Nos. 98-1648 and 98-1671

In the Supreme Court of the United States

GUY MITCHELL, ET AL., PETITIONERS

v.

MARY L. HELMS, ET AL.

CECIL J. PICARD, ET AL., PETITIONERS

v.

MARY L. HELMS, ET AL.

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

REPLY BRIEF FOR THE SECRETARY OF EDUCATION

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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1. Respondents maintain (Br. in Opp. 6, 15)[*] that the decision of the Fifth Circuit in this case, striking down the application of Title VI of the Elementary and Secondary Education Act of 1965 (ESEA), 20 U.S.C. 7301-

[*] "Br. in Opp." refers to the brief in opposition to the petition for a writ of certiorari in No. 98-1648.

7373, in Jefferson Parish, Louisiana, does not conflict with the Ninth Circuit's decision in *Walker* v. *San Francisco Unified School District*, 46 F.3d 1449 (1995), which upheld the application of Title VI in San Francisco. They assert that the two programs are distinguishable on their facts in constitutionally significant ways. Both lower courts in this case, however, found the two programs to be indistinguishable. See 98-1648 Pet. App. 59a, 107a.

Indeed, although respondents suggest (Br. in Opp. 15) that the San Francisco Title VI program upheld in *Walker* was confined to prescreened materials and locked computer hardware and software, in fact private schools in San Francisco received "library books, textbooks, videos, overhead projectors, movie and slide projectors and projection stands, television sets, record players, cassette recorders, VCRs, video cameras, 'listening centers,' globes and maps, microscopes and other lab equipment, computer equipment, musical equipment, stereo systems, and desks and tables." 46 F.3d at 1464. Although not all of these materials were lent to private schools in every year, and the program was eventually limited to prescreened library books, instructional materials, and reference materials, see *ibid.*, the Ninth Circuit's decision upholding the program was not limited to the latter, more restricted class of materials. See *id.* at 1469 n.17 (upholding loan of maps and science kits, and finding them indistinguishable from textbooks, which may be lent to students under *Board of Education* v. *Allen*, 392 U.S. 236 (1968)).

2. Respondents argue (Br. in Opp. 18) that the anti-supplantation rule of Title VI, see 20 U.S.C. 7371(b), requiring that funds made available under the federal program supplement, and not supplant, other re-

sources, applies only to the local educational agency (LEA) that receives the federal funds, and not to private schools that are lent equipment purchased with Title VI funds by the LEA. The statute, however, is framed generally to prohibit the use of Title VI funds by LEAs that would supplant non-federal resources in any way. Title VI requires LEAs to use and allocate Title VI funds "only so as to supplement and, to the extent practical, increase the level of funds that would, in the absence of Federal funds made available under this part, be made available from non-Federal sources, and in no case * * * to supplant funds from non-Federal sources." *Ibid.* The statute's prohibition against the use of federal funds to supplant "non-Federal sources" is not limited to the supplantation of state and local governmental sources of funds, as opposed to non-governmental sources of funds. If an LEA used Title VI funds to provide private schools with equipment that would, in the absence of federal funds, be made available from any non-federal sources, including private sources, the anti-supplantation rule would be violated.

Further, the Department of Education's regulations implementing the ESEA's provisions governing the participation of private schoolchildren in federal programs expressly require that LEAs use Title VI funds "to provide services that supplement, and in no case supplant, the level of services that would, in the absence of services provided under [Title VI], be available to participating children * * * in private schools." 34 C.F.R. 299.8(a). That regulation is not limited to prohibiting supplantation of services that would be available to private school children from other *public* sources, but also prohibits use of Title VI resources to supplant services that would be otherwise

made available from private resources. Cf. *Agostini* v. *Felton*, 521 U.S. 203, 210 (1997) (similar regulation implementing Title I of the ESEA prohibits supplanting "services already provided by the private school"). Finally, the State of Louisiana has also applied Title VI's anti-supplantation requirement to prohibit supplantation of nonfederal resources by private schools; in its Title VI Guidelines to LEAs, the State recommended that LEAs require private schools to give assurances, in their applications for participation in the Title VI program, that resources made available under Title VI will be used only to supplement, and in no case supplant, funds available from non-federal sources. See Exh. D-4, at 85, to Gov't Opp. to Resp. Mot. for Summ. Judg.

3. Respondents suggest (Br. in Opp. 28) that, notwithstanding the court of appeals' decision invalidating the loan of instructional equipment and materials to religious schools in any circumstances, private schoolchildren may nonetheless participate in Title VI services provided directly to them by public school officials or contractors. As we have explained, however (Gov't Resp. 19-20), in many cases this is not a practicable alternative. Congress has not funded Title VI at a level that would permit the use of public school instructors to provide Title VI services to private schoolchildren in many circumstances. Thus, to an overwhelming degree, LEAs ensure the participation of private schoolchildren in Title VI benefits (as they are required to do by statute, see 20 U.S.C. 7372(a) and (b)) by lending instructional equipment and materials to private schools. See Title VI Nat'l Steering Comm., *Elementary and Secondary Education Act (ESEA): Title VI: Innovative Education Program Strategies, National Compendium of State and Local Activities*,

1997-1998 School Year 2.3 (Feb. 1999) (lodged with the Clerk).

4. In our initial brief, we informed the Court (at 2-3 n.1) that the President would shortly announce proposals for the reauthorization and revision of the ESEA. The President's legislative proposal was publicly announced on May 21, 1999. Copies of the proposed legislation and the accompanying section-by-section analysis have been lodged with the Clerk and served on the parties.

As we explained earlier, the President's proposed revision of the ESEA would not extend Title VI in its current form. However, a revised Title III of the ESEA, entitled "Technology for Education," would authorize LEAs and other entities to use federal funds for, among other things, adapting or expanding existing and new applications of technology in learning environments, acquiring advanced technologies and access to advanced telecommunications, and using web-based learning resources. See proposed legislation, at III-49 to III-50, proposing a new ESEA § 3134; see also section-by-section analysis, at III-18. In addition, a new Title II-A-2 of the ESEA, focusing on professional development for teachers, would authorize LEAs receiving federal funds to use funds for the development and acquisition of curricular materials and other instructional aids, if they are not normally provided by the LEA or the State as part of the regular instructional program. See proposed legislation, at II-31, proposing a new ESEA § 2130(11); section-by-section analysis, at II-1.

Provisions similar to those in the current version of the ESEA, requiring LEAs to provide for the equitable participation of private schoolchildren in program benefits, prohibiting the use of federal funds to sup-

plant non-federal sources, and requiring that all benefits be secular, are also included in the President's proposed legislation. Title XI of the revised ESEA would continue in effect, for the new Title II-A-2 and Title III, both the statutory requirement currently applicable to Title III and Title VI that LEAs provide benefits under the program to private schoolchildren on an equitable basis, and also the requirement that any educational services or benefits made available under those programs, including materials and equipment, be secular, neutral, and nonideological. See proposed legislation, at XI-18, which would amend ESEA § 14503, 20 U.S.C. 8893; see also section-by-section analysis, at XI-8. In addition, both Title II-A-2 and Title III, as revised, would require that a recipient of federal funds use those funds only to supplement the funds or resources available from non-federal sources, and not to supplant those non-federal funds or resources. See proposed legislation, at II-35 and III-10; section-by-section analysis, at II-6 and III-2.

Accordingly, under the proposed revision of the ESEA, federal funds would be available for programs similar to those currently funded under Title VI, involving the acquisition and use of computer technology for loan to schools, including private religious schools. Also, as under the current Title VI, LEAs would be required to provide for the equitable participation of private schoolchildren in the benefits of such federal programs, which must be secular, neutral, and nonideological, and which may not supplant non-federal funds and resources.

* * * * *

For the foregoing reasons, and for those set forth in our initial brief, the petitions for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

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