equipment similar to that used in public schools." Id. at 264.

arguably, science equipment and maps (although people might disagree about that also). Such equipment is plainly not like textbooks, for it cannot be screened in advance to ensure that it can be used only to impart a secular content.[11] Although one might imagine a set of safeguards sufficient to establish that computers are not in fact diverted or divertable to religious purposes, neither on its face nor as applied in Jefferson Parish heretofore did the Title VI program require such safeguards. And although Title VI is on its face limited to loans of secular equipment, it is not (unlike the Ohio statute invalidated in Wolman) on its face limited to materials that are incapable of diversion to religious use.

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[11] The question of library books is closer, because it is possible to prescreen library books, like textbooks, to ensure that they have a secular content. One would, however, expect schools to have greater latitude in stocking a library than in identifying appropriate texts for classroom discussion. Even a public school, in fact, is likely to have some library books discussing religious subjects, including the Bible and scriptures of other religions. On the other hand, one could argue that there are particular dangers in a public school lending religious books to a religious school for use in its library, and so a public school might be required to provide only secular books to a religious school for use in its library, even if that public school had the Bible in its own library. Under the second condition of Justice Powell's concurrence in Wolman, however, the loan of library books could not be upheld in any event because the loan is made to the public school rather than to the student. As mentioned above, however, it is not clear whether this second condition survives Regan. In any event, I would not support a cert. petition that challenged solely that aspect of the court of appeals' decision that strikes down the loan of library books to private schools. That part of the program is not central to the program, and in any event this case is probably not a good one in which to defend that aspect of the program, because the record shows that religiously oriented books were in fact lent to the library, and the public authority had to recall many of them. While one could argue, of course, that this merely shows that the system works to ensure the secularity of the aid given to religious schools (since the LEA discovered the error and rectified it), I doubt that the Supreme Court will view it that way.

b. I do not believe that this case can~~not~~ be distinguished from Meek and Wolman on either of two grounds that have been suggested: first, the fact that the statute at issue here provides benefits to both public and private schools, whereas those invalidated in Meek and Wolman provided benefits only to private schools, and second, the fact that the statute invalidated in this case expressly requires that the aid to private schools supplement, and not supplant, the level of funds that would otherwise be available from non-federal sources. As to the first point, it is true that the specific statutes under review in Meek and Wolman provided for aid only to private schools, whereas Title VI gives aid to private and public schools alike (or, rather, to the students attending them see note 1, supra). Still, that cannot be a basis for distinguishing Meek and Wolman, 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.

The problem with the "supplement, not supplant" argument is that it simply does not meet Justice Powell's objection that aid to religious schools must at a minimum be of a nature that is "incapable of diversion" to religious ends. There is no evident reason why supplementary aid to a religiously affiliated school might nonetheless do a very effective job of advancing that school's religious mission. That might be accomplished by providing the religious school with resources that it did not already have for its religious mission. A religiously affiliated school that did not have a video player, for example, and did not intend to buy one from its own limited resources might find that such a player provided to it by the state was highly useful for its religious purposes, even though that same video player might legitimately be considered supplementary under the statute.

It is true that in Agostini v. Felton, 521 U.S. 203, 228-229 (1997), the Court, in responding to Justice Souter's dissent, made note of the fact that the Title I program challenged in that case "would not impermissibly finance religious indoctrination" in part because it could be used only to supplement, and not supplant, resources and instruction already provided by the religious school. That point, however, was related to the fact that the Title I instruction was given entirely by public school teachers, under the supervision of public school authorities; the Court emphasized that "[n]o Title I funds ever reach the coffers of the religious schools." Id. at 228. Since the public agency was providing the instruction, it could determine for itself whether its instruction was supplementing, rather than supplanting, the instruction that would otherwise be given by the religious school. But in the context of Title VI assistance, I have not seen any explanation of what it means that such assistance cannot supplant the schools' own funds, nor how that requirement might be enforced in a way that might give content to a requirement that instructional equipment not be diverted for religious purposes. If a LEA gives a religious school computer equipment without significant restrictions on how that equipment may be used, it seems impossible to me to determine whether that equipment supplements or supplants the effort that the religious school would make on its own. Moreover, and perhaps more importantly, even if one could determine that the religious school would not purchase computer equipment or tape recorders for its own use, and therefore the provision of such equipment supplemented the religious school's resources, the fact remains that, absent assurances and monitoring, such equipment could be diverted to religious uses. In other words, supplementary aid might well supplement both the religious and secular mission of the religious school.

c. Nor do I believe that the Court's decisions in Meek and Wolman have been overturned by the reasoning in subsequent decisions in Agostini, Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993), and Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986). Without doubt, those decisions do cut back on some of the more extended reasoning of Meek; thus, in Agostini, the Court observed that, in Zobrest and Witters, it had "abandoned the presumption in Meek * * * that the placement of public schools on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination." 521 U.S. at 223. But as that sentence indicates, the Court's retrenchment of Meek was directed at the part of Meek invalidating public school employees' provision of "auxiliary services" to students on private school grounds (see 421 U.S. at 367-372), not the part of that decision invalidating aid by the public school system to the private schools themselves. Indeed, in Agostini, the Court went to some pains to point out that the educational benefits flowed to the students without the intercession of the private school (which cannot be said of Title VI). See 521 U.S. at 226. Thus, the Court in Agostini viewed the question as whether the presence of public school personnel on private school premises created an Establishment Clause problem per se. It is also noteworthy that, although in our brief in Agostini, we urged the Court to rely on Bowen v. Kendrick, 487 U.S. 589 (1988), which had permitted direct financial subventions from the federal government to religiously affiliated institutions (as long as they were not "pervasively sectarian"), the Court did not cite Kendrick for its discussion of the changes in Establishment Clause law. Therefore, Agostini should be read, not as a case involving funding assistance to religious schools, but as a case involving assistance by public school teachers to students at such schools without the intercession of the parochial school.

In sum, under current Establishment Clause law, the court of appeals was correct to conclude that this case is controlled by Meek and Wolman. Accordingly, if we seek certiorari, we would have to ask the Supreme Court to overrule those decisions.

2. a. There are two possible ways in which we might ask the Supreme Court to overrule Meek and Wolman. We might argue broadly that, because the Establishment Clause prohibits only the favoritism of religious over non-religion, the Clause is not violated as long as a public authority distributes secular, educational benefits neutrally to religious and secular schools. Alternatively, we might argue narrowly that Meek and Wolman, even as reinterpreted by Justice Powell, went too far by requiring that aid to religious schools be of a nature that is inherently "incapable" of diversion to religious purposes, and that the Court should require instead only that, under the totality of the circumstances including any safeguards imposed by the statute or administrative practice, there is no realistic danger that such aid will be diverted to religious purposes (which one might think of as a presumption of validity, subject to rebuttal in a particular case). Both arguments have difficulties.

The first argument presents a highly controversial view of the Establishment Clause (and one that we did not urge upon the Court in Agostini, even though several amici and the intervenors did).

It would require asking the Supreme Court to overrule, not just Meek and Wolman, but also the underpinnings of many other Establishment Clause decisions, because it requires wholesale abandonment of the "effect" prong of the Establishment Clause jurisprudence insofar as that prong relates to the provision of material aid to pervasively sectarian institutions. That is to say, a construction of the Establishment Clause that required only neutrality between religious and nonreligious institutions would likely permit the government to give much aid, including perhaps direct cash aid, to religious schools, without any restriction as to the particular use of the financial aid by the religious institution. Beyond Meek and Wolman, such a rule would be difficult to square with, for example, Committee for Public Education v. Nyquist, 413 U.S. 756 (1973), which invalidated a program under which New York provided grants to private, nonprofit schools for the maintenance and repair of school facilities, and concluded that the effect of such grants, "inevitably, is to subsidize and advance the religious mission of sectarian schools." Id. at 779-780. It would also appear to be inconsistent with the part of Grand Rapids School District v. Ball, 473 U.S. 373 (1985), which struck down a program that provided funding to parochial schools for instruction by parochial school teachers, notwithstanding that the course work appeared to be secular in nature. See id. at 376-377, 399-400. (This aspect of Ball was not questioned in the Court's decision subsequent in Agostini, and Justice O'Connor concurred in that part of the decision in Ball.) Thus, a neutrality argument would require not just the overruling of Meek and Wolman, but also several other Supreme Court decisions in this area.

In Agostini, the Court did make clear that the government may provide educational services to students attending religious schools, if those services are provided without regard to religion. That decision must, however, be read in the context of provision of assistance directly to students, and not lending of equipment to schools. (Moreover, although Title VI does ostensibly provide the benefits to the students rather than the schools, it would be blinking reality in this case to argue that the aid did not flow to the schools. See note 1, supra.) Agostini should not be read to permit government financing of religious schools without regard to the secularity of the purpose for which the financing is provided.

In fact, in Rosenberger v. Rector, 515 U.S. 819 (1995), Justice O'Connor (the author of Agostini) reiterated her view that "public funds may not be used to endorse [a] religious message."

Id. at 846-847 (concurring opinion); see also Kendrick, 487 U.S. at 622 (O'Connor, J., concurring) (stating that "any use of public funds to promote religious doctrines violates the Establishment Clause") (emphasis in original). She went on to make clear in her Rosenberger concurrence that, although "[o]ur cases have permitted some government funding of secular functions performed by sectarian organizations," those decisions "provide no precedent for the use of public funds to finance religious activities." 515 U.S. at 847. She noted further that the funding at issue in Rosenberger was "distributed in a manner that ensures its use only for permissible purposes," including various safeguards to dissociate the university from the religious group receiving the financing; and that the program was funded, not by general tax revenues, but from a "student use fund," and that a student might have a Free Speech Clause challenge to the compulsory financing of another's speech, with which he disagrees, through that fund. Id. at 851. She therefore concluded that the Court's decision in Rosenberger "therefore neither trumpets the supremacy of the neutrality principle nor signals the demise of the funding prohibition in Establishment Clause jurisprudence." Id. at 852. Given Justice O'Connor's concurrence in Rosenberger, there is scant likelihood that she will endorse a "neutrality" reading of the Clause that would permit outright grants to religious schools, as long as similar grants were made to nonreligious schools.

b. Justice O'Connor's concurrence in Rosenberger does suggest, however, that she might support an interpretation of the Establishment Clause that permitted secular aid to religious schools, as long as that aid is accompanied by safeguards that ensured that the aid could not be diverted to religious purposes (whether or not it is inherently "incapable" of such diversion). Such an argument, if carefully framed, would involve a minor adjustment of Meek and Wolman, but not the wholesale repudiation of those cases. (Indeed, we might argue that those cases were correctly decided on their facts, because the programs invalidated in those cases were not accompanied by any safeguards; thus, under a formulation to be discussed herein, those programs were unconstitutional because, even though the statutes required that only secular aid be provided, nothing in the program provided any assurance that this would actually be the way the program was administered). The crucial difference between the argument we would propose and the position taken by, for example, Justice Powell in Wolman, is that instead of arguing that material aid to religious schools is impermissible unless it is "incapable" of diversion to religious ends, we would argue that such aid is permissible when there is no reasonable likelihood that it would be diverted to religious ends. In effect, we would be asking for a presumption that, when a public authority gives material aid neutrally to both religious and nonreligious schools, and accompanies that aid with requirements and safeguards sufficient to ensure that the aid is not diverted to religious purposes, then the aid is permissible. One could, of course, always contend in a particular case that the aid had been diverted to religious purposes, or that the safeguards were insufficient, which would establish not just an Establishment Clause violation but also a violation of the requirements of the governing program.[12]

If we were to propose that the Court adopt this rule, we would point out to the Court that the Department of Education has recently issued guidance indicating safeguards in the Title VI context to ensure that equipment and materials are not diverted to

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[12] This approach would be roughly consistent with, but significantly different from, the approach taken by the Court in Kendrick. That case, unlike this one, did not involve aid to a pervasively sectarian institution, a distinguishing point that was crucial there. See 487 U.S. at 621 (leaving it open on remand for plaintiffs to show that "aid is flowing to grantees that can be considered 'pervasively sectarian' religious institutions, such as we have held parochial schools to be"). The crucial, but admittedly subtle, difference is that Kendrick does not require actual safeguards that aid not be reasonably diverted to religious ends; to sustain the statute on its face, it was held sufficient in that case that the statute required that the aid be used for secular purposes. Under the approach discussed herein, such a statutory requirement would not be sufficient to sustain the statute against an as-applied challenge when aid is provided to religious schools; safeguards against diversion would also be required. The difference is warranted in light of the fact that this case involves aid to pervasively sectarian institutions, whereas Kendrick did not. In the context of aid to pervasively sectarian institutions, the Court has not indulged a blanket presumption that the institution receiving the aid may be trusted not to use the aid for religious purposes. Some assurances, and some monitoring, are necessary in a way that is not necessary in the context of aid to an institution that is religious affiliated, but is not pervasively sectarian, such as a religiously affiliated university or social-service organization. See Kendrick, 487 U.S. at 612.

religious purposes. We would therefore argue that, to the extent the Establishment Clause requires such safeguards, the Department of Education's guidance is sufficient.

There are, however, three serious problems with going to the Supreme Court on this theory at this particular time. First, when the record in this case was compiled, there was nothing explicit in the Department's regulations or guidance that articulated safeguards required of LEAs to make sure that the aid provided by Title VI is used for secular purposes only, and is not diverted to religious ends. The record does show that Jefferson Parish public school administrators made occasional forays into the religious schools to examine the use of the materials, but there is nothing to indicate that the Parish did so pursuant to any formal policy, especially a policy adopted at the federal level. It is not clear, therefore, how we could benefit from our new rule of constitutional law, because it would not excuse the constitutional violations that had already been identified (and were not excused by the new rule we would propose). This is an "as applied" challenge, and it is not clear how we could show that the statute had actually been applied in a way that, we would suggest, is sufficient to make it constitutional. And of course the recent issuance of the new Education Department guidance decidedly has the air of having been adopted for the purpose of salvaging our position in litigation (which is by no means to suggest that its adoption was a mistake).

The new rule that we would propose might be of use in fighting off an injunction <u>in futuro</u>, because, armed with the new Department of Education guidance, we might argue that no constitutional violation is likely to be perpetuated. Even so, I think there are two considerable difficulties with our argument. The first is that the Department of Education's guidance is simply guidance, and does not have the force of a binding regulation. It explains what the Department of Education views as sufficient to satisfy Title VI, but it does not provide that compliance with the guidance is required by Title VI. Thus, we may not really be in a position to offer the Court reasonable assurance that Title VI aid will not be diverted to religious purposes, and it will be difficult to persuade the Court that this is really distinguishable from <u>Meek</u> and <u>Wolman</u> despite the presence of the new guidance. The second difficulty is the Department has no history of implementation of the guidance (since it is very recent). We therefore cannot point to any experience to assure the Court that the guidance works. Thus, the case is quite unlike <u>Agostini</u>, where the Department of Education had undertaken an extensive study of the effect of the

Court's decision in Aguilar v. Felton, 473 U.S. 402 (1985), on schools' educational mission, found that that effect was overwhelmingly negative, and was able to make a representation as to that effect.[13]

The combination of these two factors suggests to me that, if we want eventually to obtain a reversal of the Fifth Circuit's decision, a possible course is to let this particular case go but to monitor and document the implementation of the Department of Education's guidance and (I would also strongly suggest) adopt binding regulations giving further teeth to that guidance. Then, if a challenge is brought to Title VI in another circuit, we will be in a position to develop a record, with a view ultimately to show the Court that it is indeed possible to develop safeguards that protect against the diversion of material aid to religious purposes, and that the broader rule of Meek and Wolman is not necessary to ensure that public funds are not used to subsidize the religious mission of a pervasively sectarian institution - which a

[13] Yet another possibility I have considered would be to ask the Court to vacate the decision below and remand the case for further consideration in light of the Department of Education's newly published guidance. I note, however, our efforts to accomplish such remands in the past in light of intervening administrative developments to conform administrative practice to decisional law have not been particularly successful. Moreover, it is highly doubtful that the Fifth Circuit would conclude that the new guidance had added anything of relevance. The lower court's decision was based on its reading of Meek and Wolman as flatly barring the kind of aid challenged in this case, not based on a conclusion that there were insufficient statutory or administrative safeguards to ensure that the aid was used only for secular purposes by a religious school. Thus, a remand is unlikely to change the result in the lower court. Further, it is not clear why the Supreme Court would think that the new guidance would be relevant under the current state of Establishment Clause law. The new guidance might assist us in persuading the Supreme Court that the law ought to be changed, but it is difficult to argue that adoption of the new guidelines should change the result under the current state of the law, even that under the narrow reading of Meek adopted by Justice Powell in Wolman.

majority of the Court continues to view as a central tenet of the Establishment Clause.[14]

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[14] It is also important not to forget the "entanglement" problem that the Court considered but rejected on the facts of Agostini -- namely, the danger of excessive supervision of religious schools by public school personnel. In Agostini, the danger was found to be insubstantial 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, and the Court declined to presume that in such situations monitoring would be necessary to ensure that the public school teachers were not inculcating religion. See 521 U.S. at 234. Here, there may indeed be an entanglement danger if the public school authorities are constantly looking over the shoulder of religious school instructors to make sure they are not using their Title VI equipment for religious purposes. There is something rather disturbing about having a public school official sit in a religious school classroom to make sure that a class during which computers are used is not excessively religious in content. Cf. Kendrick, 487 U.S. at 616-617 (noting that entanglement problems are lessened when government is not seeking to supervise pervasively sectarian institution). I note, however, that the Department of Education's guidance does not even remotely suggest this degree of supervision. Yet our case would depend on the proposition that the Establishment Clause permits material aid to the instructional mission of religious schools if that aid is accompanied by some (but not too much) monitoring to make sure that the aid is used only for secular purposes.

I also note that, in the future, there are other means by which the Department of Education could ensure that computer equipment is not diverted to religious purposes. In Walker v. San Francisco Unified School District, 46 F.3d 1449 (9th Cir. 1995), which upheld the application of Title VI in San Francisco, the court pointed out that private schools were provided with computers that were "locked" and could be used only with software that could not be diverted to religious use. Id. at 1464. Although it is debatable whether the Walker court rested its decision on this ground, it does present another option for resolving the Establishment Clause problems in Title VI. It is my understanding, however, that the Department of Education as a

3. It is true that the court of appeals framed its decision as invalidating a federal statute, as applied. 157 F.3d at 374. For two important reasons, this ruling may not implicate the presumption that a judgment declaring a federal statute unconstitutional ordinarily warrants certiorari (even apart from the fact that the decision of the court of appeals is correct under existing constitutional law). First, Title VI has been declared unconstitutional only as to the manner in which it has been heretofore applied in Jefferson Parish - not as it has been applied by the Department of Education, and certainly not as it might be applied in the future, after the issuance of the Department of Education's new guidance. The latter point is particularly important, because now that the Department of Education is on record in its guidance to the effect that safeguards should be adopted by LEAs to ensure compliance with Title VI's secularity requirement, Jefferson Parish's "application" of Title VI heretofore without such safeguards (really, its administration of the funds given to it by the Department of Education) is inconsistent with current Department of Education policy. That is to say, even if it is the case that Title VI was unconstitutional as applied by Jefferson Parish, that is so only because it was "applied" in a manner that the Department of Education now views as inadvisable.

Second, Title VI does not require that private religious schools be given computers. Computer equipment is one of eight options available under the statute, and to the extent that that option is foreclosed by the Establishment Clause, the LEA can comply with Title VI by providing a religious school with another form of aid that does not implicate the same concerns. While the discretion of the LEA is of necessity constrained to some extent by the court of appeals' decision, nonetheless it is true that that deicision does not interfere with a congressional mandate that religious schools be given computers, because there is no such mandate. Religious schools must be given the opportunity to participate on an "equitable" basis in the Title VI program, but that does not mean that they must be given precisely the same benefits as those provided to public schools.

CONCLUSION

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matter of policy would prefer not to require such restrictive use of computer equipment, even in religious schools.

I recommend NO CERTIORARI.

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	From: Randolph Moss To: Solicitor General; RE: Helms v. Picard (35 pages)	03/16/1999	P5 1574
002. memo	From: Barbara Underwood To: Solicitor General; RE: Helms v. Picard (14 pages)	09/28/1998	P5 1575
003. memo	From: Marty Lederman To: Randolph Moss; RE: Helms v. Picard (11 pages)	09/24/1998	P5

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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]

U.S. Department of Justice

Office of Legal Counsel

Washington, D.C. 20530

DRAFT

March 16, 1999

MEMORANDUM FOR THE SOLICITOR GENERAL

FROM: Randolph D. Moss
Acting Assistant Attorney General

RE: Helms v. Picard, 151 F.3d 347 (5th Cir. 1998), as amended, 165 F.3d : 11, 312 (5th Cir. 1999)

In Helms v. Picard, a panel of the United States Court of Appeals for the Fifth Ci :uit 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] progran permits the loaning of educational or instructional equipment to sectarian schools." 151 F.3d : 47, 374 (5th Cir. 1998). As explained below, as a practical matter the court of appeals' holding principally prohibits the loan to religious elementary and secondary schools of three types of "educational or instructional" materials: (i) computer hardware; (ii) computer software; and (iii) library books. The Department of Education and the Civil Division have recommende that the United States file a petition for certiorari. See Letter for Robert E. Kopp, Director, Unit d States Department of Justice, Civil Division, Appellate Staff, from Judith A. Winston, Unit d States Department of Education General Counsel, Re: Helms v. Picard, No. 97-30231 (5th Ci .) (Feb. 2, 1999) ("Winston Letter"); Memorandum for the Solicitor General from David W. Ogden, Acting Assistant Attorney General, Civil Division, Re: Mary L. Helms, et al. v. Richa d Riley, Secretary of Education, et al. (March 4, 1999) ("Ogden Memo"). Assistant to the Solicitor General Paul Wolfson has recommended against such a petition. See Memorandu n to the Solicitor General from Paul R.Q. Wolfson, Assistant to the Solicitor General, Re: Hel ns et al. v. Picard et al., No. 97-30231 (5th Cir. Aug. 17, 1998) (March 5, 1999) ("Wolfson Memo").

We also recommend against petitioning in this case. A petition would require u s to seek substantial changes to Establishment Clause doctrine, including the overruling of numerous precedents that have, in combination, precluded governments from substantially su sidizing primary and secondary sectarian schools. Moreover, to the extent the United States might be prepared to seek such changes, this case is a particularly poor vehicle with which to d so.

In this Memorandum, we address the following questions:

(i) Whether the Fifth Circuit's holding is governed by binding Supreme Cou t precedents — in particular, the holdings in Meek v. Pittenger, 421 U.S. 349, 362-66 (1975), and Wolman v. Walter, 433 U.S. 229, 248-51 (1977) — and whether it is possible, in light of subsequent Supreme Court decisions, meaningfully distinguish to those precedents;

(ii) Whether the United States should ask the Supreme Court to overturn (or recharacterize) its binding precedents, and, if so, on what legal theory; and

(iii) Whether the United States, in order to comply with the court of appeals' mandate, would be required to decline enforcement of a federal statute, or whether the United States could comply with both the statute and the court's decision by providing students in religious schools with alternative forms of aid that are not at issue in Helms.

We appreciate the substantial governmental interest in ensuring that all children, whether they attend public or private schools, have access to computers and computer software. Providing such aid to pervasively sectarian schools, however, contravenes longstanding Establishment Clause doctrine. As we explain herein, we believe that, in order to reverse the judgment of the Fifth Circuit, the Supreme Court would be required to overturn its square holdings in Meek, Wolman, and Lemon v. Kurtzman, 403 U.S. 602, 620-22 (1971), barring provision of instructional materials to sectarian elementary and secondary schools. See also Public Funds for Public Schools of New Jersey v. Marburger, 358 F. Supp. 29, 36-39 (D.N.J. 1973), aff'd mem., 417 U.S. 961 (1974). Moreover, the holdings in those cases are part of a broader line of Supreme Court precedents prohibiting direct government aid to pervasively sectarian private schools. In at least seven cases, involving at least eight distinct programs of assistance, the Court has held that such aid is unconstitutional where the direct assistance can be used to further the instructional operations of such schools; and in one other important case, the Court has (for analogous reasons) invalidated a program in which a board of education used religious school teachers to provide educational services to religious school students. As the Department of Justice put the point in 1984, in its brief in Aguilar v. Felton: "The governing principle is that resources that are inherently capable of diversion of use for religious instruction must not be placed under the control of religious school authorities." Brief for the Secretary of Education in Aguilar v. Felton, Nos. 84-237, 84-238 and 84-239 ("U.S. Aguilar Brief"), at 30 n.20 (citing Wolman, 433 U.S. at 250-51).

It is difficult to see how the Court could reverse the Fifth Circuit in Helms without undermining the doctrine that underlay each of these holdings, and without expressly overruling at least the "instructional materials" holdings in Meek, Wolman, and Lemon. Accordingly, we consider herein three arguable theories for overruling the relevant precedent. Two of those theories would require a fundamental reworking of Establishment Clause jurisprudence and are not likely to garner the votes of five Justices. The third theory would, perhaps, require a less dramatic reworking of the law, would require the overruling or rethinking of fewer precedents, and might, on a different record, garner a fifth vote. That theory, however, is not properly presented on the record of this case, and might be problematic for other reasons, as well. Accordingly, we recommend against seeking certiorari here.

Finally, we also conclude that the applicable statute does not require the provision to religious schools of the types of instructional assistance that the Fifth Circuit prohibited, and that the United States likely could comply with the court of appeals' mandate and satisfy its statutory obligations by providing students in religious schools with alternative forms of aid that are not at issue in Helms and that may be provided under current Supreme Court doctrine.

BACKGROUND

1. This case involves, inter alia, a constitutional challenge to that aspect of the federal "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 sectarian elementary and secondary private schools, as part of a program also serving pupils in public and nonsectarian private schools. A panel of the Fifth Circuit held that the Chapter 2 program is unconstitutional insofar as such materials are loaned to pervasively sectarian schools. The panel's decision conflicts with a decision of the United States Court of Appeals for the Ninth Circuit, which upheld such applications of the statute against a similar constitutional challenge. Walker v. San Francisco Unified School Dist., 46 F.3d 1449 (9th Cir. 1995).

a. The "Chapter 2," or "Title VI," Program. "Chapter 2" refers to Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965 ("ESEA"). Since the statute's first enactment 34 years ago, it has been amended numerous times. The lower courts consistently referred in their opinions to "Chapter 2." However, on October 20, 1994, the President signed the Improving America's Schools Act of 1994, Pub. L. 103-382, 108 Stat. 3518, which in effect transformed the former Chapter 2 into "Title VI" of the ESEA, which is entitled "Innovative Education Program Strategies" and which is codified at 20 U.S.C. §§ 7301-7373. Title VI provides financial assistance to state educational agencies (SEAs) and to local educational agencies (LEAs) to implement eight different types of "innovative assistance" programs. 20 U.S.C. § 7351(a) & (b). Plaintiffs' challenge in this case is solely to the provision, in Jefferson Parish, of one of those eight forms of assistance – namely, the assistance currently identified in 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 . . . .

This subsection of Title VI appears quite open-ended; and, in fact, this category of aid can include, for example, textbooks ("curricular materials") and state-designed tests ("assessments") — two forms of aid that, as we explain infra at 17-18, the Supreme Court has held may be provided, in certain circumstances, in the sectarian school setting. We are informed, however, that, as the Department of Education currently administers it, three particular forms of "innovative assistance programs" constitute the vast majority of aid provided under this subsection, namely: (a) computer hardware, (b) computer software, and (c) library materials (including library books and reference books, whether in traditional format or in new, computer-usable format, such as CD-ROM). Before 1988, the statute expressly identified, in addition, certain "instructional equipment" other than computers, such as slide projectors, video projectors, tape players, television sets, etc. These forms of aid were at issue when this case was initiated. However, they no longer are listed in § 7351(b)(2), as enacted and revised in 1994, and the Department of Education informs us that, at present, § 7351 aid rarely takes these forms. The Helms case, therefore, was litigated largely about kinds of instructional equipment that now are rarely provided to private schools.

Certain requirements of, and limitations on, Title VI aid are significant here:

- Title VI services must be equitably 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). Title VI 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 factors which relate to such expenditures." 20 U.S.C. § 7372(b).[1]

- As noted above, § 7372(a)(1) requries that aid be in the form of "secular, neutral, and nonideological services, materials, and equipment." (Emphasis added.)

- The law 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). If an LEA elects to provide services (such as teacher training) — as opposed to the equipment or materials at issue in this case — for the benefit of private school

[1] As explained infra at 34-35, this "equitable participation" requirement applies to the cumulative "benefits" of Title VI and not to each of the "benefits of this subchapter" individually. Accordingly, § 7372(a)(1) does not require that religious schools (or religious school students) be provided any or all of the particular types of aid specified in § 7351(b)(2), some of which are at issue in the Helms litigation: the "equitable participation" requirement could be satisfied by providing religious school students with other forms of Title VI aid that are constitutionally permissible.

students, such services 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).

- Finally, Title VI funds for the innovative assistance programs must supplement, and must in no case supplant, the level of funds that, in the absence of federal funds, would be made available for those programs from "non-Federal sources." 20 U.S.C. § 7371(b).

Consistent with the Department of Education's emphasis on flexibility and local control, its regulations largely restate the statutory requirements and do not impose additional material restrictions: children at private schools must be permitted to participate in the program on an equal and equitable basis with children at public schools, 34 C.F.R. § 299.7(b); services obtained with federal funds must supplement, not supplant, services that the private school would otherwise provide their schoolchildren, id. § 299.8(a); and the public agency must keep title to all property and equipment used for the benefit of private school children, id. § 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." Id. § 299.9(c)(1) (emphasis added). The regulations do not, however, define such "proper purposes," or explain how LEAs are supposed to ensure that such equipment and supplies are used only for "proper purposes." Most significantly, the regulations do not reflect any requirement that the assistance not be used for religious education.

b. Chapter 2 in Jefferson Parish, Louisiana. The Helms plaintiffs challenged the Chapter 2 program only 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 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, slide projectors and library books. See 51 F.3d at 368. As explained above, however, most of these forms of instructional equipment (other than computers and library books) no longer are significant components of the Title VI program.

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). As the court of appeals explained at some length, the State, the LEA, and the federal government did, to some extent, monitor the equipment and materials purchased with Chapter 2 funds for use by sectarian school students in Jefferson Parish. 151 F.3d at 368; see also Wolfson Memo at 5. For example, the district court found that the LEA prescreened the instructional materials, library books, and other instructional equipment. Most, but not all, sectarian schools signed a pledge agreeing not to use the Chapter 2 materials for religious purposes, and the Chapter 2 LEA 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. Nevertheless, the monitoring system is not foolproof, even at ensuring that the materials are not of a religious nature. For instance, at one point the LEA had to recall 191 books from private school libraries because they were "inappropriate" or "in violation of Chapter 2 guidelines." 151 F.3d at 368.

2. The Helms plaintiffs challenged the federal Chapter 2 provision of instructional equipment and materials, and library books, to pervasively sectarian schools in Jefferson Parish, as well as the constitutionality of three state-law programs not relevant here. The district court entertained cross-motions for summary judgment. In a judgment entered on July 25, 1991 (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 computers and audio-visual equipment), educational materials, and library books 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 Dist., 46 F.3d 1449 (9th Cir. 1995), agreeing with the Walker court'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" – including computers – "to sectarian schools." 151 F.3d at 374. That decree, by its terms, "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.

3. The Department of Justice filed a petition for rehearing and suggestion for rehearing

en banc, which the Fifth Circuit denied. 165 F.3d 311 (5th Cir. 1999).[2] In the mean time, the Department of Education prepared amended published guidance on Title VI, which stresses that no assistance should be diverted to religious uses. That guidance "does not impose any requirements beyond those in the Title VI statute and other applicable Federal statutes and regulations, but encourages varying views and focuses on what should and can be done, rather than setting limits." Guidance at iii (Feb. 1999).

The Guidance explains the Department of Education's view regarding what constitutes compliance with Title VI's statutory requirement that benefits to private schools be secular and neutral. The Guidance states that LEAs should employ several safeguards to ensure that aid will not be diverted to religious purposes. For example, the LEA "should" obtain from the private school a written assurance that the equipment and materials placed in the private school will be used only for secular purposes. In addition, the LEA "should" ensure that such equipment and materials are in fact secular by, for example, reviewing the content of any library books provided to private schools, conducting periodic on-site monitoring, and requiring private schools to keep logs to ensure that they use equipment and materials only for secular purposes. In addition, the LEA should ensure that any violations are corrected at once and must remove equipment and materials if necessary to prevent unauthorized use. See Guidance at 19-20.

DISCUSSION

I. The Governing Precedent

The Fifth Circuit's ruling is compelled by the Supreme Court's holdings in Meek, Wolman, and Lemon v. Kurtzman, 403 U.S. 602, 620-22 (1971), regarding provision of instructional materials to pervasively sectarian schools. See also Public Funds for Public Schools of New Jersey v. Marburger, 358 F. Supp. 29, 36-39 (D.N.J. 1973), aff'd mem., 417 U.S. 961 (1974). Accordingly, in order to ask the Court to reverse the court of appeals' judgment, the United States would have to urge the Court to overrule those holdings. Moreover, the holdings in Meek, Wolman and Lemon are part of a broader line of Supreme Court precedents prohibiting direct government aid to "pervasively sectarian" elementary and secondary private schools. The Court repeatedly has held that such aid is unconstitutional where the direct assistance can be used to further the instructional operations of such schools; and in one other important case, the Court has (for similar reasons) invalidated a program in which a board of education used religious school teachers to provide supplemental educational services to religious school students.

A.

In this section, we describe each of the pertinent holdings, with particular attention to the holdings regarding instructional materials in Meek, Wolman and Lemon.

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[2] The panel did amend its opinion to clarify that its mandate did not affect "the acquisition of textbooks," which had not been challenged in the Helms litigation. Id. at 312.

(1) Lemon v. Kurtzman and Earley v. DiCenso, 403 U.S. 602 (1971).

(a) Earley v. DiCenso.

Earley was the companion case to Lemon, discussed in section (b), infra. It involved a Rhode Island statute pursuant to which the state provided teachers in nonpublic elementary schools a supplement of 15% of their annual salary. The statute was intended to provide private school teachers with salaries comparable to, but no greater than, the salaries that the state paid its public school teachers. 403 U.S. 602, 607 (1971). The statute required that teachers eligible for salary supplements could teach only those subjects that were offered in the state's public schools, and could use only teaching materials that were used in the public schools. Teachers also had to agree in writing not to teach a course in religion for so long as they received any salary supplements. Id. at 608. As the Court put it, "the considerable religious activities of these schools led the legislature to provide for careful governmental controls and surveillance by state authorities in order to ensure that state aid supports only secular education." Id. at 616.

The Court reasoned that, because of the religious nature of the schools, and because "[i]nevitably some of a teacher's responsibilities [in such schools] hover on the border between secular and religious orientation," id. at 618, even the best-intentioned teacher "would find it hard to make a total separation between secular teaching and religious doctrine," id. at 618-19.[3] Thus, Rhode Island "has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts." Id. at 619. Instead, "[a] comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that the[] restrictions [on religious instruction] are obeyed and the First Amendment otherwise respected." Id. But the surveillance necessary to assure that state aid was not used to inculcate religion was itself unconstitutional: the required "prophylactic contacts [would] involve excessive and enduring entanglement between state and church" that the Establishment Clause prohibits. Id.

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[3] The Court elaborated:

> We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals. With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine. What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion. Further difficulties are inherent in the combination of religious discipline and the possibility of disagreement between teacher and religious authorities over the meaning of the statutory restrictions.

Id.

(b) Lemon v. Kurtzman.

Lemon, the more famous companion case to Earley, involved a Pennsylvania statute that reimbursed nonpublic schools for their actual expenditures for (i) teachers' salaries; (ii) textbooks; and, as in Helms, (iii) instructional materials. Id. at 609. Pennsylvania, like Rhode Island, required certain prophylactic measures "designed to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former." Id. at 613.[4]

The Court held, for reasons analogous to those emphasized in Earley, that these forms of aid violated the Establishment Clause, id. at 620-22, since without the prophylactics there would be too great a risk that the aid would be used for religious teaching, and because the "very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role," id. at 620, would create an impermissible entanglement. "In particular the government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state." Id. at 621-22.

(2) Levitt v. Committee for Public Education, 413 U.S. 472 (1973).

Levitt involved a New York statute that reimbursed private schools for the costs of maintaining a "regular program of traditional internal testing designed to measure pupil achievement." 413 U.S. 472, 480 (1973). The Court found that there was an "obviously integral role of such testing in the total teaching process" in the religious schools. Id. Yet "no attempt is made under the statute, and no means are available, to assure that internally prepared tests are free of religious instruction." Id. The Court held that this aid — for "routine teacher-prepared tests" that, unlike, e.g., bus rides to school, are "an integral part of the teaching process," id. at 481 (internal quotation omitted) — violated the Establishment Clause because of the "substantial risk that these examinations, prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church," id. at 480. As in Earley and Lemon, the Court did not "'assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the

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[4] To wit:

> A school seeking reimbursement must maintain prescribed accounting procedures that identify the "separate" cost of the "secular educational service." These accounts are subject to state audit. . . . There are several significant statutory restrictions on state aid. Reimbursement is limited to courses "presented in the curricula of the public schools." It is further limited "solely" to courses in the following "secular" subjects: mathematics, modern foreign languages physical science, and physical education. Textbooks and instructional materials included in the program must be approved by the state Superintendent of Public Instruction. Finally, the statute prohibits reimbursement for any course that contains "any subject matter expressing religious teaching, or the morals or forms of worship of any sect."

Id. at 609-10.

limitations imposed by the statute and the First Amendment.'" Id. (quoting Lemon, 403 U.S. at 618). But, the Court reasoned, the "potential for conflict 'inheres in the situation.'" Id. quoting Lemon, 403 U.S. at 617).[5]

(3) Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

Nyquist was decided on the same day as Levitt. One of the statutory provisions at issue in Nyquist was a New York law that provided for direct money grants from the State to nonpublic schools serving a high concentration of pupils from low-income families, to be used for the "maintenance and repair of . . . school facilities and equipment to ensure the health, welfare and safety of enrolled pupils." 413 U.S. 756, 762 (1973).[8] Aid was based on the number of students: schools were entitled to receive a grant of $30 per pupil per year, or $40 per pupil per year if the facilities were more than 25 years old. The grant to nonpublic qualifying schools could not exceed 50% of the average per-pupil cost for the State's maintenance and repair services in the public schools. Moreover, the statute contemplated that the aid would be "'for maintenance and repair expenditures which are clearly secular, neutral and non-ideological in nature.'" Id at 764 (quoting statute).

The Court held, that this maintenance and repair aid to elementary and secondary sectarian schools was unconstitutional, id. at 774-80, not only because New York made no attempt to restrict payments "to those expenditures related to the upkeep of facilities used exclusively for secular purposes," id. at 774, but, more fundamentally, because the Court concluded that it would not even be "possible within the context of these religion-oriented institutions to impose such restrictions," id. The effect of the New York statutes, in other words, was "inevitably . . . to subsidize and advance the religious mission of sectarian schools." Id. at 779-80.[10] This portion of the Court's opinion was joined by all Justices except Justice White. See id. at 798 Burger, C.J., joined by Rehnquist, J., concurring in pertinent part) ("I join in that part of the Court's opinion . . . which holds the New York 'maintenance and repair' provision unconstitutional under the Establishment Clause because it is a direct aid to religion.").

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[5] The Court also suggested, in dicta, that a state could not reimburse church-sponsored primary and secondary schools for "lighting or sanitary facilities." Id. at 481.

[8] "Maintenance and repair" was defined broadly to include "the provision of heat, light, water, ventilation and sanitary facilities; cleaning, janitorial and custodial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner may deem necessary to ensure the health, welfare and safety of enrolled pupils."

[10] By contrast, as the Court explained, id. at 776-77 (discussing and contrasting Tilton v. Richardson, 403 U.S. 672 (1971)), such maintenance and repair grants could be provided to religious colleges and universities, because in those institutions, it would be possible to ensure that the buildings in question never be used for sectarian purposes.

(4) Public Funds for Public Schools of New Jersey v. Marburger, 358 F. Supp. 29 (D.N.J. 1973), aff'd mem., 417 U.S. 961 (1974).

In Marburger, a three-judge court reviewed the constitutionality of a New Jersey statute that would have permitted the state to loan supplies, instructional materials, equipment and auxiliary services to nonpublic schools. 358 F. Supp. 29, 36-39 (D.N.J. 1973). As in Lemon, the statute expressly provided that the services and materials could not be provided for use in sectarian instruction. Id. at 38. Adopting a rationale derived from the Supreme Court's analysis in Lemon, the three-judge court held that, in order to ensure that the aid was not used in religious schools in an impermissible manner, "a constant and continuous review and control of the manner in which such supplies, instructional materials and equipment are utilized would have to be undertaken." Id. at 39. That would, in turn, "forever demand a State involvement and a continuing and intolerable Government presence in the affairs of a church," an "entanglement between church and State which the Establishment Clause of the First Amendment was intended to avoid." Id. The Supreme Court summarily affirmed the three-judge court's judgment, 417 U.S. 961 (1974) — an affirmance that was a decision on the merits, entitled to some precedential weight. See Meek, 421 U.S. at 367 n.16.[11]

(5) Meek v. Pittenger, 421 U.S. 349 (1975).

Meek was the first case (apart from the summary affirmance in Marburger) in which the Court applied the Lemon jurisprudence concerning aid to sectarian schools to a program of direct "in kind" aid, rather than financial reimbursement. In Part IV of its opinion 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, or any other printed or published materials of a similar nature," and "instructional equipment," such as "projection equipment, recording equipment, and laboratory equipment." 421 U.S. 349, 354-55 & n.4 (1975). Notably the aid in Meek, like the aid under Title VI at issue in Helms, was "ostensibly limited to wholly neutral, secular instructional material and equipment." Id. at 366. Accordingly, the three-judge lower court had invalidated the statute only to the extent that it permitted the loan of equipment (such as projection and recording equipment) that could, by "its nature," be diverted to religious uses. Id. at 357 (describing and quoting district court opinion). Despite the "wholly neutral, secular" limitation, however, the Supreme Court concluded that all such aid (not simply that which could, by its nature, be "diverted" to religious use) "inescapably results in the direct and substantial advancement of religious activity, and thus constitutes an impermissible establishment of religion." Id. at 366. To understand why the Court reached this conclusion, it is instructive to set out its reasoning at length:

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[11] Of course, a summary disposition does not enjoy the full precedential value of a case argued on the merits and disposed of by a written opinion. See, e.g., Connecticut v. Doehr, 501 U.S. 1, 12 n.4 (1991); Edelman v. Jordan, 415 U.S. 651, 671 (1974). A summary affirmance has precedential value only as to "the precise issues necessarily presented and necessarily decided." Mandel v. Bradley, 432 U.S. 173, 176 (1977). The instructional materials holding in Marburger, however, came fairly close to being the "precise[]" issue later raised in Meek, and is not materially different from the question at issue in Helms.

It is, of course, true that as part of general legislation made available to al students, a State may include church-related schools in programs providing bu transportation, school lunches, and public health facilities — secular an nonideological services unrelated to the primary, religion-oriented educationa function of the sectarian school. The indirect and incidental benefits t church-related schools from those programs do not offend the constitutiona prohibition against establishment of religion. But the massive aid provided th church-related nonpublic schools of Pennsylvania by Act 195 is neither indirect o incidental.

For the 1972-1973 school year the Commonwealth authorized just under $1 million of direct aid to the predominantly church-related nonpublic schools o Pennsylvania through the loan of instructional material and equipment pursuant t Act 195. To be sure, the material and equipment that are the subjects of the loa — maps, charts, and laboratory equipment, for example — are "self-polic(ing), i that starting as secular, nonideological and neutral, they will not change in use. But faced with the substantial amounts of direct support authorized by Act 195, i would simply ignore reality to attempt to separate secular educational function from the predominantly religious role performed by many of Pennsylvania' church-related elementary and secondary schools and to then characterize Act 19 as channeling aid to the secular without providing direct aid to the sectarian. Eve though earmarked for secular purposes, "when it flows to an institution in whic religion is so pervasive that a substantial portion of its functions are subsumed i the religious mission," state aid has the impermissible primary effect of advancin religion.

The church-related elementary and secondary schools that are the primar beneficiaries of Act 195's instructional material and equipment loans typify suc religion-pervasive institutions. The very purpose of many of those schools is t provide an integrated secular and religious education; the teaching process is, t a large extent, devoted to the inculcation of religious values and belie Substantial aid to the educational function of such schools, accordingly, necessaril results in aid to the sectarian school enterprise as a whole. "(T)he secula education those schools provide goes hand in hand with the religious mission tha is the only reason for the schools' existence. Within the institution, the two ar inextricably intertwined." For this reason, Act 195's direct aid to Pennsylvania' predominantly church-related, nonpublic elementary and secondary schools, eve though ostensibly limited to wholly neutral, secular instructional material an equipment, inescapably results in the direct and substantial advancement c religious activity, and thus constitutes an impermissible establishment of religior

Id. at 364-66 (emphasis added; footnotes and citations omitted).[12]

(6) Wolman v. Walter, 433 U.S. 229 (1977).

(a) Instructional Materials.

Two years after Meek, the Court in Wolman considered a constitutional challei ge to an array of forms of state aid that Ohio provided to schools, including to pervasively ectarian schools. The Court upheld Ohio's provision to students in sectarian schools of several lifferent types of aid — such as textbooks, administration of state-required standardized tests, sp ech and hearing diagnostic services, and off-premises therapeutic, guidance and remedial services provided by public employees. 433 U.S. 229, 236-48 (1977). But in Part VII of its opinion, the Court expressly reaffirmed the portion of the Meek decision invalidating the loan of inst uctional materials for education in pervasively sectarian schools. Id. at 248-51. At issue in tha portion of Wolman was the state's loan to sectarian schools of educational materials such as pi ojectors, tape recorders, maps and globes, science kits, and the like.[13] As in Meek, and as under Title VI, the materials at issue in Wolman were required by statute to be "secular, neu ral 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; citation omitted).

Nevertheless, the Court, relying on Meek's understanding that, in pervasively ectarian schools, secular and religious education "are inextricably intertwined," id. at 250, 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 rc e of the schools." Id. at 250 (emphasis added). The Court rejected the argument that the aid n ight "be seen as supporting only the secular part of the church-school enterprise," reasoning th t "Meek makes clear that the material and equipment are inextricably connected with the churc i-related school's religious function." Id. at 251 n.17 (emphasis added); accord id. at 250 ("eve i though the loan ostensibly was limited to neutral and secular instructional material and equi ment, it

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[12] To be sure, the Court's opinion in Lemon had suggested that, as a theoretical matter, it mig it be possible, with highly invasive prophylactic measures, to ensure segregation of the religious and the secu ar education in a pervasively sectarian school. Nevertheless, there is no need to reconcile this with the Co rt's subsequent rhetoric in Meek concerning "the impossibility of separating the secular education function f om the sectarian," because Lemon itself (and Earley) held that the degree and type of governmental oversight ni cessary to ensure such segregation in the educational functions of a religious school would itself create an impermi sible entanglement. The Court in Meek, citing Marburger as precedent, suggested that, in theory, the religio is and the secular could be segregated, but confirmed that the government involvement that would be necessary to prevent religious use of material and equipment in parochial schools would itself be an excessive entanglement. 421 U.S. at 366-67 n.16.

[13] Ohio nominally loaned such equipment and materials to students, rather than to schools; bu , as explained infra at 23, the Court found that the notion that such assistance was not provided to the schoo ; was a "transparent fiction," id. at 264 (Powell, J., concurring in the judgment in pertinent part); accord id. at 250 (majority opinion).

inescapably had the primary effect of providing a direct and substantial advancement of the sectarian enterprise") (emphasis added).[14]

(b) Field Trips.

In Part VIII of its opinion in Wolman, id. at 252-55, the Court considered another section of the Ohio law, which provided state funds to private schools for field trip transportation. The district court had held that such aid was constitutionally indistinguishable from the state-funded school bus transportation that the Court had upheld as constitutional in Everson v. Board of Education, 330 U.S. 1 (1947).

The Court, however, thought otherwise. It explained that "the bus fare program in Everson passed constitutional muster because the school did not determine how often the pupil traveled between home and school — every child must make one round trip every day — and because the travel was unrelated to any aspect of the curriculum." Id. at 253 (emphasis added). By contrast, under the Ohio field trip arrangement, "the schools, rather than the children, truly are the recipients of the service and, as this Court has recognized, this fact alone may be sufficient to invalidate the program as impermissible direct aid." Id. (citing Lemon, 403 U.S. at 621). More significantly, private school teachers are in charge of the field trips, id., and they are "an integral part of the educational experience," id. at 254. Hence, in a pervasively sectarian school, "an unacceptable risk of fostering of religion is an inevitable byproduct." Id. (citing Meek, 421 U.S. at 366; emphasis added). The Court concluded that the funding of field trips, therefore, "must be treated as was the funding of maps and charts in Meek v. Pittenger, supra, the funding of buildings and tuition in Committee for Public Education v. Nyquist, supra, and the funding of teacher-prepared tests in Levitt v. Committee for Public Education, supra; it must be declared an impermissible direct aid to sectarian education." Id. What is more, the Court went on to emphasize that this problem could not be ameliorated by way of oversight or other prophylactics; quoting Lemon, the Court held that the requisite "close supervision of the nonpublic teachers," even in the discrete context of field trips, would "create excessive entanglement." Id.

(7) Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985).

In Ball, the Court considered two supplemental education programs provided by the Grand

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[14] In so holding, the Court in Wolman (and in Meek) in effect rejected certain reasoning that had appeared in the Court's earlier decision in Board of Educ. of Central School Dist. No. 1 v. Allen, 392 U.S. 236 (1968). The Court in Allen had stated: "[W]e cannot agree . . . either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion." Id. at 238. In Wolman, the Court explained that it would adhere to the holding of Allen as a matter of stare decisis, but that it refused to "exten[d]" to other forms of aid "the unique presumption created in Allen" that restricting the aid to that which the state provides in the public schools ensures that the aid will not be used in religious schools for religious purposes. 433 U.S. at 251 n.18. As explained infra at 17-18, 20 n.19, not only has the Court subsequently rejected the reasoning in Allen, but Allen also is plainly distinguishable from the Wolman/Meek/Lemon line of cases on the ground that the textbooks at issue in Allen were provided to individual students, rather than directly to private schools.

Rapids, Michigan, school district. Pursuant to the "Community Education" program, the school district hired teachers to teach supplementary classes, at the conclusion of the regular school day, in subjects such as Arts & Crafts, Home Economics, Spanish, Gymnastics, Yearbook Production, Christmas Arts & Crafts, Drama, Newspaper, Humanities, Chess, Model Building and Nature Appreciation. 473 U.S. 373, 376-77 (1985). The program was run by public authorities, and the classes were available in public, as well as in private, schools. The constitutional question was raised by the fact that virtually every course taught on the facilities of a private religious school had an instructor employed full time by that private school, id. at 377, teaching "the same parochial school students who attend their regular parochial school classes," id. at 399 (O'Connor, J., concurring in the judgment in pertinent part).

The program had been in operation for eight years, but "[n]ot one instance of attempted religious inculcation exists in the record[]." Id. at 401 (Rehnquist, J., dissenting). Nevertheless, the Court invalidated the Community Education program. Id. at 386-87 (majority opinion). It reasoned that "there is a substantial risk that, overtly or subtly, the religious message [the religious school teachers] are expected to convey during the regular schoolday will infuse the supposedly secular classes they teach after school." Id. at 387 (majority opinion); see also id. at 398 (Burger, C.J., concurring in the judgment in pertinent part); id. at 399-400 (O'Connor, J., concurring in the judgment in pertinent part).

* * * *

It is often suggested that the Court's precedents in the area of aid to religious schools is hopelessly muddled, or internally inconsistent. And, to be sure, there are cases in the Establishment Clause jurisprudence that "test the limits of categorical obstinacy and expose the flaws and dangers of a Grand Unified Theory that may turn out to be neither grand nor unified" – cases where "[r]eliance on categorical platitudes is unavailing." Rosenberger v. Rector & Visitors of the Univ. of Virginia, 515 U.S. 819, 852, 847 (1995) (O'Connor, J., concurring). But the cases discussed above do establish what the Department of Justice in 1984 identified as "the governing principle" in this area, namely, "that [government-provided] resources that are inherently capable of diversion of use for religious instruction must not be placed under the control of religious school authorities." U.S. Aguilar Brief at 30 n.20 (citing Wolman, 433 U.S. at 250-51). Those precedents establish a consistent and unbroken line of precedents in which the Court has held that the government may not provide aid directly to "pervasively sectarian" elementary and secondary private schools, when such aid can be used in the instructional operations of such schools.[15] And of these cases, Lemon, Marburger, Meek and Wolman each involved the provision (or loan) of instructional materials analogous to the types of aid available under § 7351(b)(2) that are at issue in Helms.

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[15] It may not be technically accurate to characterize the Community Education program in Ball as involving direct aid to sectarian schools, since, at least as a nominal matter, the aid in that case was provided to students by instructors who were on the public payroll. But that case raised the same problems as the direct aid cases, because the use of sectarian school teachers created the same risk that state aid would be used to inculcate religion and would be intertwined with the religious education provided to the students during the regular school day.

Moreover, these precedents reflect a more fundamental Establishment Clause principle. "Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith." Ball, 473 U.S. at 385; accord Bowen v. Kendrick, 487 U.S. 589, 611 (1988). Thus, government aid provided to a private religious organization may not be used to advance "'specifically religious activit[ies] in an otherwise substantially secular setting,'" id. at 621 (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973)), and in the school setting "the State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination," Levitt, 413 U.S. at 480.[16] This principle often is referred to as the "no direct funding" rule.

The cases canvassed above also demonstrate an important corollary to the "no direct funding" axiom — namely, that the government may not provide aid directly to "pervasively sectarian" institutions, defined as institutions in which "'religion is so pervasive that a substantial portion of [their] functions are subsumed in the religious mission.'" Kendrick, 487 U.S. at 610 (quoting Hunt, 413 U.S. at 743); see also id. at 621 (holding that, apart from the question whether aid was being used for religious purposes, Establishment Clause would be violated if the plaintiffs could show that aid flowed to grantees that could be considered "pervasively sectarian religious institutions"). The parameters of the "pervasively sectarian" category are not well-defined; but it is clear that it encompasses most, if not all, religiously affiliated elementary and secondary educational institutions. As the Court has explained in cases such as Lemon, Meek and Wolman, the reason for the prohibition on direct governmental aid to the educational function of pervasively sectarian institutions is that, in such institutions, secular and religious functions are "inextricably intertwined," and therefore government aid, although designated for a secular purpose, in fact will invariably advance the institution's religious mission. See Kendrick, 487 U.S. at 610. Thus, attempted safeguards against the diversion of "secular" instructional materials and equipment for sectarian purposes are, under the Court's analysis, beside the point because, in essence there is no separable secular educational mission to which the aid could be applied. In any event, as the Court has held in Lemon and related cases, even if it were possible, as a theoretical matter, for a pervasively sectarian organization to segregate government assistance so that it would be used exclusively for secular functions in such institutions, the degree and kind of governmental monitoring necessary to ensure compliance with such required segregation would itself create serious Establishment Clause problems. Id. at 616-17.

[16] Notably, in Kendrick all nine Justices accepted the principle that direct government funding of religious activities is impermissible. See 487 U.S. at 611-12, 615, 621 (Establishment Clause would be violated if public monies were used to fund "'indoctrination into the beliefs of a particular religious faith'" or to "'advance the religious mission' of the religious institution receiving aid.") (quoting Ball, 473 U.S. at 385); id. at 623 (O'Connor, J., concurring) ("[A]ny use of public funds to promote religious doctrines violates the Establishment Clause."); id. at 624 (Kennedy, J., concurring) (reasoning that the Establishment Clause would be violated if funds "are in fact being used to further religion"); id. at 634-48 (Blackmun, J., dissenting) (opining that government aid may not be used to advance religion, even if aid was intended for secular purposes).

B.

In contrast, the Court has, in three other, related lines of cases, permitted governments to provide limited forms of aid that might be used in connection with religious education.

1. Secular Aid Provided Directly to Students. First, the Court has, in certain circumscribed circumstances, permitted the government to provide aid, not to religious schools, but directly to students (or to their parents), on a neutral basis, to be used "at whatever school they choose to attend," Agostini v. Felton, 521 U.S. 203, 228 (1997), including pervasively sectarian private schools. See, e.g., id. (remedial education provided by public employees to disadvantaged children); Zobrest v. Catalina Foothills School Dist., 509 U.S. 1, 9-10 (1993) (sign language interpreter provided "neutrally to any child qualifying as disabled" can be used in sectarian school "only as a result of the private decision of individual parents"); Mueller v. Allen, 463 U.S. 388, 398-99 (1983) (tax deduction for educational expenses can be used for sectarian education resulting from "numerous private choices of individual parents of school-age children"); Everson v. Board of Educ., 330 U.S. 1 (1947) (bus transportation to public and private schools) see also Wolman, 433 U.S. at 241-44 (diagnostic services "having little or no educational content" provided by public employees to all eligible students). In such cases, the sectarian schools receive government aid, if at all, only "indirectly," "'as a result of numerous private choices.'" Zobrest, 509 U.S. at 9 (quoting Mueller, 463 U.S. at 399). Such indirect aid to pervasively sectarian schools often is permissible, at least so long as the "indirect" aid to sectarian schools supplements, rather than supplants, costs that the school otherwise would bear. See Agostini, 521 U.S. at 228, 229 (discussing the supplement/supplant distinction).

An important example of this alternative line of doctrine is a series of three cases involving provision of textbooks to students. In Board of Educ. of Central School Dist. No. 1 v. Allen, 392 U.S. 236 (1968), the Court upheld the application to sectarian school students of a law making available to all children in the state "the benefits of a general program to lend school books free of charge," furnished "at the request of the pupil," and not to parochial schools. Id. at 243-44; see also id. at 244 n.6 ("the books are furnished for the use of individual students and at their request"). The state approved all books to be provided, and could approve only secular books. Id. at 244-45. In Meek and in Wolman, the Court upheld textbook loan programs analogous to that upheld in Allen. See 421 U.S. at 359-62 (plurality opinion); 433 U.S. at 236-38 (plurality opinion). The "financial benefit" of such programs, the Court found, "is to parents and children, not to the nonpublic schools." Meek, 421 U.S. at 361 (plurality opinion). By contrast, the Pennsylvania statute at issue in Lemon directly reimbursed private schools for textbook expenditures, 403 U.S. at 609; the Court, distinguishing Allen, invalidated that statute because, inter alia, it provided "state financial aid directly to the church-related schools," rather than to "the student and his parents," id. at 621. Similarly, the statute in Meek provided for the loan directly to nonpublic schools of "periodicals, photographs, maps, charts, sound recordings, films, or any other printed or published materials of a similar nature." 421 U.S. at 355. The Court in Meek invalidated that loan program, while simultaneously upholding a textbook loan program, explaining that, while the textbooks were lent only to students, the other textual materials were loaned "directly to qualifying nonpublic schools." Id. at 362-63.

2. Aid for State-Mandated, Noncurricular Testing. Second, the Court has, in two cases, permitted states to provide to religious schools certain aid related to standardized testing. In Wolman itself, Ohio law permitted the State to provide private schools with standardized tests and scoring services, otherwise in use in the public schools, for use "by pupils attending nonpublic schools." 433 U.S. at 238-39. The tests were to be used to measure students' progress in secular subjects, id. at 239, ostensibly so that the State could ensure that private school students were meeting the State's own standards of instruction, id. at 240. Personnel from the private schools were not involved in the drafting or scoring of the tests. Id. at 239. The Court, distinguishing this program from the teacher-prepared testing reimbursement program it had invalidated in Levitt, held that the Ohio testing provision was constitutional. The Court reasoned:

> Under the section at issue, the State provides both the schools and the school district with the means of ensuring that the minimum standards are met. The nonpublic school does not control the content of the test or its result. This serves to prevent the use of the test as a part of religious teaching, and thus avoids that kind of direct aid to religion found present in Levitt. Similarly, the inability of the school to control the test eliminates the need for the supervision that gives rise to excessive entanglement. We therefore agree with the District Court's conclusion that [the statute] is constitutional.

Id. at 240.

In Committee for Public Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980), the Court upheld a New York statute (enacted following the Court's invalidation of the statute in Levitt) that authorized the state to pay private schools for the actual costs incurred in complying with state-mandated testing. The new scheme, unlike the Levitt statute, did not reimburse private schools for the preparation, administration, or grading of teacher-prepared tests. Id. at 652. The Court reasoned that, because nonpublic schools did not control the content of the test, "there was no substantial risk that the examinations could be used for religious educational purposes." Id. at 656. The Court cautioned, however, that if the grading procedures could be used to further the religious mission of the school, "serious Establishment Clause problems would be posed." Id. at 657.

The testing aid in Wolman and in Regan is the one form of direct aid to pervasively sectarian schools that the Court has permitted; and the Court has done so because — unlike with the instructional materials in cases such as Lemon, Meek and Wolman — sectarian school teachers are not in control of how such tests are used and it would be virtually impossible for teachers to use this category of aid as part of the educational process and divert it to religious instruction.

3. Aid to Secular Functions of Religiously Affiliated Institutions of Higher Education. Finally, the Court has treated religiously affiliated schools of higher education quite differently from elementary and secondary schools, permitting the government to provide direct aid to such schools so long as such aid is not, in fact, used (or permitted to be used) for religious instruction or activity. In Kendrick, the Court extended this principle to the case of certain religiously affiliated social service organizations that were potential government grantees. With respect to

such institutions and organizations, the Court does not presume, as it does in the case of pervasively sectarian organizations, that the aid inevitably will be used for religious purposes. See Kendrick, 487 U.S. at 612 (explicating this distinction); Roemer v. Maryland Public Works Bd., 426 U.S. 736, 748-54 (1976) (plurality opinion) (same). For example, although (as explained above) the Court in Nyquist held that the State may not provide aid for building repair and maintenance to pervasively sectarian primary and secondary schools, in several other cases the Court has upheld grants to non-pervasively sectarian religious schools of higher education where the program in question expressly excluded any facility used or to be used for sectarian instruction or as a place for religious worship. See Roemer; Hunt v. McNair, 413 U.S. 734, 744-45 (1973) (upholding construction of college and university facilities financed by state issuance of bonds on specially favorable terms), where such aid was subject to the restriction that the facilities not be used for "religious purposes"); Tilton v. Richardson, 403 U.S. 672, 675 (1971) (plurality opinion) (approving provision of federal construction grants to colleges and universities with religious affiliations, where facilities "used or to be used for sectarian instruction or as a place for religious worship" were not eligible for funding).[17] Moreover, and also in sharp contrast to pervasively sectarian schools, the governmental supervision and monitoring necessary to ensure that these non-pervasively sectarian institutions do not use government aid for religious uses does not create an impermissible entanglement. See Kendrick, 487 U.S. at 615-17 (explaining the "contrast" in the entanglement analysis between pervasively sectarian schools and non-pervasively sectarian organizations); Roemer, 426 U.S. at 761-65 (plurality opinion); Hunt, 413 U.S. at 74[illegible]-49.

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Helms does not fall into any of these categories of cases.

The § 7351(b)(2) assistance at issue in Helms is not provided to students in the first instance, for use in schools of their choosing; it is given directly to schools. To be sure, § 7351(b)(2) does generally provide for programs for the acquisition of "educational" and "curricular" materials, and, in theory, such materials could include textbooks provided directly to students, as in Allen, Meek and Wolman. But we are not aware of any such textbook program under Title VI, and, in any event, no such program is at issue in the Title VI program in Jefferson Parish. It is our understanding that Title VI services and aid – unlike the Title I aid at issue in Agostini – are "provided to religious schools on a school-wide basis," and that the LEA does not "dispense[] services directly to . . . eligible students within its boundaries, no matter where they choose to attend school." Agostini, 521 U.S. at 229. Moreover, the computers and library books that are the principal focus of the Title VI programs in this case would be "stored and distributed

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[17] Even in these cases, the Court conceives of the restriction on use of public funds for religious purposes as both essential and rather broad, as illustrated by the Tilton case, holding that the expiration of such a restriction after 20 years violated the Establishment Clause. 403 U.S. at 683 (plurality opinion). This part of Tilton was, in effect, a unanimous ruling. All of the Justices who declined to join the plurality opinion in Tilton agreed that the use of the building for religious activities after 20 years would violate the Establishment Clause. See id. at 692 (Douglas, J., dissenting in part); Lemon, 403 U.S. at 659-61 (separate opinion of Brennan, J., concurring in the judgment in part in Tilton); id. at 665 n.1 (White, J., concurring in the judgment in Tilton).

on the nonpublic school premises." Wolman, 433 U.S. at 250.[18] Wolman itself makes clear that it would "exalt form over substance" to indulge the fiction that LEAs could avoid constitutional limitations by purporting to "loan" such items directly to students or their parents. Id.; accord id. at 264 (Powell, J., concurring in the judgment in pertinent part) (the concept of a loan of such "classroom paraphernalia" to individuals "is a transparent fiction"; such a "loan" would be "indistinguishable from forbidden 'direct aid' to the sectarian institution itself"); see also Wolfson Memo at 2-3 n.1, 17.[19]

Section § 7351(b)(2) specifies that LEAs may provide "assessments," which presumably could include the sort of state-designed testing and evaluation assistance that the Court permitted the states to give to sectarian schools in Wolman and in Regan. But apparently Title VI as administered in Jefferson Parish has not involved such testing services. Nor can the computer and library book assistance that is at issue be justified on the basis of Wolman and Regan. The assistance at issue in Helms "inevitably" would (or, at a minimum, could) become part of the religious school curriculum, or otherwise part of the educational process controlled, designed or supervised by sectarian school teachers. Accordingly, as the Court held and explained in Wolman, Meek and Lemon, such assistance (unlike the state-designed testing in Regan) could (absent extensive oversight that itself would be unconstitutional) be "used for religious educational purposes," 444 U.S. at 656, and to "further the religious mission of the school," id. at 657.

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[18] We are not sufficiently familiar with the workings of Title VI or the relevenat types of computer software to know for certain, but it may be possible that, under the statute, certain forms of software could be provided directly to students, in a manner analogous to the textbook loan provisions upheld in Allen/Meek/Wolman.

[19] Notably, in Meek, then-Justice Rehnquist asserted in dissent, 421 U.S. at 387-96, that the same analysis the Court applied to the textbook programs in Allen and in Meek should apply to the Pennsylvania Act's instructional materials and equipment program, which — like the textbook program the Court upheld — treated private-school students no better than public-school students. But the Meek majority refused to treat the two types of aid alike. The Court in Wolman acknowledged that there was some tension between the Court's Allen doctrine relating to textbooks, on the one hand, and its decisions respecting other educational materials, on the other — a tension that is particularly sharp if one believes that the ostensible "loan" of textbooks to students is a sham, and that the textbooks are, in all pertinent respects, being provided to the schools. See Wolman, 433 U.S. at 256-60 (Marshall, J., dissenting in pertinent part). The Wolman Court noted that, in cases such as Meek, it had declined to extend (to programs involving other forms of aid) one 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, at least 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.

Finally, there can be little doubt that the elementary and secondary schools at issue in Helms undoubtedly are pervasively sectarian. As explained in cases such as Lemon, Meek and Wolman, the religious and secular components of such schools are "inextricably intertwined," and therefore aid to the educational function of such schools — even though ostensibly limited to wholly neutral, secular instructional material and equipment — "necessarily results" in aid to the sectarian school enterprise as a whole, and thus "inescapably results" in the "direct and substantial advancement" of religious activity. Meek, 421 U.S. at 366. Moreover, even if it were possible, as a theoretical matter, for a pervasively sectarian school to use government assistance exclusively for secular functions, the governmental monitoring that would be necessary to ensure such separation would itself result in impermissible entanglement that would not be present in other religious institutions that are not pervasively sectarian.

II. Distinguishing or Overruling the Governing Precedent

A. Distinguishing

We have considered whether there are any grounds on which Title VI, as administered in pervasively sectarian schools in Jefferson Parish, could be distinguished from the instructional assistance programs the Court invalidated in Meek and in Wolman. We have failed, however, to identify a persuasive basis for distinction.

1. Neutrality Between Public and Private Schools

In recent Establishment Clause cases, "neutrality" has come to play a pronounced role in the Court's decisions. See, e.g., Agostini, 521 U.S. at 230-32; Rosenberger, 515 U.S at 846, 850 (O'Connor, J., concurring). And to be sure, Title VI is a federal program "pursuant to which equipment and materials of instruction are provided equally to all school children — in public, private, and religious schools." Ogden Memo at 7; see also Winston Letter at 2 ("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."). In our view, however, the Fifth Circuit panel correctly declined to distinguish Meek and Wolman on this ground. 51 F.3d at 373.

Although Title VI "provides secular benefits equally to all school children," Ogden Memo at 8, the same was, for all intents and purposes, true of the programs in Meek and Wolman, and of the programs in the other "direct aid" cases discussed above. 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 was intended to "extend 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.[20] See also, e.g., Lemon (Earley), 403 U.S. at 607 (state supplement could not provide private school teachers a salary exceeding the maximum paid to public school teachers); Nyquist, 413 U.S. at 777 (maintenance and repair grants limited to 50% of the amount expended for comparable services in the public schools); Wolman, 433 U.S. at 252 (funds could be expended to provide field trip transportation and services "as are provided to public school students in the district"); Ball, 473 U.S. at 377 (all Community Education programs were otherwise available at the public schools).[21]

In considering whether the Department might be able to rely upon a "neutrality"-based distinction, the Civil Division looks to a footnote in Meek, 421 U.S. at 362 n.12. That footnote 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 Marburger, 417 U.S. 961 (1974) (mem.), aff'g 358 F. Supp. at 34-36. As explained above, Meek sustained a textbook loan program on the authority of Allen. 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 loans of textbooks to students (the Allen line of cases), it is critical to the Establishment Clause analysis whether or not students in private schools are treated more favorably than students in public schools, because neutrality is required even where there is some room for permissible

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[20] 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 Title VI) within a single statute that simultaneously extends the aid to public and private schools alike. But the Court in both cases indicated that, in contexts (unlike the instant one) where equality and neutrality between public and private can be dispositive of the constitutional analysis — namely, in the loan of textbooks to students — "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 (plurality opinion); see also Wolman, 433 U.S. at 238 n.6 (plurality opinion); Wolfson Memo at 14

The Ninth Circuit panel in Walker proffered another possible basis for distinguishing the federal statute at issue here, namely, that the overwhelming majority of schools and school students that benefit from the program are public school students. 46 F.3d at 1468-69. However, 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.

[21] Similarly, in Lemon and in Levitt, the states obviously provided their public schools with the sort of aid (teachers' salaries, textbooks and instructional materials, costs of administering standardized tests) that the states also were providing to private schools.

assistance. But where, as in Meek and Wolman, aid is provided directly to religious schools, the Court repeatedly has held that the Establishment Clause is violated regardless of the neutrality of the program.

2. Aid that is Not "Divertable" to Religious Education

It might also be argued that Title VI equipment and materials can be provided to pervasively sectarian schools because (in addition to the neutrality discussed above) the equipment and materials are in some sense "secular" and are not "divertable" to sectarian education. According to this argument, the "divertability" factor is the principal distinction between the Meek and Wolman instructional materials holdings, on the one hand, and the Allen line of textbook decisions, on the other. See Ogden Memo at 8. In support of this theory, the Civil Division cites Justice Powell's concurrence in Wolman, which did, indeed, stress (in part) the alleged nondivertability of textbooks to religious use. 433 U.S. at 263.[22] Although this might appear to be a promising line of argument, it cannot, we believe, be squared with the Court's Establishment Clause jurisprudence, for two basic reasons.

To begin with, Justice Powell's own distinction of the Allen line of textbook cases requires not only that the aid be "incapable of diversion to religious uses," but also that "the materials are lent to the individual students or their parents and not to the sectarian institutions." 433 U.S. at 263. As explained above, in fact this distinction between aid to students and aid to the schools was critical to the Court's decisions in the three cases in which it permitted textbook loans. By contrast, where, as in Lemon, the state directly reimbursed schools for the cost of textbooks, the program was invalidated, 403 U.S. at 621, despite the fact that the textbooks there also had to be approved by the state as nonreligious in nature, id. at 610. Moreover, as Justice Powell himself noted, and as the Wolman majority emphasized, 433 U.S. at 250, it is a "transparent fiction" to suggest that the equipment and materials at issue in Wolman (and in Helms) can be "loaned" to individual students. Id. at 264.

More importantly, the type of Title VI aid at issue in this case is, in fact, divertable to religious use: that is precisely the holding of Meek and Wolman. It does not suffice to say that the Title VI statute expressly requires that the aid be "secular" in nature, or that procedures are in place to assure that the Title VI equipment is not "divertable" to religious use. This same "nondivertability" argument was made in Wolman, 433 U.S. at 249, but the Court rejected it on the ground that religious school teachers inevitably will use such materials for religious instruction, because in pervasively sectarian schools such religious instruction is "inextricably intertwined" with the secular instruction. The Court's 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, even

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[22] There is also some support for this notion in Justice Blackmun's dissent in Zobrest, 509 U.S. at 22. See also supra at 17-18 (discussing the Court's view that it would be virtually impossible for religious school teachers to use certain aid, such as pre-screened textbooks and state-designed testing, to inculcate religion).

where (as in Wolman, id. at 249-50) the state purports to provide only aid that ostensibly is not divertable. See also Wolfson Memo at 12-13.

3. The Supplement/Supplant Distinction

A third possible basis for distinguishing the Meek/Wolman line of cases is that Title VI does not "'reliev[e] sectarian schools of costs they otherwise would have borne in educating their students.'" Winston Memo at 2 (quoting Agostini, 521 U.S. at 228; internal citation to Zobrest omitted); see also Ogden Memo at 7, 9.

Title VI 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 federal 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, Title VI aid should not have the effect of "freeing up" any resources that religious schools could then expend on religious education. Although the question is not entirely clear, 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.[23]

The supplement/supplant distinction played an important role in the Court's decision in Agostini, where Justice O'Connor went to some length, 521 U.S. at 228, 229-30, to dispute Justice Souter's contention in dissent (id. at 244, 246, 252) 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. Moreover, the Court went so far as to suggest that the instructional equipment programs in Meek and Wolman were constitutionally deficient in part because of such a "supplanting" problem:

> 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.

Id. at 220-21 (emphasis and bracketed numerals added); see also Zobrest, 509 U.S. at 1[?] (noting 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 the view of the Agostini Court, in other words, the Meek and Wolman programs were unconstitutional not only because the instructional materials "could be used to

[23] The Court in Wolman, in a somewhat different context, noted that "the parties have stipulated expressly that material and equipment must be used to supplement courses." 433 U.S. at 251 n.17. The Court did not indicate whether this stipulation was intended to reflect any requirement that the aid not supplant materials and equipment that the private schools otherwise would themselves have provided.

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."

We do not think, however, that the Court in Agostini intended to suggest that direct aid to pervasively sectarian schools is permissible whenever only one of these problems is absent. 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, which is itself an Establishment Clause violation in a case of direct aid to the educational function of religious schools. Those decisions — and all the other cases involving "direct" aid to religious schools — did not indicate (at least not expressly) that the constitutional analysis was affected, let alone controlled, by the question of whether the loan programs freed up other resources for the religious schools to use, or whether the aid provides religious schools with "supplemental" resources they would not otherwise have been able (or willing) to provide. Indeed, in Earley, the Court invalidated the Rhode Island Salary Supplement Act," which authorized state officials "to supplement the salaries" of nonpublic school teachers in an amount "not in excess of 15% of [the teachers'] current salary," 403 U.S. at 607 — i.e., to supplement, rather than supplant, the private schools' own provision of teachers' salary. Conversely, in Regan, the Court held that certain testing aid could be provided to religious schools, despite the fact that such aid "relieved" the schools of costs they otherwise would have borne.[24]

By contrast, the supplement/supplant distinction is an important touchstone for determining whether aid provided directly to students may be used in religious schools. The very purpose of the supplement/supplant inquiry in cases such as Agostini and Zobrest is to determine whether governmental aid that is provided to the students (rather than to the school) — i.e., aid that is not necessarily used for religious education (and which in the Title I program in Agostini cannot be used for such religious education) — nevertheless could, in effect, provide religious schools with resources, above those they already would have had, that such schools could use in furtherance of religious inculcation. Where, however — as the Court held with respect to the equipment loan programs 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.

B. Overruling

For the reasons explained above, we agree with Mr. Wolfson that, in order to urge the Supreme Court to reverse the Fifth Circuit's decision, the United States would be required to argue that the Court should overturn the rulings in Meek and Wolman regarding instructional equipment and materials. Moreover, the Court also would be required to overturn the holding in Lemon (and the holding in Marburger) concerning the loan of educational materials to pervasively

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[24] "The Court 'has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends.'" Id. (quoting Hunt, 413 U.S. at 743).

sectarian schools. Reversal of the Fifth Circuit judgment would also likely call into question the established doctrinal principle "that [government-provided] resources that are inherently capable of diversion of use for religious instruction must not be placed under the control of religious school authorities," U.S. Aguilar Brief at 30 n.20 (citing Wolman, 433 U.S. at 250-51) – a principle that was central to the Court's holdings in Earley and Lemon respecting teacher salaries, the holding in Lemon regarding provision of books directly to religious schools, the decision in Levitt prohibiting reimbursements for teacher-controlled tests, the holding in Nyquist prohibiting aid for building repair and maintenance, the holding in Wolman prohibiting aid for field trip transportation, and the holding in Ball with respect to the Community Education program.

If you do decide to ask the Court to reverse the judgment of the Fifth Circuit, we think that there are three basic theories on which you might ask the Court to overrule precedents such as Lemon, Meek, Wolman, and similar cases:

- First, the United States could urge the Court to adopt a "strict neutrality" doctrine, under which the Establishment Clause would permit any provision of governmental aid that does not favor religious recipients, so long as such aid is provided in accord with neutral, secular criteria. Under such a doctrine, the Court would reject its longstanding principle that the government must not provide direct aid to religious activities, including especially aid that can be used for religious education.

- Second, the United States could urge the Court to retain the "no direct funding of religious activity" rule, but to abandon the longstanding distinction between pervasively sectarian schools and other religious organizations. If primary and secondary church-affiliated schools were treated in the same manner as other religious organizations – in particular, as are religiously affiliated colleges and universities – there no longer would be a presumption that such schools cannot segregate their religious and secular teaching, or that such schools would not (or could not) abide by legal restrictions against the use of government-supplied aid to advance religious education. If one assumes that secular and sectarian functions can meaningfully be separated within pervasively sectarian schools, the monitoring that would be constitutionally required to ensure that aid is not diverted to religious education would be less intrusive than the "excessive and enduring entanglements" that the Court previously has presumed necessary in such primary and secondary schools.

- Third, and perhaps more narrowly, the United States could ask the Court to abandon its holdings in Lemon and related cases that the Establishment Clause prohibits the "excessive and enduring entanglements" that concededly would be necessary to ensure that pervasively sectarian schools do not use aid for religious inculcation.

We will discuss these three possibilities in turn. We conclude that the first two theories would require a substantial change in settled Establishment Clause doctrine, a change that would be difficult to justify under the doctrine of stare decisis, and that would permit governments to use tax revenues to substantially subsidize primary and secondary sectarian schools. In addition, there is no evidence to suggest that five Justices would adopt either approach. The third approach, in contrast, would require overruling less precedent, and might garner five votes on the Court. It, too, however, would raise serious concerns, and, in any event, it does not appear to be properly presented on the record in this case.

1. Strict Neutrality and Rejection of the "No Direct Funding" Rule

The United States could urge the Court to adopt what is sometimes referred to as a "strict neutrality" doctrine, under which the Establishment Clause would permit any provision of governmental aid that does not favor religious recipients, so long as such aid is provided for some legitimate secular objective, in accord with neutral, secular criteria. Such a doctrine would be similar to what then-Justice Rehnquist favored in dissent in Meek, 421 U.S. at 395-96, and similar cases. In effect, such a doctrine would jettison the Court's longstanding "no direct funding" rule, under which the Establishment Clause prohibits "government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith." Ball, 473 U.S. at 385. See supra at 16. It also would require abandonment of the ancillary prohibition on aid to pervasively sectarian organizations.

As recently as the Kendrick case in 1987, all nine Justices of the Court supported the "no direct funding" rule, see supra at 16 & note 16, and only Justices Kennedy and Scalia spoke out in favor of eliminating the "pervasively sectarian" doctrine, Kendrick, 487 U.S. at 624-25 (Kennedy, J., concurring, joined by Scalia, J.). More recently, in Rosenberger, Justice Thomas advocated a version of the neutrality doctrine that would expressly reject the "no direct funding" rule, 515 U.S. at 855-63 (Thomas, J., concurring), but no other Justice joined him in that view. Four Justices, taking express issue with Justice Thomas, urged a strong defense of the "no direct funding" rule, id. at 868-85 (Souter, J., dissenting); and Justice O'Connor indicated her view that the no funding rule is a "bedrock principle[]" of Establishment Clause doctrine (albeit not one that is dispositive in every hard case), id. at 847 (O'Connor, J., concurring); see also id. at 846-47 ("Public funds may not be used to endorse the religious message.") (citation omitted); id. at 847 (cases allowing some funding of secular functions performed by sectarian organizations provide no precedent for the use of public funds to finance religious activities").

A strict neutrality rule would, of course, sweep away those of the Court's precedents (including the cases discussed above) that "absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith." Ball, 473 U.S. at 385, and might resolve many other contentious questions as well, including, for example, the constitutionality of various voucher programs. In Agostini, several prominent amici urged the Court to adopt a strict neutrality doctrine[25] (and undoubtedly would do so again if the Court were to grant certiorari in Helms). The United States, however, was careful in its brief in Agostini not

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[25] See, e.g., Brief Amici Curiae of Christian Legal Society, et al., Agostini v. Felton, Nos. 96 552, 96-553 (Feb. 1997).

to embrace such a view. This was consistent with the 1988 position of the United States in Kendrick that the Establishment Clause would prohibit recipients of federal funds from using such funds for specifically religious activity. See Brief for the Appellant, Bowen v. Kendrick, Nos. 87-253, 87-431, 87-462 ("U.S. Kendrick Brief"), at 34-38 (Jan. 1988).[26] And, in Aguilar, the United States represented that "[t]he governing principle is that resources that are inherently capable of diversion of use for religious instruction must not be placed under the control of religious school authorities." U.S. Aguilar Brief at 30 n.20 (citing Wolman, 433 U.S. at 250-51).

The Court in Agostini, while indicating that neutrality is an important principle in Establishment Clause cases, 521 U.S. at 230-32, nevertheless did not accept the amici's invitation to give neutrality the dominant doctrinal place in the Establishment Clause analysis. We believe that Justice Souter's response to Justice Thomas in Rosenberger is forceful; at the very least, the question is a difficult one. Furthermore, in light of Justice O'Connor's recent indication that she is not inclined to abandon the "no direct funding" rule, it is unlikely that a majority of the Court could be persuaded to adopt such a theory as a ground for departing from stare decisis. Accordingly, we recommend that the United States adhere to its longstanding position and not urge the Court to abandon its "no direct funding of religious education" principle. See also Wolfson Memo at 16-18.

2. Abandoning the "Pervasively Sectarian" Distinction

The United States alternatively could argue that, even though the Court should retain its "no direct funding" rule, nevertheless it should abandon the presumption that religious primary and secondary schools cannot (or will not) abide by proscriptions against the use of government aid for religious education. In other words, we could ask the Court to abandon its longstanding distinction between religious institutions that are pervasively sectarian and those that are not (a position that Justices Kennedy and Scalia urged in Kendrick, 487 U.S. at 624-25).

As recently as Kendrick, the Court held fast to the distinction between "pervasively sectarian" organizations and other religiously affiliated institutions. In that case, it explained that aid to pervasively sectarian institutions is more constitutionally problematic (and more extensive monitoring would be necessary in pervasively sectarian schools to prevent diversion of government aid to religious education), because "a substantial portion of [their] functions are subsumed in the religious mission," secular and religious functions are "inextricably intertwined," and such schools have "as a substantial purpose the inculcation of religious values." Kendrick, 487 U.S. at 610, 616 (quotations omitted). The argument that these characteristics should no longer be presumed meaningfully to distinguish primary and secondary religious schools from other religious organizations would logically entail the related argument that the risk of diversion of aid to religious uses is no greater in these schools than in other religious institutions, which would in

[26] See also, e.g., id. at 36 n.30 (use of government funds for "religious inculcation" is conduct that "would have presented a clear Establishment Clause violation at the time [1981] the statutes were enacted"); id. at 40-41 (instances where grantees held classes in religious settings, included religious discussions in otherwise secular programs, and used explicitly religious materials were "departures from proper constitutional principles," and "raise[d] serious concerns").

turn appear to lead to the view that providing direct aid to such schools should be permitted to the same extent that it may be provided to religious colleges and universities. In other words, the distinctions that the Court developed in cases such as Tilton, Hunt and Roemer would fall away,[27] and the more permissive direct aid doctrine in those cases would, even in the context of primary and secondary schools, displace the restrictive doctrine of Lemon, Meek, Wolman, Nyquist, et al.

We think this also would be a fairly momentous doctrinal development, and we recommend against urging the Court to adopt such a view, for the following reasons. First, the argument would be inconsistent with the position that the United States expressly urged upon the Court in Kendrick – a position that the Court adopted. In that case, the Solicitor General wrote at length about the critical distinction between organizations that are pervasively sectarian and those that are not:

> This Court's cases involving government funding programs make clear that the heart of any Establishment Clause analysis is whether the assisted organizations are pervasively sectarian in nature. The critical importance of that inquiry is best reflected in the crisp distinction drawn by this Court between primary and secondary parochial schools, whose mission often disables them from receiving governmental assistance, and other religiously-affiliated organizations, which are ordinarily free to participate in government programs on an equal footing. The Court has observed that in parochial schools, education and counseling are "integral part[s] of the dominant sectarian mission . . . in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." Meek v. Pittenger, 421 U.S. 349, 371 (1975). This Court has emphasized that in a parochial school setting "[r]eligious authority necessarily pervades the school system," and that it is the "substantial religious character of . . . church-related schools" (Lemon v. Kurtzman, 403 U.S. at 616-617), that requires the Court to be "particularly vigilant" (Edwards v. Aguillard, No. 85-1513 (June 19, 1987), slip op. 4). The "danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular" is a "conflict of functions [that] inheres in the situation" (Lemon v. Kurtzman, 403 U.S. at 617). Put another way, "where the teacher works within and for a sectarian institution, an unacceptable risk of fostering of religion is an inevitable byproduct." Wolman v. Walter, 433 U.S. 229, 254 (1977). See also Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 384-385, 391-392 (1985); NLRB v. Catholic Bishop, 440 U.S. 490, 501-504 (1979). . . . The Court's vigilance in connection with aid to primary and secondary schools is additionally justified by the fact that the government has made primary education compulsory, making children whose parents select religious schools nearly a captive audience for as many hours as they are required to attend.

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[27] See, e.g., Roemer, 426 U.S. at 748-54 (plurality opinion).

U.S. Kendrick Brief at 27 & n.23.[28] Similarly, in its Reply Brief in Kendrick, the United States expressly distinguished Meek's holding respecting teaching materials on the ground that the schools in Meek — unlike the organizations in Kendrick — had a predominantly sectarian character. See Reply Brief for the Federal Appellant and Brief for the Federal Cross-Appellee, Bowen v. Kendrick, Nos. 87-253, 87-431, 87-462, at 12 n.12 (Feb. 1988).

Second, abandonment of the pervasively/nonpervasively sectarian distinction would mean that governments could provide extensive direct aid to sectarian primary and secondary schools, so long as there were some reasonable mechanism for detecting and remedying cases in which such aid was used to inculcate religious doctrine. That would be quite a striking change from regime that has been in place since Lemon and its progeny. As with the strict neutrality theory, it would be necessary - and difficult - to explain to the Court why so much doctrine should be discarded notwithstanding stare decisis.

Third, there is good reason to think that the Court would decline such an invitation. As noted above, in Kendrick only Justices Kennedy and Scalia expressed any sympathy for the notion that the pervasively sectarian distinction should be abandoned. Moreover, Justice O'Connor has provided a strong signal that she believes Establishment Clause problems are much more pronounced where state aid is filtered to students through the auspices of the teachers in pervasively sectarian schools. In Ball and in Aguilar, Justice O'Connor dissented from the majority's view that the Establishment Clause prohibits the state from using public school teachers to provide students with supplemental education on sectarian school grounds. See 473 U.S. at 398-99 (Ball); id. at 421-31 (Aguilar). But, notably, Justice O'Connor concurred with the (7-2) Ball majority with respect to the Community Education program, see supra at 14-15, in which supplemental education was provided to sectarian school students by sectarian school teachers:

> I agree with the Court, however, that the Community Education program violates the Establishment Clause. The record indicates that Community Education courses in the parochial schools are overwhelmingly taught by instructors who are current full-time employees of the parochial school. The teachers offer secular subjects to the same parochial school students who attend their regular parochial school classes. In addition, the supervisors of the Community Education program in the parochial schools are by and large the principals of the very schools where the classes are offered. When full-time parochial school teachers receive public funds to teach secular courses to their parochial school students under parochial school supervision, I agree that the program has the perceived and actual effect of advancing the religious aims of the church-related schools. This is particularly the case where, as here, religion pervades the curriculum and the teachers are

[28] See also, e.g., id. at 30-31 (were Secretary of Health & Human Services to involve pervasively sectarian groups in the program, that would be an "as-applied" violation of the Establishment Clause); id. at 45 ("where the recipient of government funds is not pervasively sectarian, there is . . . a sharply reduced basis for presuming that the grantee will violate the terms of the grant by inculcating religious doctrine"); id. at 42-45 (entanglement concerns raised by cases of pervasively sectarian recipients are unwarranted where recipient is not pervasively sectarian).

accustomed to bring religion to play in everything they teach. I concur in the judgment of the Court that the Community Education program violates the Establishment Clause.

Ball, 473 U.S. at 399-400 (O'Connor, J., concurring in the judgment in pertinent part; emphasis added). Justice O'Connor reached this conclusion despite the fact that the private school teachers in the Community Education program were (for purposes of the program) public employees; despite the secular nature of the courses taught; and despite the fact that, in the eight years of the program's operation, "[n]ot one instance of attempted religious inculcation exists in the record[]." Id. at 401 (Rehnquist, J., dissenting). Subsequently, in Agostini, Justice O'Connor wrote the opinion for the Court overturning the Court's holding in Aguilar. She concluded that "Aguilar, as well as the portion of Ball addressing Grand Rapids' Shared Time program, are no longer good law." 521 U.S. at 235 (emphasis added). Notably, however, Justice O'Connor did nothing to suggest that she had changed her view with respect to the Community Education program in Ball, which had provided supplemental education using teachers from pervasively sectarian schools. See also id. at 241 n.1 (Souter, J., dissenting) ("I do not understand the Court's discussion to implicate Ball's evaluation of the Community Education program.").

Fourth, even in nonpervasively sectarian institutions, the Constitution requires some (much more limited) oversight to ensure that government aid is not diverted to religious inculcation, such as the level of oversight that was required under the federal grant program approved in Kendrick, 487 U.S. at 615. If Kendrick is to be the guide, potential religious school recipients of Title VI aid would, at the very least, have to "disclose in detail," id., precisely how the equipment and library books will be used. A recipient also presumably would be required to "make such reports concerning its use of Federal [aid] as the Secretary may require." Id. And government employees likely would have to visit the schools regularly "to see whether [the aid is] in fact being administered in accordance with statutory and constitutional requirements." Id. at 617; see also Hunt, 413 U.S. at 745-46 (discussing "inspecti[on] of the project to insure that it is not being used for religious purposes"). The Court in Kendrick found that this level of oversight was sufficient to ensure (in the context of a facial challenge) that nonpervasively sectarian organizations would not use government aid for religious purposes. 487 U.S. at 617. It is not clear that the record in this case demonstrates even this level of oversight.

(3) Overruling the Lemon Entanglement Doctrine

Alternatively, perhaps the United States could urge the Court to interpret the Establishment Clause to permit direct provision of equipment and materials to pervasively sectarian schools, "as long as that aid is accompanied by safeguards that ensured that the aid could not be diverted to religious purposes (whether or not it is inherently 'incapable' of such diversion)." Wolfson Memo at 18. The argument would be that such aid is permissible where, because of government required safeguards, "there is no reasonable likelihood that it would be diverted to religious ends." Id. Mr. Wolfson — who does not in the end support this idea in the context of this case — suggests that "[s]uch an argument, if carefully framed, would involve a minor adjustment of Meek and Wolman, but not the wholesale repudiation of those cases." Id.

We agree with Mr. Wolfson that this proposal is the most attractive, but that it also would raise several serious problems. Id. at 19-21. We note that, although this argument would not necessitate "wholesale repudiation" of Meek and Wolman, it would require the Court to reject the entanglement doctrine that it developed in Lemon and applied in cases such as Meek and Wolman.

If the Department of Education determined to impose enforceable and effective safeguards, there would still be a significant question what those safeguards would have to include in order to be "sufficient to ensure that the aid is not diverted to religious purposes." Wolfson Memo at 18. The Court has suggested that "comprehensive, discriminating, and continuing state surveillance" would "inevitably" be required to ensure that teachers in pervasively sectarian schools do not use government aid for religious purposes. Lemon (Earley), 403 U.S. at 619.[29] But such a regime of such "close supervision of the nonpublic teachers" who use the federal aid, Wolman, 433 U.S. at 254, would result in excessive entanglement under Lemon (and Earley), 403 U.S. at 619-22; Marburger, 358 F. Supp. at 39, aff'd mem., 417 U.S. 961; Meek, 421 U.S. at 366-67 n.16; and Wolman, 433 U.S. at 254. In order for the Court to hold that Earley Lemon-level monitoring and surveillance (or Wolman's "close supervision of the teachers" who use the provided aid, 433 U.S. at 254) is sufficient to ensure that Title VI aid is used only for secular purposes, the Court would have to abandon its doctrine that such "prophylactic contacts . . . involv[ing] excessive and enduring entanglements," Lemon (DiCesno), 403 U.S. at 619, are themselves unconstitutional.

Notably, there is some indication that Justice O'Connor would be sympathetic to such an argument. In her dissent in Aguilar, 472 U.S. at 430, she wrote:

> Pervasive institutional involvement of church and state may remain relevant in deciding the effect of a statute which is alleged to violate the Establishment Clause,

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[29] The Court's discussion of entanglement in Lemon and Earley was focused on the difficulty inherent in supervision of the entire educational function of the religious school teachers, since in those cases not only was Pennsylvania providing reimbursement for books and equipment (Lemon), but both Pennsylvania (Lemon) and Rhode Island (Earley) were providing supplemental salaries for the teachers themselves. It might be the case that somewhat less oversight would be needed (or the oversight could be more confined) where the government provides only computer hardware and software and library books. In both Marburger, 358 F. Supp. at 36-39, aff'd mem., 417 U.S. 961, and Meek, 421 U.S. at 366-67 n.16, excessive entanglement was found in the isolated context of loans of equipment and materials. It is notable, as well, that the Court in Wolman found impermissible entanglement in connection with the "close supervision" that would be required in the discrete and limited context of field trips. 433 U.S. at 254.

Of course, as these and the entire Lemon line of cases indicate, the Establishment Clause problems created by aid to pervasively sectarian schools are especially pronounced where sectarian school teachers have control over the manner in which the governmental aid is used. "The key role played by teachers in such a school system has been the predicate for our conclusions that governmental aid channeled through teachers creates an impermissible risk of excessive governmental entanglement in the affairs of the church-operated schools." NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 501 (1979); see also Lemon, 403 U.S. at 617-20; Ball, 473 U.S. at 399-400 (O'Connor, J., concurring in the judgment in pertinent part). These problems will, accordingly, be most pronounced with respect to aid under § 7351(b)(2) that teachers regularly would use, or that would be subject to teacher control.

> Walz v. Tax Comm'n, 397 U.S. 664 (1970), but state efforts to ensure that public resources are used only for nonsectarian ends should not in themselves serve to invalidate an otherwise valid statute. The State requires sectarian organizations to cooperate on a whole range of matters without thereby advancing religion or giving the impression that the government endorses religion. Wallace v. Jaffree, supra, at 110 (dissenting opinion of REHNQUIST, J.) (noting that state educational agencies impose myriad curriculum, attendance, certification, fire, and safety regulations on sectarian schools). If a statute lacks a purpose or effect of advancing or endorsing religion, *I would not invalidate it merely because it requires some ongoing cooperation between church and state or some state supervision to ensure that state funds do not advance religion*. (Emphasis added.)

Aguilar itself involved supervision of *public* employees, rather than supervision of religious school teachers; and, at the urging of the United States, the Court in Agostini (per Justice O'Connor) rejected Aguilar's holding that supervision of public employees is impermissibly entangling, 521 U.S. at 232-35. Justice O'Connor's criticism of the entanglement doctrine would appear, however, to extend beyond the context of public employee monitoring, and might reach the situations found in Lemon, Earley, Marburger, Meek and Wolman.

Even if you conclude that it is appropriate to urge the Court to adopt this substantially diminished view of the entanglement doctrine, however, there are at least two reasons why Helms would not be an ideal vehicle for such an argument. First, as Mr. Wolfson emphasizes, the Department of Education in fact has not imposed the requisite prophylactics, Wolfson Memo at 19-20, and even the Department's advisory guidance does not require this degree of supervision, see id. at 21 n.14. Furthermore, the Department of Education has informed us that there would be significant practical obstacles to imposing a monitoring regime of this sort and that such oversight would be incompatible with the spirit, if not the letter, of the law. See 20 U.S.C. § 8902 ("Nothing in this chapter shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources . . . .").[30]

Finally in its recent brief in Agostini, the United States expressly contrasted supervision of public employees — which (according to the United States) the Court in Aguilar mistakenly concluded would create an impermissible entanglement — with supervision of sectarian school teachers, which we conceded would be impermissible under Lemon and related cases. See Brief for the United States in Agostini v. Felton, Nos. 96-552 and 96-553, at 18-20, 28, 30 (1997). This was consistent with the United States' position in Aguilar itself, where the Solicitor General argued that, in Lemon, "in a very and direct sense, the surveillance constituted 'excessive and enduring entanglement between state and church' . . . . The government has no business overseeing the agents of the church to ensure that they do not commit religion." U.S. Aguilar

[30] We have not done any research with respect to the scope or intended effect of § 8902. But the plain words of that statute need not be construed to prohibit governmental officials from overseeing a school's curricular use of government-provided instructional materials and equipment.

Brief at 37 (quoting Lemon, 403 U.S. at 619); accord U.S. Kendrick Brief at 42-44.

III. The Effect on Title VI if the Court of Appeals' Decision is Permitted to Stand

The court of appeals' opinion, if left in place, would not prohibit the United States from satisfying the statutory mandate contained in Title VI; and, in particular, the mandate would not prevent the federal or local governments from satisfying the "equitable participation" requirement of § 7372(a)(1).

Title VI does not require that sectarian schools or their students receive particular forms of assistance. Rather, § 7372(a)(1) 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." (Emphasis added.) Title VI 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 factors which relate to such expenditures." 20 U.S.C. § 7372(b).

The equitable participation requirement derives from a prior regulatory mandate discussed in Wheeler v. Barrera, 417 U.S. 402 (1974). That case concerned Title I of the ESEA, which provides for federal funding of special programs for educationally deprived children in both public and private schools. The suit was instituted on behalf of parochial school students who were eligible for Title I benefits and who claimed that the public school authorities in their area, in violation of the Act, failed to provide adequate Title I programs for private school children as compared with those programs provided for public school children. The defendants answered that they could not, under state constitutional law, provide the aid that plaintiffs requested. The question was whether that refusal to provide certain aid violated the statute. The Court noted that the governmental defendants "clearly had failed to meet their statutory commitment to provide comparable services to children in nonpublic schools." Id. at 415. (Although the source of this comparability requirement was regulatory, id. at 415 n.11, the Court nevertheless referred to a "statutory" commitment.)

The Court held that "comparable services" does not mean "identical services." Id. at 420. "Congress expressly recognized that different and unique problems and needs might make it appropriate to utilize different programs in the private schools. A requirement of identity would run directly counter to this recognition." Id. at 422. In particular, "Congress recognized that the needs of educationally deprived children attending nonpublic schools might be different from those of similar children in public schools; it was also recognized that in some States certain programs for private and parochial schools would be legally impossible because of state constitutional restrictions, most notably in the church-state area." Id. at 421. The Court accordingly concluded that, where a "form of services to parochial school children is rendered unavailable because of state constitutional proscriptions, the solution is to employ an acceptable alternative form," id. at

419-20.

Congress's 1978 addition to Title I of an express "equal expenditure" provision was intended to "insure that children enrolled in private elementary and secondary schools will receive comparable benefits from programs authorized by Title I according to the standard . . . required by regulations and approved by the United States Supreme Court in its Decision of June 10, 1974 (Wheeler v. Barrera). H.R. Rep. 95-1137, at 33 (1978), reprinted in 1978 U.S.C.C.A.N. 4971, 5003. Section 7372 also appears to reflect the "comparability" standard discussed in Wheeler.

As long as there are some forms of Title VI aid that can constitutionally be provided in the sectarian school setting, it presumably will be possible to satisfy § 7372's equitable participation mandate. The court of appeals held that "Chapter 2" was 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, by its terms, "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 later amended its opinion to clarify that its mandate did not affect "the acquisition of textbooks," which had not been challenged in the Helms litigation. 165 F.3d at 312. Thus, insofar as § 7351(b)(2) contemplates programs in which textbooks are loaned to religious school students, such as the program upheld in Allen, such programs are not covered by the decree. Moreover, § 7351(b)(2) also refers to programs for the acquisition and use of "assessments." Presumably this could include the sort of state-designed testing and evaluation assistance that the Court permitted the states to give to sectarian schools in Wolman and in Regan. Thus, even within the confines of § 7351, there is assistance that can be provided to religious schools and students.

Moreover, § 7351(b)(2) is only one of eight categories of "innovative assistance programs" identified in § 7351(b), most of which are quite broad (at least on their face). It may be that many of these alternative forms of aid can be provided to religious school students in a manner that would not be constitutionally problematic. To be sure, in light of the constitutional limitations reflected in the Fifth Circuit's opinion, "it may well be a significant challenge" to devise programs that satisfy the standard. Wheeler, 417 U.S. at 423. Without significantly more information about the various Title VI programs, however, "[w]e cannot say . . . that this is an impossibility." Id. If the Fifth Circuit's decision is left in place, we would be happy to work with the Department of Education to determine what particular forms of Title VI assistance might be provided in sectarian schools (or to sectarian school students), in satisfaction of the equitable participation requirement.

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.

Memorandum

Subject	Date
Helms et al. v. Picard et al., No. 97-30231 (5th Cir. Aug. 17, 1998)	September 25, 1998

To	From
The Solicitor General	**Paul R.Q. Wolfson**

TIME

A petition for rehearing would have to be filed by **Thursday, October 1, 1998**. (NB: the previous day, September 30, 1998, is Yom Kippur, so a decision may be necessary by **Tuesday, September 29**).

RECOMMENDATIONS

The Department of Education and the Civil Division recommend rehearing en banc.

The Office of Legal Counsel recommends no rehearing en banc.

I recommend REHEARING EN BANC.

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-

[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.[3] 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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[3] 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, * Wolman v. Walter. 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

[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.

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2009-1006-F
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- 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]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-2096

DAVID POWELL, et al.,

Plaintiffs-Appellants

v.

THOMAS J. RIDGE, et al.,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING APPELLANTS AND URGING REVERSAL

INTEREST OF THE UNITED STATES

This case presents the issue whether a person may enforce valid regulations promulgated by the U.S. Department of Education to implement Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq. Because of the inherent limitations on administrative enforcement mechanisms and on the litigation resources of the United States, the United States has an interest in ensuring that both Title VI and its implementing regulations may be enforced in federal court by private parties acting as "private attorneys general." Such private suits are critical to ensuring optimal enforcement of the mandate of Title VI and the regulations. See Cannon v. University of Chicago, 441 U.S. 677, 705-706 (1979) (permitting private citizens to sue under Title VI is "fully consistent with -- and in some cases even necessary to

-- the orderly enforcement of the statute").

This appeal also involves the construction of regulations issued by the Department of Education. The Department of Education disburses over a half a billion dollars in federal funds each year to Pennsylvania for education programs and is responsible for administrative enforcement of Title VI regulations against fund recipients. 42 U.S.C. 2000d-1. The Department of Justice coordinates the enforcement of Title VI by executive agencies. See Executive Order No. 12250, 45 Fed. Reg. 72,995 (1980). The Department of Justice also has authority to enforce Title VI in federal court upon a referral by an agency that extends federal assistance to an education program or activity. This appeal may thus significantly affect both Departments' enforcement responsibilities. The United States participated as amicus curiae in the district court.

STATEMENT OF THE ISSUES

The United States will address the following questions:

1. Whether private plaintiffs may sue a recipient of federal funds, under 42 U.S.C. 1983 or through an implied private right of action, to enforce the requirement, embodied in regulations implementing Title VI, that recipients not administer their programs in a manner to cause unjustified discriminatory effects on the basis of race.

2. Whether plaintiffs' allegations state a claim under the Title VI regulations.

STATEMENT OF THE CASE

Plaintiffs filed their two-count complaint in the Eastern District of Pennsylvania on March 9, 1998 (App. yy-yy). Count I alleged that defendants, state officials sued in their individual and official capacities, violated federal regulations implementing Title VI and sought declaratory and injunctive relief pursuant to an implied private right of action (App. yy-yy). Count II alleged the same violation and sought the same remedy through 42 U.S.C. 1983 (App. yy-yy). Four legislators were permitted to intervene as defendants (App. yy). Defendants and intervenors both moved to dismiss the complaint.

On November 20, 1998, the district court granted the motion, holding, inter alia, that defendants were not "persons" suable under Section 1983; that plaintiffs could enforce the Title VI regulations through a private right of action; but that plaintiffs' allegations did not state a claim under the regulations. Plaintiffs filed a notice of appeal on December 4, 1998 (App. yy).

STATEMENT OF THE FACTS

According to the allegations of the complaint, which at this stage must be taken as true and read in the light most favorable to plaintiffs, Pennsylvania contains 500 school districts (App. yy ¶ 53). Pennsylvania has delegated to the Philadelphia School District its responsibility to educate school-age children residing in the city (App. yy ¶ 20). Philadelphia educates a predominantly non-white student body, and in fact educates nearly half of the non-white students in Pennsylvania (App. yy ¶¶ 23-24). Pennsylvania receives federal financial assistance for education (App. yy-yy ¶¶ 34-35). Pennsylvania has established a system of funding public education that depends upon a combination of locally generated revenues authorized by the Commonwealth (primarily property taxes), state funds, and federal funds (App. yy ¶ 47). We will discuss plaintiffs' remaining allegations at appropriate points in the brief.

SUMMARY OF ARGUMENT

A regulation promulgated by the Department of Education to implement Title VI prohibits recipients of federal funds from using criteria or methods of administering their programs that have the _effect_ of subjecting individuals to discrimination because of their race, color, or national origin. This valid substantive regulation is enforceable through 42 U.S.C. 1983. There is thus no need to resolve the question -- addressed by this Court in _Chester Residents Concerned for Quality Living_ v. _Seif_, 132 F.3d 925 (1997), vacated as moot, 119 S. Ct. 22 (1998) -- whether it can also be enforced through an implied private right of action. In any event, _Chester Residents_ correctly implied such a private right of action, and should be reinstated as the law of this circuit. Permitting private plaintiffs to enforce the discriminatory effects regulation is consistent with the statutory provisions providing for administrative review of recipients' activities, and will further the purposes of Title VI by assuring that persons can seek effective redress for their injuries.

The district court erred in holding that plaintiffs' complaint failed to allege a violation of the Title VI regulations. The overarching allegations of the complaint are sufficient to meet the short, plain statement of the facts required at this early stage. Moreover, plaintiffs' complaint contains at least three theories of liability that require further investigation on remand. First, that the defendants actions were the result, at least in part, of purposeful race discrimination. Second, that the current funding formula uses factors that unjustifiably shift Commonwealth funding away from school districts with larger minority populations. Third, that the funding system as a whole has unjustified discriminatory effects on school districts with high minority enrollments. Under the generous standard by which a complaint is reviewed on a motion to dismiss, the district court erred in dismissing this action.

ARGUMENT

I

PLAINTIFFS MAY ENFORCE THE DISCRIMINATORY EFFECTS STANDARD CONTAINED IN THE DEPARTMENT OF EDUCATION'S TITLE VI IMPLEMENTING REGULATIONS

Congress enacted 42 U.S.C. 2000d, as Title VI of the Civil Rights Act of 1964. Section 2000d provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 2000d-1 provides that "[e]ach Federal department and agency which is empowered to extend Federal financial assistance to any program or activity * * * is authorized and directed to effectuate the provisions of section 2000d of this title * * * by issuing rules, regulations, or orders of general applicability." 42 U.S.C. 2000d-1. To coordinate Title VI implementation, compliance, and enforcement activities of Federal agencies, Congress vested the President with the authority to approve all such regulations. Ibid. "Shortly after the enactment of Title VI, a Presidential task force produced model Title VI enforcement regulations specifying that recipients of federal funds not use 'criteria or methods of administration which have the effect of subjecting individuals to discrimination.'" Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 618 (1983) (Marshall, J.) (quoting 45 C.F.R. 80.3(b)(2) (1964)). Following the promulgation of the initial regulations, "every Cabinet department and about 40 federal agencies adopted Title VI regulations prohibiting disparate-impact discrimination." Guardians, 463 U.S. at 592 n.13 (White, J.).

Both counts of plaintiffs' complaint alleged that defendants violated 34 C.F.R. 100.3(b)(2). That provision prohibits the "utiliz[ation of] criteria or methods of administration [by recipients] which have the effect of subjecting individuals to discrimination because of their race, color, or national origin." This discriminatory effects regulation is within the scope of the enabling statute. Although the Supreme Court's decision in Guardians is comprised of six separate opinions, the proposition that regulations prohibiting discriminatory effects are valid Title VI implementation regulations clearly garnered the approval of a majority of the Court. See 463 U.S. at 584 n.2 (White, J.), 623 n.15 (Marshall, J.), 642-645 (Stevens, Brennan, Blackmun, JJ.). In Alexander v. Choate, 469 U.S. 287, 293 (1985), a unanimous Court confirmed that "actions having an unjustifiable disparate impact on minorities [can] be redressed through agency regulations designed to implement the purposes of Title VI."

A. Title VI Discriminatory Effects Regulations May Be Enforced Through 42 U.S.C. 1983

Count II of the complaint sought to enforce this valid regulation pursuant to 42 U.S.C. 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States * * * to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In order to seek redress through Section 1983, a plaintiff must assert that a "person" acting under the color of state law violated a federal "right." See Blessing v. Freestone, 117 S. Ct. 1353, 1359 (1997). Once a plaintiff demonstrates that a federal statute creates an individual right, a "presumption" of enforcability under Section 1983 arises, that can only be rebutted "if Congress 'specifically foreclosed a remedy under § 1983.'" Id. at 1360.

1. The district court dismissed Count II on the ground that state officials sued in their official capacities are not "persons" for purposes of Section 1983. While that is true when state officials are being sued for damages, the Supreme Court has made clear "a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because `official-capacity actions for prospective relief are not treated as actions against the State.'" Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 n.10 (1989) (citations omitted). Thus, the district court's dismissal of Count II cannot be upheld on that ground.

2. In the district court, defendants raised a number of alternative arguments why the regulations could not be enforced throught Section 1983, but none are persuasive. Federal substantive (also known as legislative) regulations have "the 'force and effect of law.'" Chrysler Corp. v. Brown, 441 U.S.

281, 295 (1979),[1] and thus can create rights enforceable through Section 1983. See West Virginia Univ. Hospitals, Inc. v. Casey, 885 F.2d 11, 18 (3d Cir. 1989) ("valid federal regulations as well as federal statutes may create rights enforceable under section 1983"), aff'd on other grounds, 499 U.S. 83 (1991); Alexander v. Polk, 750 F.2d 250, 259 (3d Cir. 1984) (same); accord Loschiavo v. City of Dearborn, 33 F.3d 548, 551 (6th Cir. 1994), cert. denied, 513 U.S. 1150 (1995); Samuels v. District of Columbia, 770 F.2d 184, 199-200 (D.C. Cir. 1985).

The discriminatory effects regulation, like the statute it implements, is intended to benefit plaintiffs. See Cannon v. University of Chicago, 441 U.S. 677, 694 (1979). The plain language of the regulation makes clear that the requirement is mandatory. See 34 C.F.R. 100.3(b)(2). Finally, courts are competent to enforce a discriminatory effects standard under Title VI. See, e.g., NAACP v. Medical Ctr., Inc., 657 F.2d 1322

[1] A substantive regulation is a one that (1) is based on a delegation of an express grant of authority by Congress; (2) implements the statute; and (3) "affect[s] individual rights and obligations." Id. at 302-303. The effects regulations meet these requirements. First, Title VI contains a "delegation of the requisite legislative authority by Congress" to establish substantive regulations. Chrysler Corp., 441 U.S. at 304 & 305 n.35. Second, a majority of the Justices in Guardians held that the effects regulations are a valid implementation of the statute. Third, the rules affect the "obligations" of fund recipients and the "rights" of persons Title VI protects. Although not expressly applying this test, a majority of the Justices in Guardians viewed the effects regulations promulgated under the statute to be substantive regulations. See 463 U.S. at at 643 (Stevens, Brennan, Blackmun, JJ.) (regulations "have the force of law"), 611 n.5 (Powell, Burger, Rehnquist, JJ.) (discussing agencies' "lawmaking power"), 613-615 (O'Connor, J.) (analyzing regulations as "legislative regulations" that "hav[e] the force of law").

(3d Cir. 1981) (en banc); see also Resident Advisory Board v. Rizzo, 564 F.2d 126 (3rd Cir. 1977) (adjudicating discriminatory effects claim under Fair Housing Act), cert. denied, 435 U.S. 908 (1978). These three conditions are sufficient to create a "right" enforceable under Section 1983. See Blessing, 117 S. Ct. at 1359.

A majority of the Justices in Guardians clearly thought that the disparate effects regulations were enforceable through Section 1983. Justice Stevens, writing for himself and two others, would have granted plaintiffs relief under Section 1983 without deciding whether there was also a private right of action to enforce the regulations. See 463 U.S. at 638 n.6, 645 n.18 (Stevens, Brennan, Blackmun, JJ.). Justice Powell, writing for himself and Chief Justice Burger, expressed the opinion that the only means of enforcing the regulations would be through Section 1983. Id. at 608 n.1 (Powell, J., and Burger, C.J.);[2/] see also Larry P. v. Riles, 793 F.2d 969, 986 (9th Cir. 1984) (Enright, J., concurring in part) ("the Title VI regulations in Guardians Association were enforced pursuant to a suit under 42 U.S.C. § 1983").

[2/] Justice Powell and Chief Justice Burger's rejection of an implied private right of action to enforce the regulation is consistent with their position that Title VI itself could not be enforced through a private right of action, id. at 608-610, a position that six other Justices and this Court have firmly rejected. Id. at 594-595 (White, Rehnquist, JJ.), 625-626 (Marshall, J.), 635-636 (Stevens, Brennan, Blackmun, JJ.); NAACP v. Medical Ctr., Inc., 599 F.2d 1247, 1250 n.10 (3d Cir. 1979). Thus, Justice Powell's unsupported statement on this issue is entitled to little weight if this Court elects to revisit the implied right of action issue discussed infra.

3. Because Title VI does not expressly limit Section 1983 actions, defendants must make the "difficult showing that allowing § 1983 actions to go forward in these circumstances 'would be inconsistent with Congress' carefully tailored scheme.'" Blessing, 117 S. Ct. at 1362. Defendants argued in the district court that the statutory provision providing for agency enforcement of the regulations through fund cut-off and other means precluded private enforcement through Section 1983. But this Court rejected a similar claim in Casey, explaining that empowering a federal agency to cut-off funds "gives no indication" of Congress' intent "to supplant a section 1983 remedy." 885 F.2d at 22. The Supreme Court has reached the same conclusion in its most recent Section 1983 cases. See Blessing, 117 S. Ct. at 1363 (so holding and collecting cases).[3]

Not surprisingly, this Court has permitted plaintiffs to invoke Section 1983 to enforce regulations under schemes patterned on Title VI. In W.B. v. Matula, 67 F.3d 484 (1995), this Court held that Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and its implementing regulations could be enforced through Section 1983. Id. at 494. Given that Section 504 incorporates the "remedies and procedures" of Title VI, 29

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[3] In the only two cases in which the Court has found a remedial scheme comprehensive enough to displace the Section 1983 remedy, Congress had created express private rights of actions that a plaintiff could invoke. See Blessing, 117 S. Ct. at 1362-1363. Here, by contrast, although anyone may file a complaint with the administrative agency alleging a violation of the regulations, the complainant is not a party to (and often times is not a participant in) the administrative proceedings. See Cannon, 441 U.S. at 707 n.41.

U.S.C. 794a(a)(2), there is no reason for a different result under Title VI and its regulations.[4]

4. Defendants also suggested in the district court that only the entity that receives the funds, not the officials who administer the funds sued in their official capacities, are appropriate defendants under Title VI's private right of action. They argued that permitting suits under Section 1983 to proceed against state officials sued in their official capacities would permit suits against defendants Congress did not intend to be liable.

But official-capacity suits are a pleading device for suing the entity for whom the official works. See Acierno v. Cloutier, 40 F.3d 597, 608 (3d Cir. 1994) (en banc) ("a suit against elected officials in their official capacit[ies] is functionally a suit against the government entity"). Thus, it is well-

[4] In Matula, this Court noted that Congress had responded to the Supreme Court's decision in Smith -- which had held that Section 504 claims involving education for children covered by the Individuals with Disabilities Education Act (IDEA), as well as some constitutional claims brought under Section 1983, were precluded by the express right of action Congress created under IDEA -- by enacting 20 U.S.C. 1415(f), which provided that nothing in IDEA "shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal statutes protecting the rights of children and youth with disabilities." 67 F.3d at 494. That statute reversed the holding of Smith by providing that the express cause of action under IDEA was not intended to exclude reliance on other rights and remedies otherwise available, thus permitting a suit under Section 504 to enforce its provisions, and a suit under Section 1983 to enforce constitutional rights. But nothing in that statute affected the relationship between Section 504 and Section 1983. Thus, the holding of Matula that Section 504 rights can be enforced through Section 1983 cannot be distinguished from this case on the basis of Section 1415(f).

established in cases brought under Section 1983 that a plaintiff may name state or local officials in their official capacities as defendants in lieu of (or in addition to) the state or local entity itself. See Hafer v. Melo, 502 U.S. 21, 25 (1991); Kentucky v. Graham, 473 U.S. 159, 165 (1985); Gregory v. Chehi, 843 F.2d 111, 120 (3d Cir. 1988). The device evolved as a means of circumventing sovereign immunity limitations imposed on suits directly against government entities. See, e.g., Ex parte Young, 209 U.S. 123 (1908); United States v. Lee, 106 U.S. 196 (1882). In such suits, even though officials are the nominal defendants, the entity is the real party in interest, and all the injunctive relief runs against the entity. For example, if Governor Ridge were to leave office, he would no longer be a party to the lawsuit in his official capacity; his successor would be automatically substituted as a party. See Fed. R. App. P. 43(c)(1). Thus, under the case law, "a plaintiff need not join the governmental unit itself as a defendant to impose liability against it, but may sue the individual official in his official capacity, so long as the governmental unit the official represents is given notice and an opportunity to be heard." Gegenheimer v. Galan, 920 F.2d 307, 310 (5th Cir. 1991).

There is no reason why this pleading device cannot be used in cases involving Title VI. Courts have often applied the official capacity suit outside the realm of Section 1983. Thus in Balgowan v. New Jersey, 115 F.3d 214 (1997), this Court permitted plaintiffs to sue a state official in his official capacity for a declaratory judgment under the Fair Labor Standards Act when the suit [redacted]ot proceed against the state in its own name. See also Welch v. Lang, 57 F.3d 1004, 1010-1011 (11th Cir. 1995) (treating suit against officials sued in official capacity as suit against entity under Equal Pay Act and Title VII); Garcia v. Elf Atochem N. Am., 28 F.3d 446, 451 n.2 (5th Cir. 1994) (same under Title VII); Riordan v. Kempiners, 831 F.2d 690, 694-695 (7th Cir. 1987) (Posner, J.) (same under Equal Pay Act).

In Matula, this Court approved suing officials in their official capacities under Section 504, a statute modeled on Title VI. Matula involved a suit against school officials in their individual and official capacities. This Court held that the "claims against defendants in their official capacities are equivalent to claims against the government entity itself," 67 F.3d at 499, and specifically noted that plaintiffs' failure to name the entity as a defendant did not prevent them from maintaining the action. Id. at 499 n.8.

The Fifth Circuit has also specifically so held under Section 504, see Brennan v. Stewart, 834 F.2d 1248, 1251-1252 (5th Cir. 1988); Helms v. McDaniel, 657 F.2d 800, 806 n.10 (5th Cir. 1981), cert. denied, 455 U.S. 946 (1982), and many other courts of appeals have permitted Title VI actions to proceed against state officials in their official capacities as a matter of course. See, e.g., Fuller v. Rayburn, 161 F.3d 516, 518 (8th Cir. 1998).

The Eleventh Circuit is the only court of appeals that has expressed a view to the contrary, but its jurisprudence on the question has been inconsistent. Consistent with Matula, the Eleventh Circuit held in Lussier v. Dugger, 904 F.2d 661, 670 n.10 (1990), that a suit under Section 504 could proceed against state officials sued in their official capacities. However, in Floyd v. Waiters, 133 F.3d 786, 789 (11th Cir.), vacated and remanded, 119 S. Ct. 33 (1998), the court held that only entities, and not officials in their official capacities, can be sued under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq., another statute patterned on Title VI. Floyd did not explain why the general rule that official-capacity suits are an appropriate means of bringing suit against an entity was inapplicable to Title IX cases, and could cite no appellate authority supporting its holding.[5] Because it contains no persuasive analysis, and is contrary to Matula and the weight of authority, we urge this Court to reject Floyd and find that this action can proceed under Section 1983 against defendants in their

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[5] The Floyd court improperly relied on Smith v. Metropolitan School District, 128 F.3d 1014 (7th Cir. 1997), cert. denied, 118 S. Ct. 2367 (1998). Smith held that Title IX did not extend to suits against persons in their individual capacities. Id. at 1019. But Smith also held that those officials who had sufficient "administrative control" over a program could be sued in their official capacities, while finding that the defendant in that case did not have such control under state law. Id. at 1020. Accepting the allegations of the complaint in this case as true (App. yy-yy ¶¶ 27-30), no such impediment exists here. Smith also recognized, as we argue in the text, that a suit against an appropriate official in his official capacity is the equivalent of suing the entity itself. Id. at 1021 n.3.

official capacities.[6]

B. Individuals Have A Private Right Of Action To Enforce The Discriminatory Effects Regulations

The district court held that Title VI's implied private right of action also encompasses suits for violations of the discriminatory effects regulation (App. yy). But if this Court holds that the regulation is enforceable through Section 1983, there is no reason to reach this issue. See Jeremy H. v. Mount Lebanon Sch. Dist., 95 F.3d 272, 278, 283 n.20 (3d Cir. 1996) (finding suit permissible under Section 1983 made it unnecessary to decide if private right of action was available).

In any event, the district court properly followed this Court's decision in Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925, 937 (1997), vacated as moot, 119 S. Ct. 22 (1998), that "private plaintiffs may maintain an action

[6] Pfeiffer v. Marion Center Area School District, 917 F.2d 779 (3d Cir. 1990), is not to the contrary. In Pfeiffer, this Court held that the private right of action under Title IX "subsumed" a Section 1983 claim to enforce the Equal Protection Clause. But the question whether a statute precludes a constitutional claim requires a different analysis from whether a statute contains a sufficiently comprehensive remedial scheme to preclude enforcement of the statutory rights through Section 1983. See Michael A. Zwibelman, Why Title IX Does Not Preclude Section 1983 Claims, 65 U. Chicago L. Rev. 1465, 1468-1470 (1998) (contrasting requirements). In any event, to the extent Pfeiffer could be read to hold that the existence of a private right of action under a statute can preclude reliance on Section 1983, it has been significantly narrowed by later cases. See Matula, 67 F.3d at 494 (holding that Section 504 may be enforced through a private right of action and Section 1983); Jeremy H. v. Mount Lebanon Sch. Dist., 95 F.3d 272, 278-279 (3d Cir. 1996) (permitting suit to enforce IDEA rights under Section 1983 without resolving whether private right of action existed under the statute). Moreover, that reading of Pfeiffer would only be relevant if (contrary to defendants' contentions) there were a private right of action to enforce the regulation.

under discriminatory effect regulations promulgated by federal administrative agencies pursuant to section 602 of Title VI of the Civil Rights Act of 1964." Although no longer binding circuit precedent, the Chester Residents opinion represents the considered judgement of three appellate judges acting on what was, at that point, a live case and controversy. It thus retains its persuasive authority. See Polychrome Int'l Corp. v. Krigger, 5 F.3d 1522, 1534 (3d Cir. 1993); Finberg v. Sullivan, 658 F.2d 93, 100 n.14 (3d Cir. 1981) (en banc) ("Even if a decision is vacated, however, the force of its reasoning remains, and the opinion of the Court may influence resolution of future disputes."). In addition, as this Court noted in Chester Residents, its holding was consistent with every other court of appeals to consider the issue. Id. at 936-937 (collecting cases from the First, Second, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits). "In light of such an array of precedent, we would require a compelling basis to hold otherwise before effecting a circuit split." Wagner v. PennWest Farm Credit, ACA, 109 F.3d 909, 912 (3rd Cir. 1997).

No such "compelling basis" exists here. In the district court, defendants and intervenors raised three major challenges to this Court's reasoning in Chester Residents, none of which should be found persuasive. First, defendants and intervenors argued that because the regulations go beyond what is prohibited by the statute, they cannot be the basis for a private right of action. But valid regulations are often prophylactic in nature, see United States v. O'Hagan, 117 S. Ct. 2199, 2217 (1997), and the right of action implied from the statute can serve as a gateway for the enforcement of such regulations. See Angelastro v. Prudential-Bache Secs., Inc., 764 F.2d 939, 946-947 (3d Cir.), cert. denied, 474 U.S. 935 (1985). "Such a conclusion was, of course, entirely consistent with the Court's recognition in J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964), that private enforcement of Commission rules may '[provide] a necessary supplement to Commission action.'" Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730 (1975) (emphasis added).

The courts of appeals have applied a "general rule" that a "private right of action may be implied from administrative regulations as well as from federal statutes, provided the private right of action may be inferred from the enabling statute." Lowrey v. Texas A & M Univ. Sys., 117 F.3d 242, 250 n.10 (5th Cir. 1997); see, e.g., Roosevelt v. E.I. Du Pont de Nemours & Co., 958 F.2d 416, 419-425 (D.C. Cir. 1992) (R.B. Ginsburg, J.); Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 536 (9th Cir. 1984); Ashbrook v. Block, 917 F.2d 918, 926 (6th Cir. 1990). This is consistent with the common sense notion that "if Congress intended to permit private actions for violations of the statute, 'it would be anomalous to preclude private parties from suing under the rules * * *'" implementing the statute. Angelastro, 764 F.2d at 947. Chester Residents was correct in applying this well-established legal analysis to the regulation at issue.

Second, defendants and intervenors argued that Section 602 sets out the exclusive means for enforcing the regulations promulgated to enforce Section 601. But the procedural requirements in Section 602 are an attempt to limit the Executive Branch -- which some in Congress believed had an undue advantage because of its greater resources and feared would capriciously deny needed funds to entities -- and were not directed at actions taken by the federal judiciary in suits by private persons after a full hearing on the merits. If defendants and intervenors were correct in their reading of the statute and legislative history, then the private right of action to enforce the prohibition on intentional discrimination (which the federal government also enforces through the procedures laid out in Section 602) would also be barred, a result clearly foreclosed by Cannon.

Third, defendants and intervenors attempted to diminish the import of the legislative history of the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988), discussed by this Court in Chester Residents. They characterized it as "subsequent legislative history," and noting that much of the discussion of the discriminatory effects regulations came from opponents of the Act's expanded coverage. But Chester Residents was following the well-accepted rule that when there is evidence that Congress understood that a private right of action was available under a statutory scheme, and amends the statute without demonstrating any intent to disapprove of such suits, it has ratified that private right of action. See Herman & MacLean

v. Huddleston, 459 U.S. 375, 386 (1983); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 381-382 (1982); see also Lindahl v. OPM, 470 U.S. 768, 787-788 (1985). And while much of the discussion of private enforcement of the discriminatory effects regulations came from opponents to the bill, "they are nevertheless relevant and useful, especially where, as here, the proponents of the bill made no response." Arizona v. California, 373 U.S. 546, 583 n.85 (1963).[1/]

Defendants and intervenors were unable to articulate a compelling basis for the district court to discard the holding of Chester Residents and reject the result reached by the other circuits that have addressed the question. Should this Court reach the issue, it should thus reaffirm the holding of Chester Residents.

[1/] Intervenors also argued that the Section 602 procedures are needed to allow agencies to apply their expertise to the questions presented. But courts have gained proficiency in adjudicating disparate impact cases through experience with Title VII and Fair Housing Act cases. And when such specialized expertise is required, a court may request the United States to participate as amicus curiae or ask the relevant agency to initiate an investigation. Compare Cheyney State College Faculty v. Hufstedler, 703 F.2d 732, 737 (3d Cir. 1983) (agencies do not have "primary jurisdiction" over violations of Title VI) with NAACP, 599 F.2d at 1249-1250 (district court directed agency to review actions for compliance with Title VI).

II

PLAINTIFFS' COMPLAINT STATES A CLAIM FOR VIOLATION OF THE DEPARTMENT OF EDUCATION'S TITLE VI REGULATIONS

A court may dismiss a complaint for a failure to state a claim only when it is certain that the allegations, and all the inferences fairly drawn from those allegations, cannot state a claim under any legal theory. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). Applying this generous standard, plaintiffs' complaint should not have been dismissed at this stage.

A complaint need only contain a "a short and plain statement of the claim." Fed. R. Civ. P. 8(a)(2). "Generally, under the liberal notice pleading practices in federal civil cases, a claimant 'does not have to set out in detail the facts upon which the claim for relief is based, but must merely provide a statement sufficient to put the opposing party on notice of the claim.'" Foulk v. Donjon Marine Co., 144 F.3d 252, 256 (3d Cir. 1998).

After surveying defendants' practices in funding public education in Pennsylvania, the complaint alleges that defendants' "funding policies and practices wrongfully discriminate against African-American, Hispanic, Asian and other minority students in the School District by utilizing criteria and methods that have had the foreseeable effect of subjecting such students to discrimination because of their race, color, or national origin, by disproportionately denying them necessary support for their education" (App. yy ¶ 73). The Department of Education's Title VI regulations proscribe "utiliz[ation of] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin." 34 C.F.R. 100.3(b)(2). The broad language of the regulations encompasses complaints regarding the "criteria or methods" of programs funding public education. See Campaign for Fiscal Equity, Inc. v. New York, 655 N.E.2d 661, 670 (N.Y. 1995).[8] Plaintiffs' complaint has put defendants on notice of the circumstances that are involved in the claim, and has alleged that defendants' actions are in violation of federal law. Nothing more is required. See Frazier v. SEPTA, 785 F.2d 65, 66-67 (3d Cir. 1986) (federal rules permit "great generality" in stating the basis of plaintiff's claim); Bennett v. Schmidt, 153 F.3d 516, 518 (7th Cir. 1998). By purporting to look behind these allegations to divine plaintiffs' "actual" complaint, the district court prematurely and inappropriately terminated the litigation.

In their appellate brief, plaintiffs have identified at least three potential theories of liability under the Title VI regulations, each of which needs to be explored more fully on remand. We address them briefly to explain why plaintiffs' more specific allegations are also sufficient at this stage to support

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[8] The Department of Education has made clear, in interpreting identically worded Title VI regulations for vocational education programs receiving federal assistance, that "recipients may not adopt a formula or other method for the allocation of Federal, State or local vocational education funds that has the effect of discriminating on the basis of race, color, [or] national origin." 34 C.F.R. Pt. 101, App. B, Pt. III.B.

potential claims for violating the Title VI regulation.[9]

A. Allegations Of Intentional Discrimination State A Claim Under The Title VI Regulation

The Department of Education regulations prohibit "discrimination" on the basis of race. 34 C.F.R. 100.3(a). Drawing all inferences in favor of plaintiffs, the complaint alleges intentional race discrimination by defendants. Plaintiffs allege that defendants have in recent years persistently changed the state revenue formula "with prior knowledge of its discriminatory consequences on students based on race," App. yy ¶ 47, resulting in a constant decrease on the flow of new money available to predominantly minority school districts, App. yy ¶¶ 58-61. As plaintiffs explain (Br. 35), based on these allegations, a factfinder would be entitled to infer that defendants took these actions, which they were aware would harm predominantly minority districts, at least in part because of "purposeful" discrimination. See Hunter v. Underwood, 471 U.S. 222, 231-232 (1985) (in order to show intentional racial discrimination, plaintiffs need not show that racial minorities were the only class intended to be burdened, or that race was the

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[9] In the district court, the United States argued as amicus curiae that the "benefit" provided by the Commonwealth's financing system was an "education," see Lau v. Nichols, 414 U.S. 563, 568 (1974), and that defendants' failure to take into account the increased cost of providing such an education in predominantly minority school districts such as Philadelphia also stated a claim. Plaintiffs have expressly disavowed that argument (Br. 30), and thus we do not press it in this appeal. See DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 731 (3d Cir.) ("'amicus may not frame the issues for appeal'"), cert. denied, 516 U.S. 916 (1995).

only reason for the decision); cf. Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061 (3d Cir. 1996) (en banc) (disbelief of defendant's proffered reasons combined with other evidence permits factfinder to conclude that there was intentional discrimination), cert. denied, 117 S. Ct. 2532 (1997). As the facts alleged in the complaint could permit a factfinder to ultimately conclude that defendants engaged in intentional discrimination, this case should be remanded to give plaintiffs the opportunity to prove these allegations.

B. Allegations That The State Revenues Are Distributed With A Discriminatory Effect State A Claim Under The Title VI Regulation

Drawing all inferences in favor of plaintiffs, the complaint alleges that the Commonwealth's method of allocating state revenues has a racially discriminatory effect on predominantly minority school districts. If, as plaintiffs allege, the funding formula currently uses a factor intended to give more money to school districts with high poverty rates (App. yy ¶ 49), but that predominantly white school districts receive more than predominantly minority school districts when poverty is controlled for (App. yy-yy ¶ 53-55), then it is apparent that some other component of the defendants' current formula is disparately affecting minority school districts.

Intervenors suggested in the district court that predominantly minority school districts actually get more state revenues per-pupil than many predominantly white school districts. Even if that suggestion could properly be considered at this stage and were true, it would not defeat plaintiffs' disparate impact claim under this theory. A disparate impact claim is not simply about "bottom line" results, but about a process free from neutral factors that unjustifiedly diminish the benefits received by minority populations. In Connecticut v. Teal, 457 U.S. 440, 455-456 (1982), for example, the Supreme Court held that a Title VII disparate impact suit about promotions was not barred simply because defendants could show that minorities ultimately were promoted at a higher rate than whites. Instead, the Court held that plaintiffs could challenge any portion of the promotions process that disparately excluded minorities from consideration. The Teal holding has been applied in Title VI disparate impact cases. See Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1420 (11th Cir. 1993); Meek v. Martinez, 724 F. Supp. 888, 905-906 (S.D. Fla. 1987) (finding that various components of funding distribution formula violated Title VI regulations). Indeed, this Court applied Teal in a case analogous to this one in Wilmore v. City of Wilmington, 699 F.2d 667 (1983). In Wilmore, plaintiffs challenged a promotions process under Title VII that ranked people based on the combined weight of three separate factors. In response to the district court's suggestion that the disparate impact of one factor could not be challenged because it was balanced out by the results of another, this Court explained "[t]his reasoning penalizes minorities for doing well on one part of the exam and overlooks how much better their overall test results would have been if they had not been so handicapped on that part of the exam." Id. at 675.

This case should be remanded so that plaintiffs have the opportunity to discover the causes of this disparity in state funds between predominantly minority and other school districts when poverty is controlled for, as well as to provide defendants the opportunity to articulate any "substantial legitimate justification[s]" for the disparity. Elston, 997 F.2d at 1407. At this stage, however, plaintiffs allegations that the current formula utilizes criteria that "significantly diminish[]" and "reduce[]" the impact of criteria that increase state aid to Philadelphia, and thus "shift" the money away from school districts with larger minority populations (App. yy, yy-yy ¶¶ 49-50, 58, 74), are sufficient.[10]

C. Allegations That Predominantly Minority School Districts Are Disparately Affected By The Commonwealth's Overall Funding Scheme State A Claim Under The Title VI Regulation

The complaint alleges that the Commonwealth's overall system of funding local school districts has a disparate impact on predominantly minority districts. The complaint alleges that the

[10] The fact that plaintiffs did not identify the factors in the formula that have a disparate impact on their share of funding is not dispositive at this stage of the proceedings. See Menkowitz v. Pottstown Memorial Med. Ctr., 154 F.3d 113, 124 (3d Cir. 1998) ("a plaintiff generally need not explicitly allege the existence of every element in a cause of action if fair notice of the transaction is given and the complaint sets forth the material points necessary to sustain recovery"); cf. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657-658 (1989) (noting that discovery will normally be necessary to permit plaintiffs to identify with specificity causes of disparate impact).

Commonwealth has the duty to provide each child with an education (App. yy ¶ 20), that it has delegated that duty to each of the 500 existing school districts (ibid.), and that it has authorized and encouraged school districts to raise monies locally, primarily through property taxes, to supplement the education revenues it provides directly (App. yy ¶ 47).

Drawing all inferences in favor of plaintiffs, they have alleged that predominantly minority school districts are less likely to be able to spend as much per-pupil as predominantly white school districts because the predominantly minority school districts are unable to raise as much money locally to supplement the direct state revenue (App. yy-yy, yy, yy-yy ¶¶ 52, 56, 60, 65, 66). If true, these allegations may state a claim for a violation of the disparate impact regulation.

In an employment discrimination case, when there is a significant disparity between the proportion of white applicants who are hired and the proportion of black applicants who are hired, a prima facie violation of Title VII's disparate impact standard is made out, and an employer must justify the use of the criterion that causes the disparity or change the way it does business. Griggs v. Duke Power Co., 401 U.S. 424 (1971). Similarly, if an employer uses a method of ranking applicants so that a significantly disproportionate number of black applicants end up near the bottom of the rankings, that too would state a prima facie case under the Title VII disparate impact standard. Waisome v. Port Auth., 948 F.2d 1370, 1378 (2d Cir. 1991). These unexceptional disparate impact holdings are based on the proposition that identifiable patterns of minority disadvantage are suspect, even when arrived at through facially neutral methods.

A similar rule should apply in this case. If plaintiffs on remand can show that the predominantly minority school districts are disproportionately represented at the lower end of total spending per-pupil rankings, they will have made a prima facie case. We are not suggesting that simply showing that some predominantly minority school districts receive total per-pupil revenues below the statewide average would be sufficient. But if, as the complaint here can fairly be read to allege, predominantly minority school districts are significantly concentrated in the lower echelons of total funding, plaintiffs have carried their initial burden of showing a "significantly discriminatory impact" on the basis of race that suggests that factors other than chance are at work. Teal, 457 U.S. at 446.

Of course, even if plaintiffs do make that showing, that will by no means be the end of the inquiry. Defendants will have the opportunity to articulate "substantial legitimate justification[s]" for the disparities. Elston, 997 F.2d at 1407.[11/] Finally, even if a significant and unjustified disparity

[11/] What will constitute a "significant" disparity and a "substantial legitimate" justification in this context are not easy issues. Given the generality of the allegations and the nascent state of the litigation, we think it best for the district court to address those question in the first instance after discovery has been completed.

is shown, this would not inevitably lead to a federal court imposing its own funding scheme on a state. Just as an employer need not use any particular hiring test in order to comply with Title VII, defendants are not required by Title VI to use any particular method of funding public education. By accepting federal funds, however, defendants agreed not to administer their program in a manner that unjustifiedly results in discriminatory effects. If they are found to be utilizing criteria or methods of administration that are causing such a result, they would be afforded an opportunity to propose their own plan to remedy the violation. Lawyer v. Department of Justice, 117 S. Ct. 2186, 2193 (1997).

CONCLUSION

This Court should hold that plaintiffs may sue to enforce the discriminatory effects regulation and have stated a claim under the regulations.

Respectfully submitted,

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[Department of Education names]

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Educ - single sex schools

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 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.

The leading cases in this area are United States v. Virginia (VMI) and Mississippi University for Women v. Hogan. In Hogan, the state ran two coed nursing schools and a third one limited to women. In VMI, the state prevented women from having access to a unique form of education. In both cases, the state policy was struck down. Together, however, these cases suggest two possible justifications for gender classifications: 1) a comparable opportunities rationale; and 2) a compensatory rationale.

The Comparable Opportunity Rationale

A comparable opportunity rationale means that neither gender is significantly disadvantaged by a gender classification because comparable benefits are offered to both. The state is acting even-handedly. One variation of a comparable benefits rationale emphasizes the value of diversity (institutional and program diversity, not diversity in a student body). For example, the state may offer a variety of programs, one of which is available to only one gender, but argue that members of the other gender are not disadvantaged because comparable coed programs are available. We do not yet have a case upholding a single sex school on that ground. It is clear that a diversity rationale is unacceptable if the benefit offered to one gender is viewed as unique, and the value of the benefit to one gender is not undermined if it is offered to both.

The comparable opportunities rationale must be evaluated in the context of the underlying goals of equal protection. Heightened scrutiny ensures that the state is not making decisions on the basis of animus toward one gender or stereotypes, which could lead to irrational decisions or to a stigma imposed on one gender. These concerns arise differently in race and gender cases. For example, "separate but equal" programs almost always create a stigma in the race context, but they do so less frequently in the gender context. While separate but equal programs for different races has been thought to be impermissible since Brown, the Court has never said that a "separate but equal" program for both genders violates the Equal Protection Clause. In addition, the Court has never said that a comparable alternative to an education program offered to one gender in a single sex setting must also be offered to the other gender in a single sex setting.

The Compensatory Rationale

A compensatory rationale means that the state is attempting to remedy past burdens that have fallen particularly on one gender and the remedy is sufficiently related to these past burdens. We can assume that a remedy for past discrimination must meet the basic standard for all gender classifications, i.e., there is an exceedingly persuasive justification. However, the requirements for meeting that standard are more flexible on those applied to race classifications. In Croson and Adarand, the Court rejected basing remedies for race discrimination on "societal discrimination." The Court's concern was that the "amorphous" nature of societal discrimination means that it is difficult to determine when remedies are sufficiently narrowly tailored. However, this need to narrowly tailor remedies has not been applied to gender classifications. Several cases have upheld gender classifications on the basis that they remedy what amounts to societal discrimination.2

Title IX regulations have specific standards for the remedial justification.3 While there may be some differences with the constitutional standards, they do not appear to be significant in this case.

Applying these Rationale to the Leadership School

In Hogan, the comparable opportunities rationale was rejected because the Court felt males were significantly disadvantaged. The male plaintiff living near the school was forced to travel a long distance for a comparable program. Moreover, the asserted benefits of admitting only women were inconsistent with the state's own policy of allowing men to audit the classes. The Court rejected a compensatory rationale because it was not related to past discrimination. Women already dominated nursing, so a nursing school limited to women could not be said to compensate for past discrimination. Instead, it simply reinforced the stereotype that nursing is a women's profession.

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
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. paper	Legal brief re: government action and due process (5 pages)	02/09/1999	P5 1578
002a. fax	Coversheet from Seth Wasman to Dan Marcus re: 9th Circuit decision (1 page)	02/09/1999	P5 1579
002b. paper	Legal brief re: 9th Circuit decision (5 pages)	02/09/1999	P5 1580

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Elena Kagan
OA/Box Number: 14363

FOLDER TITLE:

Health - Grijalva [2]

Kara Ellis
2009-1006-F
ke658

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]

Government action and due process questions similar to those raised in this case are currently before the Court in American Manufacturers Mutual Insurance Co., et al. v. Sullivan, et al., No. 97-2000 (argued Jan. 19, 1999). There, the Third Circuit held that payment decisions made by workers' compensation insurers, as permitted by state law, were both attributable to the State and inconsistent with due process. See Sullivan v. Barnett, 139 F.3d 158 (3d Cir. 1998).

The court of appeals decisions in Sullivan and in this case are remarkably similar on the government action issue. Neither decision examines the "three principles" identified by this Court for determining whether otherwise private conduct "is governmental in character": (1) "the extent to which the actor relies on governmental assistance," or accedes to the government's coercive powers or encouragement, in effectuating its will, (2) "whether the actor is performing a traditional governmental function," (3) and "whether the injury caused is aggravated in a unique way by the incidents of governmental authority." Edmonson v. Leesville Concrete Co., 500 U.S. 614, 621-622 (1991); see also Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (government "normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement * * * that the choice must in law be deemed to be that of the [government]"). Rather, both predicate a finding of government action largely on the government's regulatory role. Compare Sullivan, 139 F.3d at 168, with App. 9a-10a.

In concluding that medical treatment decisions by private HMOs concerning their Medicare-beneficiary members are properly attributed to the federal government, the Ninth Circuit appears to have relied primarily on the "rather vague generalization," Blum, 457 U.S. at 1010, that there was a "high degree of interdependence" and a "symbiotic relationship," App. 9a, that made the government "a joint participant in the challenged activity." Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961). The facts the Ninth Circuit relied upon for that conclusion, however, are largely common to heavily regulated industries. See App. 10a (relying on the facts that the "Secretary extensively regulates," that "HMOs are required * * * to comply with all federal laws," that the Secretary is obligated to ensure that "HMOs provide * * * meaningful * * * procedures," that the "federal government has created the legal framework," and that the Secretary has adjudicatory authority with respect to HMO decisions). Compare Jackson, 419 U.S. at 357; see id. at 350.

Significantly here, the relationship between an HMO and its Medicare-beneficiary members is the product of a private choice by those members. Medicare beneficiaries may choose among providers and forms of coverage, and the government neither requires them to enroll in an HMO nor precludes them from dis-enrolling. In this respect, the HMO's relationship with its Medicare-beneficiary members resembles its relationship with members who elect HMO coverage under employer-sponsored or other private health plans. With respect to each, the HMO simply determines what treatment is appropriate under its professional and contractual obligations, without government participation or assistance.[1] And although money is paid out of the Medicare Trust Funds to cover the flat monthly rate charged for the Medicare beneficiary's enrollment in the HMO, the financial consequences of a determination by the HMO to furnish or deny particular services to that beneficiary once he has enrolled are borne by the HMO alone.[2]

On the merits of the due process issue, the Ninth Circuit rejected the Secretary's contention that her view of the appropriate and meaningful procedures be accorded substantial weight, declaring that there is "nothing in Mathews v. Eldridge or subsequent cases to suggest that such is necessary or

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[1] Indeed, the first sentence of the Medicare statute prohibits the "exercise [of] any" governmental "supervision or control over the practice of medicine or the manner in which medical services are provided." 42 U.S.C. 1395. In Blum v. Yaretsky, the Court held that the exercise of ordinary medical judgment is not state action, even where it may affect eligibility for government benefits. The Ninth Circuit sought to distinguish Blum by characterizing HMO determinations as more in the nature of interpretations of the Medicare Act, rather than medical judgments, see App. 11a, but the primary criterion employed by HMOs in this context -- whether medical services are "reasonable and necessary," 42 U.S.C. 1395y(a) — essentially requires an exercise of medical, not legal judgment. The complaint in this case, moreover, demonstrates that respondents seek to challenge medical judgments. C.A. E.R. 10-11 (¶ 29)(physical therapy denied because patient could not file therapeutic directions), 12-13 (¶¶ 40-41)(failure to prescribe adequate pain medication or order physical therapy), 13-15 (¶¶ 48-54)(skilled nursing care found not medically necessary), 16 (¶ 62)(speech therapy denied because it would not be effective).

[2]. In Blum, the Court rejected the contention that decisions made by physicians and nursing homes were attributable to the State, despite "state subsidization of the operating and capital costs of the facilities" and coverage for "the medical expenses of more than 90% of the patients." 457 U.S. at 1011. That the government pays for coverage neither encourages HMOs to deny requests for treatment, nor prevents the financial impact of HMO decisions from being visited exclusively on the HMO. If the fact that the government pays for coverage were a sufficient basis for attributing HMO (conduct to the government, HMOs providing services to government employees under the Federal Employees Health Benefits Act of 1959, 5 U.S.C. 8901 et seq., would also all be government actors.

advisable." App. 13a n.3. That was error. The Court expressly stated in Mathews v. Eldridge, 424 U.S. 319, 349 (1976), that, "[i]n assessing what process is due * * * substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration." For similar reasons, the imposition of a detailed, judicial injunction providing new requirements, rather than a remand order directing the Secretary to promulgate new procedures through a participatory and fully public rulemaking process, was error as well. Congress delegated implementation of 42 U.S.C. 1395mm(g) and the creation of "meaningful" procedures in the first instance to the Secretary, not to the courts. Cf. SEC v. Chenery, 332 U.S. 194, 199 (1947) (where prior agency action is set aside, "the [agency is] bound to deal with the problem afresh, performing the function delegated to it by Congress."); Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985) (proper course where agency errs is to "remand to the agency").[3]

The arguments that the Sullivan petitioners make in support of reversal there apply with equal force in this case as well.[4]

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[3] The district court also exceeded its authority in ordering the Secretary to terminate contracts with HMOs that fail to comply with the procedures it imposed. See Blessing v. Freestone, 520 U.S. 329, 343-344 (1997).

[4] See 97-2000 Pet. Br. at 20-21 (arguing that State does not influence insurer's non-payment decision), 17-22 (arguing that insurer decisions are not governmental benefits determinations), 22-25 (no unique aggravation of injury by government), 26-32 (regulated nature of industry does not render private action attributable to State). And there are clear similarities between the due process arguments as well. For example, in this case the lower courts implicitly concluded that respondents

Indeed, so closely related are the cases that lead counsel in this case filed an amicus brief in Sullivan, emphasizing the potential impact of the Court's decision there on the Medicare program at issue here.[5] For the foregoing reasons, we suggest that the petition in this case be held pending the decision in Sullivan.

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could have a constitutionally-protected property interest in receiving medical services before their legal entitlement to those services was established, and that pre-deprivation processes were required in certain contexts, App. 63a. Petitioners in Sullivan challenge similar conclusions reached by the court of appeals there. See 97-2000 Pet. Br. at 35-38 (arguing that due process does not apply to disputed applications for treatment where the legal entitlement to the treatment, and thus a property interest therein, has not been established), 42-44 (arguing that pre-deprivation process is not required); see also Lyng v. Payne, 476 U.S. 926, 942 (1986) (noting that the Court has not resolved whether "applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause").

[5] See Amici Curiae American Association of Retired Persons, The Center For Medicare Advocacy, Inc., et al., Br. at 4, 7.

ROUTING AND TRANSMITTAL SLIP	DATE	February 9, 1999
TO: (Name, office symbol, room number, Agency/Post)	Initials	Date
1. **Dan Marcus (via fax)** ***confidential attorney-client and attorney work-product communication***		

REMARKS:

Enclosed is an alternative version of the state action section. In addition to being significantly shorter, it also makes a point that should be important to those who want to distinguish Medicaid – that under Medicare enrollment in an HMO is voluntary.

It is possible, but in my view not desirable, to file an even more truncated version along the lines of what is footnote 11 in the penultimate draft. Of course, we would still need to say that the 9th Circuit's decision is incorrect, and why. Filing a version of this sort will make the distinction mentioned above more awkward, and it will, I think, provoke a brief in opposition that will require us to present our arguments in a reply anyway. There are also other reasons why it would be less desirable to file that sort of petition. Still, it would be better than not filing anything.

I want to reemphasize the point I made when I called you last evening -- that not filing a petition challenging this 9th Circuit ruling will likely have serious consequences well beyond HHS/HCFA. Given the governmental interests at stake here, it would be stunning if we did not file.

I hope the President will bear in mind that the arguments advanced here are **the same as those we have already made** in the district court, in our merits brief in the court of appeals, and in our rehearing papers. And we are not soliciting plenary review. We are simply trying to get this case back to the district court – absent a damaging state-action precedent -- so that the new statute and regulations can be evaluated on their merits, and the President's program can proceed unhindered.

DO NOT use this form as a RECORD of approvals, concurrences, disposals, clearances, and similar actions

FROM: (Name, org. symbol, Agency/Post)	Room No. —Bldg.
	5712-Main DOJ
Seth Waxman **Solicitor General** **Department of Justice**	Phone No. **202-514-2201**

1. The Due Process Clause does not apply to purely private conduct; it applies only where the actor is governmental, or the conduct can be fairly attributed to the government. NCAA v. Tarkanian, 488 U.S. 179, 191 (1988). The Ninth Circuit held that medical treatment decisions of private HMOs are properly attributed to the federal government in this case because the "Secretary extensively regulates the provision of Medicare services by HMOs" and pays HMOs "for each enrolled Medicare beneficiary (regardless of the services provided)"; HMOs must "comply with all federal laws and regulations"; and the "federal government has created the legal framework -- the standards and enforcement mechanisms -- within which HMOs" operate. App. 9a-10a. The Ninth Circuit's analysis departs from this Court's usual approach in this area, which focuses on three factors:

a. The first factor is whether the government "has exercised coercive power or has provided such significant encouragement * * * that the choice must in law be deemed to be that of the [government]." Blum v. Yaretsky, 457 U.S. 991, 1004 (1982). When an HMO makes an initial determination whether to provide a requested service, it does so without governmental participation or assistance. Indeed, the first section of the Medicare statute prohibits the "exercise [of] any" governmental "supervision or control over the practice of medicine or the manner in which medical services are provided." 42 U.S.C. 1395.[1]

[1] In Blum v. Yaretsky, 477 U.S. 991 (1982), this Court held that the exercise of ordinary medical judgment is not state action, even where it may affect eligibility for government benefits. The Ninth Circuit sought to distinguish Blum by characterizing HMO determinations as more in the nature of interpretations of the Medicare Act, rather than medical judgments, see App. 11a, but the primary criterion employed by HMOs in this context -- whether the medical services are "reasonable

b. The second factor is whether the otherwise private actor exercises some power "traditionally exclusively reserved to the State." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974). Significantly here, the relationship between an HMO and its Medicare-beneficiary members is the product of a private choice by those members. Medicare beneficiaries may choose among providers and forms of coverage, and the government neither requires them to enroll in an HMO nor precludes them from dis-enrolling. In this respect, the HMO's relationship with its Medicare-beneficiary members resembles its relationship with members who elect HMO coverage under employer-sponsored or other private health plans. Moreover, when an HMO decides whether to provide particular medical services requested by a member who has enrolled through Medicare, it does not act as an agent of the government or distribute government resources or funds. The HMO responds as it would to a similar request by a privately-enrolled member. The HMO exercises its own judgment as to whether the services are reasonable and necessary, and thus within the scope of its professional and contractual obligations. Although money is paid out of the Medicare Trust Funds to cover the flat monthly cost of the Medicare beneficiary's enrollment in the HMO, the

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and necessary," 42 U.S.C. 1395y(a) -- requires essentially medical, not legal, judgment. The complaint in this case, moreover, demonstrates that respondents seek to challenge medical judgments. One named plaintiff, for example, alleged that she was denied physical therapy because she could not follow therapeutic instructions. C.A. E.R. 10-11, ¶ 29. Another plaintiff alleged that treating physicians failed to prescribe adequate pain medication or to order physical therapy. C.A. E.R. 12-13, ¶¶ 40-41. Another plaintiff, much like the plaintiffs in Blum, alleged that the HMO erroneously concluded that skilled nursing care was not medically necessary. C.A. E.R. 13-15, ¶¶ 48-54. And yet another named plaintiff alleged that the HMO denied speech therapy services on the ground that the therapy would not be effective. C.A. E.R. 16, ¶ 62.

financial consequences of a determination by the HMO to furnish or deny particular services to that enrollee are borne by the HMO alone.[2]

Nor does an HMO exercise traditionally-governmental adjudicatory powers with respect to its members who choose to enroll through Medicare. See App. 10a-11a. The HMO's medical treatment decisions regarding such a member represent its own judgment about what is medically appropriate. A Medicare beneficiary who disputes an HMO denial may request an ALJ hearing in HHS, and the HMO then becomes a formal party, adverse to the beneficiary. See pp. , supra. The adjudication, of course, is government action, and the Secretary may order the HMO to provide the requested service, but that does not convert the HMO's otherwise-private initial determination into government conduct.[3] Indeed, the HMO's role is little different than that of a private defendant confronting potential liability in a civil suit. The defendant would always make an initial determination

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[2] See Blum, 457 U.S. at 1011 (rejecting contention that decisions made by physicians and nursing homes are attributable to the State, despite "state subsidization of the operating and capital costs of the facilities" and coverage for "the medical expenses of more than 90% of the patients"). That the government pays for coverage neither encourages HMOs to deny requests for treatment, nor prevents the financial impact of HMO decisions from being visited exclusively on the HMO. If the fact that the government pays for coverage were a sufficient basis for attributing HMO conduct to the government, HMOs providing services to government employees under the Federal Employees Health Benefits Act of 1959, 5 U.S.C. 8901 et seq., would also all be government actors.

[3] Administrative appeal statistics indicate that, in 1996 and 1997, the Secretary reversed HMO determinations in whole or in part in nearly 30% of all cases. Center for Health Dispute Resolution, Medicare HMO/CMP Reconsideration Data 1996-1997 (1998). In some instances, the HMO and the Secretary may be adverse parties in contested legal proceedings. If the HMO wishes to challenge one of Secretary's decisions, it may sue the Secretary in an action for judicial review, 42 U.S.C. 1395mm(c)(5)(B); and if the Secretary believes that the HMO is not meeting its legal obligations, she could impose civil money penalties or other sanctions, see 42 U.S.C. 1395mm(i)(6)(A)(i); accord 111 Stat. 323-325 (Sections 1857(g) and (h), to be codified at 42 U.S.C. 1395w-27(g) and (h)).

as to whether it considers itself liable and thus whether to satisfy the asserted obligation voluntarily. If it declines to do so and the plaintiff files suit, that decision may effectively be "reversed" -- and a contrary course compelled -- by the court. But that does not convert the initial private decision whether to meet the obligation voluntarily, or instead to dispute it, into government action. See Edmonson, 500 U.S. at 627 (decisions "whether to sue at all, the selection of counsel, and any number of ensuing tactical choices in the course of discovery and trial may be without the requisite governmental character").

c. Finally, there can be no argument that "the injury caused is aggravated in a unique way by the incidents of governmental authority." Edmonson, 500 U.S. at 622. This is not a case, like Edmonson, in which a dignitary injury or stigma of the sort caused by racial discrimination might be exacerbated by an appearance of governmental endorsement. See id. at 628. The government simply provides adjudicatory mechanisms through which HMO decisions may be challenged.

d. At bottom, the Ninth Circuit's decision to attribute to the federal government an HMO's medical treatment decisions about its members who have enrolled through Medicare appears to have rested primarily on the "rather vague generalization," Blum, 457 U.S. at 1010, that there was a "high degree of interdependence" and a "symbiotic relationship," App. 9a, that made the government "a joint participant in the challenged activity." Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961). The facts the Ninth Circuit relied upon for that conclusion, however, are largely common to heavily regulated industries. See App. 10a; pp. , supra. Even the most intensive governmental regulation of an industry is an insufficient basis for attributing otherwise private decisions and conduct to the government "where the initiative comes from" the private party "and not from the [government]" itself. Jackson, 419 U.S. at 357; see id. at 350.

Withdrawal/Redaction Sheet
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Don Baer, et al. to the President [partial] (1 page)	04/29/1997	P5 1581

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Elena Kagan
OA/Box Number: 14363

FOLDER TITLE:

Ideas - Generally

Kara Ellis
2009-1006-F
ke678

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]

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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]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

enlargement, and also framing your major foreign policy actions from May through July to make clear the larger purposes that unite them (with the NSC, we will put forward a themes memo showing how to pull this all together). This would be paired with a speech you would deliver two days earlier in the Hague to commemorate the 50th anniversary of the Marshall Plan -- billed as "President Clinton's major address to the people of Europe on the future of American-European relations." The West Point speech would be your major address to the American people on the same subject. (The contents of both will obviously depend on negotiations regarding NATO and Russia).

Please note that there is a strong feeling among your foreign policy advisers that you need to press the case publicly for NATO enlargement. Given the timing of this speech, that argument would definitely be newsworthy.

Recommendation: that you deliver a May 31st commencement address at West Point on foreign policy vision and NATO enlargement.

Agree_________ **Disagree**_________ **Discuss**_________

UC San Diego -- Race and Reconciliation. This could be the place where you announce actions relating to race and reconciliation, and deliver a strong One America speech -- focussed on harnessing the increasing diversity of our nation as our greatest strength. One recommendation is that you deliver such a speech in California -- the gateway to much of the world and the embodiment of American diversity. UC San Diego itself is very diverse (3% African-American, 29% Asian, 12% Latino), as is the surrounding San Diego metropolitan area (9% African American, 11% Asian, 19% Hispanic).

Giving a race-related speech at a University of California campus will undoubtedly raise two controversial issues -- the UC Regents' affirmative action policy and Proposition 209. However, this would enable you to address these issues directly, and we believe this should not prevent you from giving an address at UC San Diego. In fact, UC San Diego recently signed onto a letter printed in the New York Times in support of affirmative action.

It should be noted that a number of other western, racially diverse schools -- including the Universities of Washington, Oregon, Arizona and New Mexico -- were considered and rejected because of scheduling conflicts or policy issues the Administration has pending with particular universities.

Recommendation: that you deliver a June 14th commencement address at UC San Diego on race and reconciliation.

Agree_________ **Disagree**_________ **Discuss**_________

Withdrawal/Redaction Sheet
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Isabelle Katz Pinzler to Acting Associate Attorney General re: Individuals with Disabilities Education Act (IDEA) - 1997 (5 pages)	08/07/1997	P5 1582

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Elena Kagan
OA/Box Number: 14363

FOLDER TITLE:

DPC - Keep Up On [1]

Dana Simmons
2009-1006-F
ds278

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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Educatin - IDEA

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

August 7, 1997

Bruce/Mike —
Counsel's Office gave me this yesterday. The DoEd wants this fight with Gov. Wilson, but I'm not altogether sure we should.
Elena

MEMORANDUM FOR THE ACTING ASSOCIATE ATTORNEY GENERAL

FROM: Isabelle Katz Pinzler
Acting Assistant Attorney General
Civil Rights Division

SUBJECT: California's Failure To Comply With The Individuals With Disabilities Education Act Amendments of 1997

The United States Department of Education (D.Ed) has requested that we bring a lawsuit against the State of California to require it to comply with the Individuals with Disabilities Education Act as amended by the Individuals with Disabilities Education Act Amendments of 1997 (hereinafter referred to as the IDEA) and to make available a free appropriate public education to all eligible children with disabilities who are convicted as adults under state law and are incarcerated in adult correctional facilities.

D.Ed has not completed all the prerequisites for referring the matter to us for a lawsuit. However, the State has made it clear that it will continue to refuse to provide services to this identified population. Below, we set out in summary form, the strengths and weaknesses of the case, especially in light of the relief that we seek.

Statutory scheme

The IDEA provides grants to states for the education of individuals (up to age 21) with disabilities. States must provide matching funds such that the States pay up to 94% of the cost of the services provided. The IDEA and its implementing regulations have consistently required that a free appropriate public education be available to eligible children with disabilities, including eligible youth with disabilities in state adult correctional facilities. See 34 CFR §300.2(b)(4); Alexander S. v. Boyd, 876 F. Supp. 773, 800-801 (D.S.C. 1995); Donnell C. v. Ill. State Bd. Of Educ., 829 F. Supp. 1016, 1020

(N.D. Ill. 1993); Green v. Johnson, 513 F. Supp. 1016, 1020 (D. Mass. 1981). The IDEA Amendments of 1997 affirm this obligation, although, for youths 18-21, the obligation is now limited to individuals who were identified as having a disability or who had an individualized education program prior to being incarcerated. The amendments also allow states to transfer responsibility for providing these services from the state educational agency to the state's corrections agency. §§ 612(a)(1)(B), 612(a)(11)(C).

For the State of California to be eligible for its $300 million IDEA grant, it must demonstrate to the satisfaction of the Secretary of Education that the State has in effect policies and procedures to ensure that a free public education is made available to all children with disabilities residing within the state, including eligible children incarcerated in adult facilities. The Secretary requires that states provide this assurance in writing.

The IDEA has an enforcement mechanism under which, after notice and an opportunity for a hearing, the Secretary may withhold, in whole or in part, further payments to the state of IDEA funds for failing to comply substantially with the Act. Alternatively, the Secretary may refer the matter to the Department of Justice for appropriate enforcement action. § 616 (a). In situations where, as in California, the Governor has transferred the responsibility for ensuring that appropriate services are made available to eligible children in adult correctional facilities to the California Department of Corrections, the Secretary can take appropriate corrective action to ensure compliance; however, any withholding of funds is limited to the proportion of eligible children in prison to the overall statewide eligible population, § 616(c)(1). In California, it is estimated that this would be less than $1 million of the $300 million award. A referral to the Department of Justice could lead to the filing of a lawsuit to seek specific performance. See United States v. Marion County School District, 625 F.2d 607 (5th Cir. 1980) cert. denied 451 U.S. 910(1981). The lawsuit would seek to require the State to make appropriate services available to eligible children incarcerated in the adult prisons.

Facts

California has never provided special education services to children in adult correctional facilities and at all times since the effective date of the Individuals with Disabilities Education Act Amendments of 1997 (June 4, 1997) has made it clear that they do not intend to provide such services to eligible children.

The State, however, at D.Ed's request, did forward an assurance, signed by an official in the State's Department of Education. This assurance stated that "throughout the period of the grant award, all public agencies in the state will comply with all of the requirements of ... the IDEA Amendments of 1997, including ... the eligibility requirements of Section 612 of the Act, as amended." The state official represented that she had authority to make all of the assurances above. However, a footnote in the assurance statement noted that the Governor had assigned the responsibility of ensuring compliance with the IDEA with respect to eligible individuals incarcerated in adult correctional facilities to the California Department of Corrections (CDC). In a June 5, 1997 letter to Secretary Riley, the interim director of the CDC notified D.Ed that CDC elected not to provide special education services to eligible inmates in state prisons.

On July 16, 1997, the Department of Education forwarded to the state California's Federal Fiscal Year 1997 IDEA grant award. The state was informed that "Acceptance by California of this grant award constitutes an agreement by the State to: ensure compliance with all requirements of the IDEA Amendments of 1997, including the requirements that a free appropriate public education is available to all eligible youth with disabilities in adult correctional facilities...." D.Ed also informed the state that because of its past compliance history and its current assurance statement, D.Ed was imposing special reporting conditions.

On July 24, 1997, Governor Wilson wrote to D.Ed that: "Because the condition reflects a dramatic misinterpretation of the new IDEA law, California rejects the condition and accepts the full grant in accordance with the terms of the grant award notification, minus the amount permitted under the IDEA to be deducted when a state chooses not to divert special education services to convicted felons in state prison." The Governor's letter cited to legislative history which indicated that all IDEA funds could not be withheld for non-compliance, and only a small amount of funds could be withheld <u>i.e.</u>, less than 1/4 of 1% in this case. The legislative history does not mention the referral process.

It is our understanding that D.Ed is preparing a response to the Governor's letter.

Strengths of the case

The primary strength of the case lies in the fact that the eligibility requirements of the IDEA require recipients to ensure that a free public education is made available to all children with disabilities residing within the state, including children with disabilities who, in the educational placement prior to their incarceration in an adult correctional facility, were identified as being children with disabilities or had individualized education programs. California cannot choose to accept the grant award and not ensure that the services will be made available. Neither California nor the Secretary can modify the terms of the statute. California has declared its open intention to defy that requirement.

Second, California has accepted the award and we anticipate that it will draw, or has drawn, on the available funds. California was aware of the conditions imposed on the grant, and that acceptance would be treated by D.Ed as an assurance of compliance.

The 1997 amendments provided for the first time under the IDEA the authority to refer the case to the Department of Justice for appropriate enforcement and requires the Secretary to take appropriate corrective action to ensure compliance. Specific performance is such a remedy.

Weaknesses of the case

The main weakness of the case lies in the remedy we seek, which is to enforce an agreement that California will claim it did not make. Our suit for specific performance is based on California's assurance that it will provide the services required by the IDEA and its acceptance of the grant, with knowledge of the conditions set out in D.Ed's July 16, 1997, letter. The written assurance provided by California is somewhat ambiguous, and it is not clear that the signer of the assurance actually had the authority to commit the Department of Corrections. In all events, the state will most likely claim that the assurance was a limited one.

Indeed, because of the language of the assurance, D.Ed felt it necessary to send the July 16, 1997, letter informing the state that acceptance of the grant award constituted an agreement that the state would ensure that the appropriate services at adult correctional facilities would be made available to eligible children. California did accept the grant, but claims to have done so on its own terms, rejecting D.Ed's conditions.

Thus, while there is certainly a case for recoupment of funds, (which in any event, California is willing to forgo) there remains a question as to whether California has agreed, either in its assurance or acceptance of the grant, to comply with the applicable law with regard to providing special education and related services to eligible children with disabilities convicted as adults under state law and incarcerated in adult correctional facilities.

California also cites the legislative history of the Individuals with Disabilities Act Amendments of 1997, and particularly portions of Senator Boxer's colloquy with Senators Harkin and Jeffords regarding the treatment of those with disabilities who are convicted as adults and incarcerated in adult prisons. That exchange indicates that if California does not provide special education services in prisons, it stands to lose only one-fourth of 1 percent of its allotted share, and would no longer face the possible loss of 100 percent of its IDEA award. However, the exchange addresses only what the Secretary could withhold, and does not address what remedies could be pursued upon referral to the Department of Justice for appropriate enforcement action.

As we read the IDEA, if California satisfies the eligibility requirements and ensures that it will serve all eligible children, the potential loss of funds is limited -- probably less than $1 million. However, D.Ed does not have to withhold further funding, but can elect to refer the matter to the Department of Justice. Of course, if California does not meet the eligibility requirements, it is not eligible for any funding.

The question comes down to this: whether under the IDEA and as a matter of contract law, California can, by offering to renounce or return the portion of the federal grant earmarked for this particular segment of the population, relieve itself of the legal responsibility to serve that population. We believe that there is a good argument that it cannot, but prevailing in federal court will be difficult.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. letter	Phil Caplan to President William J. Clinton re: appointments (1 page)	03/25/1997	P2, P5 1583
001b. memo	Bruce Reed et al. to President William J. Clinton re: Names for Consideration (1 page)	03/24/1997	P2, P5 1584
001c. list	Re: Proposed Board of Directors (partial) (1 page)	ca. 03/24/1997	P2, P5, b(6) 1585
001d. chart	Re: Possible Additional Submissions on Task Force Membership (1 page)	ca. 03/24/1997	P2, P5, b(6)
001e. list	Re: Proposed Task Force Leadership (5 pages)	ca. 03/24/1997	P2, P5, b(6)
002a. memo	Diana Fortuna to Bruce Reed et al. re: attached (1 page)	02/28/1997	P2, P5 1588
002b. list	Re: Proposed Task Force Leadership (1 page)	ca. 02/28/1997	P2, P5, b(6)
002c. list	Re: Proposed Task Force for Goal 5 (partial) (1 page)	ca. 02/28/1997	P2, P5, b(6) 1590
002d. list	Re: Possible Candidates (1 page)	ca. 02/28/1997	P2, P5, b(6)
002e. chart	Re: Additional Possible Candidates (2 pages)	ca. 02/28/1997	P2, P5, b(6)

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Elena Kagan
OA/Box Number: 14370

FOLDER TITLE:

Service - President's Summit [1]

2009-1006-F
kh564

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]
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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]

Service summit

THE WHITE HOUSE
WASHINGTON

March 25, 1997

THE PRESIDENT HAS SEEN
4/14/97

MR. PRESIDENT:

This memo lists names that a) White House staff will suggest to serve on the Board of Directors and the five Task Forces for the upcoming Service Summit in Philadelphia, and b) those names already proposed by the organizers of the Summit.

While Counsel advises that you cannot appoint people to these entities, the White House is able to suggest names for consideration.

Before making our suggestions, Sylvia, Bruce Reed and Steve Silverman are interested to see if you have any thoughts about the names.

It is possible that the organizers may announce these names tomorrow.

Phil Caplan Phil

copied
Matthews
Reed
Silverman
Sanford
COS

Real mistake to leave our Boston, Houston on safe spaces for children —
See my notes
BC

THE WHITE HOUSE

WASHINGTON

March 24, 1997

MEMORANDUM FOR THE PRESIDENT

THROUGH: SYLVIA MATHEWS SMM

FROM: BRUCE REED BR
STEVE SILVERMAN SS
STEFANIE SANFORD SS

SUBJECT: Names for Consideration for Service Summit Involvement

As you know, planning for the Presidents' Summit for America's Future is well underway. The goals of the summit will be implemented by a 501(c)3 corporation known as "The Partnership" and five advisory task forces, reflecting the five key objectives of the summit: Mentoring, Safe Spaces, Health, Marketable Skills and Youth Service. White House Counsel advises that while you cannot appoint people to the board of directors or the task forces, it is appropriate to suggest names for consideration for these entities.

Attached for your review are names collected from numerous White House sources for the Partnership to consider. We will forward suggested names in an appropriate manner.

Documents attached:

- A list of suggested names for potential board membership;
- A summary chart of White House recommendations by task force;
- Task force rosters, divided into two parts -- the names with bullets are those already elected by Summit organizers outside the White House; names without are those to be suggested by the White House.

cc: ERSKINE BOWLES
KITTY HIGGINS
DAWN CHIRWA

PROPOSED BOARD OF DIRECTORS

Founding Members of Board

- Colin Powell, Chair
- Henry Cisneros, Vice Chair
- Ray Chambers
- Rick Little, President, International Youth Foundation
- Bob Goodwin, President, Points of Light Foundation
- Billy Shore, President, Share our Strength
- Bill Millikin, President, Communities in Schools

BW

[redacted] (b)(6)

we have no good friends who (need be common)

[redacted] (b)(6)

are ok

File: Service summit

TO: Bruce Reed
Elena Kagan
Steve Silverman

FROM: Diana Fortuna

DATE: February 28, 1997

Attached is a scary paper I just got from the Corporation, with lots of names attached to task forces. I am trying to find out how far along in the process these names are, but I will yell at them if they are anything other than the Corporation's own ideas.

PROPOSED TASK FORCE FOR GOAL 5

Co-Chairs
Rosabeth Moss Kanter, Harvard Business School
Tim Shriver, Special Olympics

Vice Chairs
Alan Khazei, City Year
Shirley Sagawa
Phillip Wu, AmeriCorps Alum

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Sylvia Mathews et al. to President William J. Clinton re: National Service Summit (2 pages)	03/05/1997	P5 1593
002. email	Diana Fortuna to Bruce Reed and Elena Kagan re: Latest from Silverman to Sylvia on Summit FYI (partial) (1 page)	03/10/1997	P2, P5, b(6) 1594
003. memo	Bruce Reed to President William J. Clinton re: Summit on Service (2 pages)	01/22/1997	P5 1595

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Elena Kagan
OA/Box Number: 14370

FOLDER TITLE:

Service - President's Summit [2]

2009-1006-F
kh565

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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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]
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b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

File: Service Summit

THE WHITE HOUSE

WASHINGTON

March 5, 1997

Barber has given voice to exactly what I fear — & I want ~~[illegible]~~ to know ~~[illegible]~~ what options are to prevent that for all this — we've got to have Americorps & Pts of light organized but very different — it's annoying — Show Ben soon — BC

MEMORANDUM FOR THE PRESIDENT

FROM: **SYLVIA MATHEWS, BRUCE REED, AND STEVE SILVERMAN**

SUBJECT: **National Service Summit**

Strongly agree

Attached is a memo from Benjamin Barber on the National Service Summit. In strong terms, Ben articulates his concern about ensuring that the concept of service (not simply volunteerism) is preserved in the Summit. He also expresses that we need to build up Americorps and the concept of service in the time leading up to the Summit. We agree with Ben on these objectives.

We recently sent a memo (which is attached) to Erskine Bowles outlining some of the steps we are taking to ensure that service and your signature program Americorps are an anchor of the summit. Since then, a few other steps have taken place which are summarized below. Please let us know if you have other thoughts.

Establishing a Summit decision-making process where the WH is involved.

I think I should be there for at least part

- Erskine has called General Powell and set up a meeting during the week of March 10 with him, Ray Chambers, Harris Wofford, the Summit's CEO and others to discuss where we stand and establish an inclusive process for decision making. In this meeting, Erskine will discuss: 1) the substance of the Summit; 2) message and communications; 3) attendance; 4) principal participation; 5) logistics; and 6) post summit follow-up.

- We are establishing a working group which will hold conference calls twice a week where decisions are made. Steve Silverman and Diana Fortuna, who works with Bruce, will participate on the calls for the WH.

Staying on top of the Summit within the Administration.

- Bruce and Steve call weekly interagency meetings where they track the process of the Administration efforts on the Summit.

- Bruce also calls a WH interdepartmental meeting where he and Steve ensure that WH processes are fully integrated, and we act on ideas. For example, Communications participates in the meeting so that we can focus on the message of your pre-Summit events. Also at this meeting, Marcia posts us on Mayor Rendell and the Philadelphia front, as well as the participation of state and locals. The First Lady's office participates as well.

- Steve is establishing a relationship with the CEO of the Summit, Stuart Shapiro, much like he did with the people from the Atlanta Mayor's office during the Olympics.

- WH meetings are being held with Leslie Dach and Michael Deaver who were hired to handle the communications effort.

- This week, General Powell may announce a series of task forces that will follow up on the work of the Summit. We are working to ensure that the membership of the task forces reflects your priorities.

Planning Pre-Summit investment of Principals' Time.

- We are gathering event ideas for you and the other principals as a lead up to the Summit. These ideas include events that are not time intensive, such as greeting Americorps volunteers on the tarmac on some of your trips. We hope to present these ideas to you soon.

Staffing Americorps.

- In a related matter, Bob Nash, Bruce and Sylvia Mathews are working with Harris Wofford on the positions of COO and Director of Americorps.

This is what I am & have been concerned about

I used to do, that all the time. Area Americorps kids would be excited to see my staff ~~[illegible]~~

cc: Erskine Bowles
Rahm Emanuel
John Podesta
Vicki Radd
Doug Sosnik

attachment

File - Service summit

Diana Fortuna 03/10/97 11:19:00 AM

Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP

cc:
Subject: Latest from Silverman to Sylvia on summit FYI

Not sure if you're interested in all this detail, but since it's to Sylvia....

-------------------- Forwarded by Diana Fortuna/OPD/EOP on 03/10/97 11:17 AM --------------------

Stephen B. Silverman
03/07/97 06:21:00 PM

Record Type: Record

To: Sylvia M. Mathews/WHO/EOP

cc: Diana Fortuna/OPD/EOP, Katherine Hubbard/WHO/EOP
Subject: Summit

Let's catch up tomorrow, if you'd like on service summit.

I. Just talked to Powell's guy, Col. Smolin, re: next week. Meeting is set for Thursday 11 am here in Roos. Room. Carole Parmalee and I spoke earlier. Harris: not available that day, but we should still go forward. Henry is all set. Should we brief Erskine Wednesday?
II. Smolin and Stuart are amendable to weekly Thursday meetings at the staff level. Also, amenable to weekly Tuesday conference calls at staff level. Maybe 1-2 Powell-Cisneros-Bowles meetings before the summit.
III. Diana, Eli, Bibb and I met to review communications/scheduling options. We will work up a plan by early next week with ideas for the lead-up and the Summit itself, share with Eli and then [illegible]

IV. Key Issue: **Staffing.** We think that we should:

A) have several Administration people working at the Summit with Stuart. These could be agency people "on assignment" (I think that's the right personnel term) or detailed. This would help us be as helpful as possible to the organizers (among other reasons).
B) have Henry request to have 1-2 people at the Summit. Powell has done all the hiring at this point. Henry should have someone/two inside.
C) have several detailees or assignees (or whatever the right personnel term is) go over to Americorp from the Administration. They need help over there. It must be very overwheming. Constituencies, commitments, press, logistics, et al. How does this sound?

Let's talk tomorrow, if you'd like. Just call or page.

Steve

THE WHITE HOUSE

WASHINGTON

January 22, 1997

MEMORANDUM FOR THE PRESIDENT

FROM: Bruce Reed

SUBJECT: Summit on Service

Before we agree to hold a White House event to announce the Philadelphia summit on citizen service, you should review the attached memo from Harris Wofford, which spells out what the summit is designed to accomplish and what will follow from it. Recent developments in Wofford's negotiations with Ray Chambers, the co-organizer who represents Bush's interests, have caused some concern. In particular, concerns have been raised about the long-term effort that will come out of the summit, and Colin Powell's role in it. The summit may still be the right thing to do for the country, but we should go into it with our eyes wide open.

I. Background

The Wofford memo outlines the basic purpose of the summit -- to raise the profile of volunteer service -- and its potential benefits to Americorps and to the Administration. He believes the summit will restore bipartisan support for service, give you another platform to advance the ethic of service, and produce tangible commitments from corporations and service organizations to expand their efforts.

The structure and content of the summit have changed repeatedly in recent weeks, and remain under negotiation. Erskine and Wofford had a conference call this morning with Ray Chambers, who informed us that he intends to raise $100 million for a non-profit to oversee the summit and follow-up, and that Powell has agreed to be general chairman of the whole enterprise. Chambers had Bill Bradley in mind as vice-chair, but was open to other names instead. (Erskine suggested Henry Cisneros). Chambers said that Powell plans to make service and the follow-up to the summit the central focus of his life over the next few years. Because the magnitude of the effort was news to us (and apparently, to Wofford), Erskine told Chambers that he needed to think about it before committing to any announcement.

II. Options

There is general agreement that the summit, and Powell's involvement, could be a boost for the idea of service. The question is whether we can define the summit and Powell's role in a way that does not inadvertently hand Powell a well-funded political platform or bless something that might go on to eclipse Americorps.

One option is to downplay our involvement, and let Wofford and Chambers announce the summit themselves, with no guarantee that we'll participate. That would reduce press interest in the event, and let us play it by ear over the next three months. If the effort catches on, we could align ourselves with it, but we would not rush into a project that could eclipse our own efforts. The risk of this course is that Powell -- and Bush -- might drop out entirely, and make it more difficult for the summit to succeed in raising the profile of service. The alternate risk is that Powell and Bush might go forward without us, and get all the credit.

A second option is to insist on giving Cisneros a strong, though not necessarily equal, role in the project (e.g., vice-chair). Cisneros would vigorously protect the Administration's interests, and together, Powell and Cisneros would send a powerful signal about service as a way to strengthen community. We could also insist that you and Bush serve as honorary co-chairs, that the summit be called "The Presidents' Summit on Service," and that the CEO of the non-profit be someone we can trust. With the right launch, either in a White House event or the State of the Union, you could make it clear that Powell and Cisneros were both part of a broader, Administration-backed effort. We might still run the risk that Powell might use this as a launching pad, or that this effort would detract attention from Americorps.

A third, high-risk option is to play hardball, and insist that Cisneros have an equal role to Powell's. Having an equal counterweight to Powell clearly would serve the Administration's interests. If this effort is as ambitious as Chambers makes it sound, and Powell plans to make it the major focus of his public life, he might decide not to walk away. But Powell no doubt has a host of other offers to choose from, and Chambers believes he would walk (and Bush might go with him).

The Vice President's office has no strong preference among these options. Ron Klain says that from their standpoint, the question is not so much about Powell -- who will be part of the landscape in any case -- as it is about whether this enterprise will help Americorps or subsume it.

If we do proceed with an announcement, we would envision an East Room ceremony Friday afternoon, with you, the Vice President, President Bush, Powell, and Cisneros speaking to an audience of service enthusiasts. Bush is available Friday, but would also be willing to reschedule for another day.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Beverly J. Barnes to Richard Socarides re: Candidates for Race Initiative Communications Director [partial] (1 page)	01/12/1998	P2, b(6) 1601

COLLECTION:

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

FOLDER TITLE:

[01/10/1998 - 01/12/1998]

2009-1006-F
eh201

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]

READ:UNKNOWN

Michelle Crisci (CN=Michelle Crisci/OU=WHO/O=EOP [WHO])
READ:UNKNOWN

Sara M. Latham (CN=Sara M. Latham/OU=WHO/O=EOP [WHO])
READ:UNKNOWN

TEXT:
Please let us know if any of you have any additional thoughts or comments on the list that follows.
---------------------- Forwarded by Richard Socarides/WHO/EOP on 01/12/98 10:43 AM ---------------------------

Beverly J. Barnes
01/12/98 10:31:11 AM

Record Type: Record

To: Richard Socarides/WHO/EOP
cc:
Subject: Candidates for Race Initiative Communications Director

Following is a list of names that have been suggested to us for this position. We will start contacting these people later today in hopes of interviewing this week.

Please let me know if you have any thoughts about any of these candidates or if you have other names to suggest. Our goal is finish the first round of interviews by Friday. Thanks for your help.

[redacted]

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
001. email	Richard Socarides to Thurgood Marshall Jr, et al; RE: Candidates for Race Initiative Communications Director (partial) (1 page)	01/12/1998	P2, b(6)	1604

COLLECTION:

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

FOLDER TITLE:

[01/09/1998 - 01/13/1998]

2009-1006-F
db1576

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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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]

READ:UNKNOWN

Michelle Crisci (CN=Michelle Crisci/OU=WHO/O=EOP [WHO])
READ:UNKNOWN

Sara M. Latham (CN=Sara M. Latham/OU=WHO/O=EOP [WHO])
READ:UNKNOWN

TEXT:
Please let us know if any of you have any additional thoughts or comments on the list that follows.
---------------------- Forwarded by Richard Socarides/WHO/EOP on 01/12/98 10:43 AM ---------------------------

Beverly J. Barnes
01/12/98 10:31:11 AM

Record Type: Record

To: Richard Socarides/WHO/EOP
cc:
Subject: Candidates for Race Initiative Communications Director

Following is a list of names that have been suggested to us for this position. We will start contacting these people later today in hopes of interviewing this week.

Please let me know if you have any thoughts about any of these candidates or if you have other names to suggest. Our goal is finish the first round of interviews by Friday. Thanks for your help.

[redacted]