Bankruptcy Bill

SEC. XX82. STUDENT SAFETY AND FAMILY SCHOOL CHOICE.
Subpart 1 of part A of title I of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6311 et seq.) is amended by inserting after section 1115A of such Act (20 U.S.C. 6316) the following:

`SEC. 1115B. STUDENT SAFETY AND FAMILY SCHOOL CHOICE.
`(a) In General: Notwithstanding any other provision of law, if a student is eligible to be served under section 1115(b), or attends a school eligible for a schoolwide program under section 1114, and becomes a victim of a violent criminal offense, including drug-related violence, while in or on the grounds of a public elementary school or secondary school that the student attends and that receives assistance under this part, then the local educational agency may use funds provided under this part or under any other Federal education program to pay the supplementary costs for such student to attend another school. The agency may use the funds to pay for the supplementary costs of such student to attend any other public or private elementary school or secondary school, including a religious school, in the same State as the school where the criminal offense occurred, that is selected by the student's parent. The State educational agency shall determine what actions constitute a violent criminal offense for purposes of this section.
`(b) Supplementary Costs: The supplementary costs referred to in subsection (a) shall not exceed--

`(1) in the case of a student for whom funds under this section are used to enable the student to attend a public elementary school or secondary school served by a local educational agency that also serves the school where the violent criminal offense occurred, the costs of supplementary educational services and activities described in section 1114(b) or 1115(c) that are provided to the student;

`(2) in the case of a student for whom funds under this section are used to enable the student to attend a public elementary school or secondary school served by a local educational agency that does not serve the school where the violent criminal offense occurred but is located in the same State--

`(A) the costs of supplementary educational services and activities described in section 1114(b) or 1115(c) that are provided to the student; and

`(B) the reasonable costs of transportation for the student to attend the school selected by the student's parent; and

`(3) in the case of a student for whom funds under this section are used to enable the student to

attend a private elementary school or secondary school, including a religious school, the costs of tuition, required fees, and the reasonable costs of such transportation.
`(c) Construction: Nothing in this Act or any other Federal law shall be construed to prevent a parent assisted under this section from selecting the public or private, including religious, elementary
school or secondary school that a child of the parent will attend within the State.
`(d) Consideration of Assistance: Subject to subsection (h), assistance made available under this section that is used to pay the costs for a student to attend a private or religious school shall not be
considered to be Federal aid to the school, and the Federal Government shall have no authority to influence or regulate the operations of a private or religious school as a result of assistance received
under this section.
`(e) Continuing Eligibility: A student assisted under this section shall remain eligible to continue receiving assistance under this section for at least 3 academic years without regard to whether the student is eligible for assistance under section 1114 or 1115(b).
`(f) Tuition Charges: Assistance under this section may not be used to pay tuition or required fees at a private elementary school or secondary school in an amount that is greater than the tuition and
required fees paid by students not assisted under this section at such school.
`(g) Special Rule: Any school receiving assistance provided under this section shall comply with title
VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) and not discriminate on the basis race,
color, or national origin.
`(h) Assistance; Taxes and Other Federal Programs:

`(1) Assistance to families, not schools: Assistance provided under this section shall be considered to be aid to families, not schools. Use of such assistance at a school shall not be construed to be Federal financial aid or assistance to that school.

`(2) Taxes and determinations of eligibility for other federal programs: Assistance provided under this section to a student shall not be considered to be income of the student or the parent of such student for Federal, State, or local tax purposes or for determining eligibility for any other Federal program.
`(i) Part B of the Individuals With Disabilities Education Act: Nothing in this section shall be construed to affect the requirements of part B of the Individuals with Disabilities Education Act (20
U.S.C. 1411 et seq.).
`(j) Maximum Amount: Notwithstanding any other provision of this section, the amount of assistance provided under this part for a student shall not exceed the per pupil expenditure for elementary or secondary education, as appropriate, by the local educational agency that serves the
school where the criminal offense occurred for the fiscal year preceding the fiscal year for which the

determination is made.'.

SEC. XX83. TRANSFER OF REVENUES.
(a) In General: Notwithstanding any other provision of Federal law, a State, a State educational agency, or a local educational agency may transfer any non-Federal public funds associated with the
education of a student who is a victim of a violent criminal offense while in or on the grounds of a
public elementary school or secondary school served by a local educational agency to another local
educational agency or to a private elementary school or secondary school, including a religious school.
(b) Definitions: For the purpose of subsection (a), the terms `elementary school', `secondary school', `local educational agency', and `State educational agency' have the meanings given such terms in section 14101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 8801).

THE WHITE HOUSE

WASHINGTON

COPY

April 7, 2000

The Honorable Paul Wellstone
United States Senate
Washington, DC 20510

Dear Senator Wellstone:

The President asked me to respond to your letter concerning the voucher provisions that were included in the Senate passed bankruptcy bill. As you know, this Administration shares your concerns about the negative impact that vouchers would have on public education.

During his time in office the President has worked for a comprehensive agenda that invests more in our schools while raising standards and demanding more from them. He has worked to increase accountability, most recently through his Accountability Fund that Congress enacted last year. The President believes that vouchers are a distraction from this comprehensive agenda and more importantly would rollback the progress we have made on accountability.

The conferees should be aware of the President's longstanding opposition to vouchers and the Administration will also make clear our strong opposition to the specific voucher provisions in the bankruptcy bill when we make our views on the bill known to the conference. As you know, these provisions are entirely unrelated to the underlying bill and the issues it seeks to address. If I can be of further assistance to you please do not hesitate to contact me.

Sincerely,

Bruce Reed
Assistant to the President and
Domestic Policy Advisor

PAUL D. WELLSTONE
MINNESOTA

MINNESOTA TOLL FREE NUMBER:
1-800-642-6041

United States Senate

WASHINGTON, DC 20510-2303

COMMITTEES
LABOR AND HUMAN RESOURCES
SMALL BUSINESS
INDIAN AFFAIRS
VETERANS' AFFAIRS
FOREIGN RELATIONS

410835

February 16, 2000

The Honorable William J. Clinton
President
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20500

Dear Mr. President:

I would like to express my grave concern about the possible consequences of the Hatch school voucher amendment which was included in the Senate passed bankruptcy bill. I certainly appreciate my colleagues' desire to help children who are victims of violence. However, this amendment, in the end, will do nothing to increase school safety for the vast majority of American students. The Hatch Amendment may provide relief for a handful of students, but it will also leave millions of other children at risk.

If the Hatch Amendment becomes law, desperately needed funds will be diverted from our public school system. Instead, we need to support programs that will make schools safer for all students. We are obligated to ensure that all children have the opportunity to grow and learn in a safe and productive learning environment.

I urge you to send a strong message to the conferees to oppose the Senate passed school voucher provision of the bankruptcy bill.

Sincerely,

Paul Wellstone

Paul D. Wellstone
United States Senate

☐ HART SENATE OFFICE BUILDING
WASHINGTON, DC 20510-2303
(202) 224-5641

☐ 2550 UNIVERSITY AVENUE, WEST
COURT INTERNATIONAL BUILDING
ST. PAUL, MN 55114-1025
(651) 645-0323

☐ POST OFFICE BOX 281
105 2D AVENUE, SOUTH
VIRGINIA, MN 55792
(218) 741-1074

☐ 417 LITCHFIELD AVENUE, SW
WILLMAR, MN 56201
(320) 231-0001

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

ID# 410835
PAGE 1

DATE RECEIVED: 02/29/2000

NAME OF CORRESPONDENT: THE HONORABLE PAUL WELLSTONE

SUBJECT: EXPRESSES CONCERN ABOUT THE POSSIBLE CONSEQUENCES OF THE HATCH SCHOOL VOUCHER AMENDMENT WHICH WAS INCLUDED IN THE SENATE PASSED BANKRUPTCY BILL

ROUTE TO OFFICE/AGENCY	(STAFF NAME)	ACTION CODE	ACTION DATE YY/MM/DD	DISPOSITION TYPE RESP	C D	COMPLETED YY/MM/DD
LEGISLATIVE AFFAIRS	CHARLES 'CHUCK' BRAIN	ORG	2000/02/29	CB	A	00/03/08
ACTION COMMENTS:						
DPC	CJ	A	00/3/14	A	C	00/04/11
ACTION COMMENTS:						
			/ /			/ /
ACTION COMMENTS:						
			/ /			/ /
ACTION COMMENTS:						

COMMENTS: BATCH #410833 cc Joanne Slaney

ADDITIONAL CORRESPONDENTS: 0 MEDIA: LETTER INDIVIDUAL CODES:

REPORT CODES: USER CODES:

ACTION CODES:
A - APPROPRIATE ACTION
C - COMMENT/RECOMMENDETION
D - DRAFT RESPONSE
F - FURNISH FACT SHEET
I - INFO COPY/NO ACT NECESSARY
R - DIRECT REPLY W/COPY
S - FOR SIGNATURE

DISPOSITION CODES:
A - ANSWERED
B - NON-SPEC REFERRAL
C - COMPLETED
S - SUSPENDED

OUTGOING CORRESPONDENCE:
TYPE RESP = INITIALS OF SIGNER
CODE = A
COMPLETED = DATE OF OUTGOING

REFER QUESTIONS AND ROUTING UPDATES TO RECORDS MANAGEMENT (ROOM 72, OEOB) EXT-62590
KEEP THIS WORKSHEET ATTACHED TO THE ORIGINAL INCOMING LETTER AT ALL TIMES AND SEND COMPLETED RECORD TO RECORDS MANAGEMENT.

THE WHITE HOUSE

WASHINGTON

March 8, 2000

MEMORANDUM FOR BRUCE REED
DOMESTIC POLICY COUNCIL

FROM: CHARLES M. BRAIN
LEGISLATIVE AFFAIRS

SUBJECT: PRESIDENTIAL CORRESPONDENCE

Enclosed please find a copy of a letter that was sent to the President from Sen. Paul D. Wellstone (D-MN).

I do not believe this letter requires a Presidential response at this time. Please review the attached letter and respond directly to the Member(s) of Congress. Please forward a copy of the response to the Office of Records Management, Room 72 Old Executive Office Building.

Thank you very much for your assistance in this matter. If you have any questions, please feel free to call Courtney Crouch, Office of Legislative Affairs, at 456-7500.

Enclosure

THE WHITE HOUSE

WASHINGTON

March 8, 2000

Dear Senator Wellstone:

Thank you for your letter urging the President to strongly oppose the Hatch school voucher amendment in the Senate passed bankruptcy bill.

I have shared your views with the President and his other advisors, and you will receive a response in the near future. In the meantime, if I can be of assistance to you, please do not hesitate to contact me.

Best wishes.

Sincerely,

Chuck Brain

Charles M. Brain
Assistant to the President
and Director for Legislative
Affairs

The Honorable Paul D. Wellstone
United States Senate
Washington, D.C. 20510

THE PRESIDENT HAS SEEN
5-22-00

THE WHITE HOUSE
WASHINGTON

May 15, 2000

Bruce

~~Mr. President~~,

I've enclosed a column about Gov. Gray Davis' proposal for tax credits for teachers. I think it's an idea that's worth exploring. There is an acute shortage of teachers, especially in the inner cities, that will only get worse; massive turnover is predicted. The best young people are flocking to the new economy and not to public service or teaching. There will be additional federal surpluses, so I believe that we could afford such a tax credit at the federal level. We could tie it to raising standards. The policy would have the additional benefit of cornering Bush and the Republicans on education and tax cuts.

Sid

I'd [illegible] the proposal
with you whenever you
have time.

copied
Reed/Chow/Rotechan
Podesta

Monday, May 15, 2000 | Print this story

Davis Goes From Troublemaker to Teacher's Pet

By GEORGE SKELTON

SACRAMENTO--Right up front, I'll confess to a conflict: My wife is a high school teacher. One daughter is an elementary teacher.

A close friend since college also teaches. So does his wife.

You get the idea: I can't go home, sit down to a Christmas dinner or chase a golf ball without hearing about education. About administration blather, a ramshackle classroom or the latest misguided "reform." Or an outstanding student who just won a big scholarship or merely said something witty.

I see firsthand the late night paper grading--and hear the phone calls to alert some inattentive parent, or arrange speech practice with a star student after school.

Sure, there are long (unpaid) vacations, decent health care and an excellent pension plan. But the job stinks--unless you really, deep down, love the kids and feel a mission to help them learn. If not, you probably won't last and shouldn't.

You might have the calling, energy and skills and still bail out because the pay borders on insulting for a professional with five or more years college: $48,000 average, ranging from roughly $28,000 for beginners to about $60,000 for long-timers with master's degrees.

One-third of teachers quit within five years; 300,000 new ones will be needed this decade.

That's why Gov. Gray Davis' proposal Saturday was so intriguing--indeed bold for a governor not known for boldness.

"Like, where in the hell did that come from?" asked Assembly Republican Leader Scott Baugh of Huntington Beach.

* * *

Davis' controversial idea is to exempt all K-12 teachers from paying the state income tax on their public school salaries.

Tax-free income. Sounds better than it is. The state tax break would range from $500 to $1,350, depending on the pay scale--the equivalent of 1.5% to 3% raises. Figure at least 15% of it going to the feds because there'd be less to deduct on the federal tax form.

California State Politics

TOP STORIES

- Davis Goes From Troublemaker to Teacher's Pet
- Davis Seeks More English Classes for Immigrants
- Jurors May Get 1st Pay Raise Since 1957

MORE

ADDITIONAL COVERAGE

- George Skelton's Capitol Journal
- Times Poll: California Archive

Find Your State Legislators
Enter your California zip code to identify your state representatives, get contact information and Web site links.

Zip Code:

Clear Search

Breaking Health Orange County Nation & World Science Valley State & Local Politics Ventura County

Classifieds Find a home, car, rental, job, pet, merchandise, auction, boat, plane or RV. Place an Ad

Print Edition Advertisements See this week's ads

MORE SECTIONS

Books Columnists Crossword
Food Education Horoscope
Health Obituaries Lottery
Highway 1 Science Traffic
Real Estate Special Reports Weather
So.Cal. Living Times Poll Discussions
Sunday Opinion Reading by 9

tax form.

But the boost to teacher morale would be incalculable.

"This will send a clarion call across America that California truly values its teachers," Davis told reporters.

Answering Baugh's question, Davis said the idea, in essence, came from a Republican president: Dwight D. Eisenhower. With Sputnik circling the globe in 1957 and Americans fearing Soviet technological superiority, Ike proposed free, federally funded college educations for engineering majors.

"He said there's no profession more valuable to our national security than being an engineer," Davis recalled. "I say in the year 2000 there's no profession more valuable to America's economic and national security than teaching. . . .

"If you teach in California, we're going to reward you in a way we reward no other profession."

The first person I told was my wife. She just shrugged. "It'll never pass," she said.

Teachers tend to be realists, even if they do inspire students to follow their dreams.

* * *

"It just smacks of a political payoff," asserted GOP leader Baugh, alluding to the $2 mil-

lion-plus that the California Teachers Assn. spent helping Davis get elected in 1998. "To give teachers special tax treatment is wrong."

Myself, I've always questioned the special tax treatment we give people just because they produce a lot of babies--babies who soon clog classrooms.

For Davis' proposal to pass, Republican support will be needed. But that's not his biggest problem. It's fellow Democrats.

"It sets a very bad precedent," said liberal Senate leader John Burton (D-San Francisco). "Why not firefighters? Cops? Social workers? If you want to do something for teachers, increase their base pay."

Good idea. Take the $500-million cost of the tax exemption and pour it into salary hikes. Not as glitzy, but it's still money--and helps pay for some classroom supplies teachers must buy.

New Assembly Speaker Bob Hertzberg (D-Sherman Oaks), a Davis centrist, just sort of gulped. "Look, we pay 'em nothing and treat 'em horribly, so we've got to do something to create an environment that attracts teachers," Hertzberg said. "But I'm concerned about the policy implications. My instinct is it doesn't have a lot of trajectory."

Regardless, CTA President Wayne Johnson was "real impressed." Like many teachers, he had been furious with Davis in recent months.

"The guy is taking a chance here and showing real leadership," Johnson said. "Teachers will take it as a sign of respect. There will be genuine appreciation. It will help him immensely."

So Davis not only has displayed imagination in public policy, but once again finesse in politics. The teachers' villain could become their hero. At least, that's what my focus group shows.

Search the archives of the Los Angeles Times for similar stories about: Gray Davis, Income Tax - California, Tax Exemptions, Teachers - California, California - Education.
You will not be charged to look for stories, only to retrieve one.

copied
Reed ~~(folder)~~
Podesta
Burkhardt
folder
(for reply)

THE PRESIDENT HAS SEEN
3-16-00

New Schools Venture Fund
www.newschools.org

To B Reed
we should do TYs to Kim + others
Spriggs, Linares, Will who made
trip - sign pictures for them and
for ~~[illegible]~~ princ, superintendent + introducer
+ girl who went w/ us in Davenport + other student
leader —

To B Reed
we should do TYs to Kim + others
Spriggs, Linares, Will who made
trip - sign pictures for them and
for principal, superintendent + introducer
and girl who went with us in Davenport
and other student leader —

New Schools Venture Fund
440 Broadway
Redwood City, CA 94063
650.556.2342
650.569.2196 fax
ksmith@newschools.org
www.newschools.org

Kimberly C. Smith
President

newschools

LARRY GOLDBERG
CHIEF DEPUTY SHERIFF

FAYETTE COUNTY
SHERIFF'S OFFICE

61 EAST MAIN STREET
UNIONTOWN, PA 15401
724-430-1295
FAX 724-430-4030

April 11, 2000

Defying Convention, Superintendent Takes a Chance on Charter Schools

By JUNE KRONHOLZ
Staff Reporter of THE WALL STREET JOURNAL

SAN CARLOS, Calif. -- Hurtling around central California visiting his start-ups; talking business plans and deliverables; courting venture capitalists and angels; fretting how he'll manage the corporate growth that's still illusory at best, **Don Shalvey** could be any Silicon Valley entrepreneur hustling his product.

Except Mr. Shalvey's product is schools. After 33 years as a teacher, principal and superintendent, Mr. Shalvey is launching what he plans will be a string of 100 charter schools to compete with the very same public schools he has long run.

Don Shalvey

In the white-hot economy of Silicon Valley, "we pray at the altar of competition; it's our lifeblood, our oxygen," says Reed Hastings, a software entrepreneur and one of Mr. Shalvey's backers. But in education, he adds, "competition is considered weird, it's unhealthy, it's almost bizarre."

That's what makes Mr. Shalvey's journey, from education bureaucrat to education entrepreneur, so unusual. It's why fixing the schools is proving so tough, and why education is emerging as a centerpiece issue in the presidential campaign. But for all that, it's also where public education is heading -- and faster than almost anyone ever expected.

Mr. Shalvey's idea is to cluster charter schools in some of California's more troubled school districts, with his charter elementaries feeding into his charter middle schools and charter high schools. When enrollment reaches 10% of the local student population, he calculates, the district schools will have lost so many students and so much state funding to his nonprofit University Public Schools that they will be forced to improve their own programs or, better yet, adopt his. Ebullient and ever enthusiastic, Mr. Shalvey explains his reasoning with a story about the kids who visited his boyhood Philadelphia neighborhood and whipped the locals at basketball. "We got better when better players showed up and beat us," he says.

That's a guiding notion behind charters -- that by competing with district schools and each other, charters will improve them all -- and a popular one here in Silicon Valley. A venture-capital fund that includes John Doerr and Brook Byers, who also backed Amazon.com Inc. and Sun Microsystems Inc., has given $1 million to Mr. Shalvey's company and put two directors on his board. Mr. Hastings, who began an Internet dot-com after selling his software company and who is on the California board of education, also gave $1 million and sits on the UPS board. That high-octane support has smoothed, although not paved the way for UPS.

A Modest Start

There are only two schools this first year, in Stockton and Modesto. Mr. Shalvey uses vacation days from his job as superintendent in San Carlos to run his company. Philanthropy is paying for curriculum writers and school construction. Mr. Shalvey says UPS won't be "sustainable" -- that is, able to operate without gifts -- until it reaches 10 schools in perhaps two years. He talks of keeping overhead low by moving the UPS offices into a mobile home and traveling from school to school, but first, he allows, he has to find the money to buy the mobile home.

And finding a niche in a mature market -- there are schools everywhere, after all -- isn't easy. So it is that, searching for expansion, Mr. Shalvey cleared his calendar one recent afternoon when he was summoned to St. Louis Bertrand Catholic church in Oakland. The parish has closed its school because of falling enrollment and indicated it may be willing to rent it to Mr. Shalvey. The school, like the largely Hispanic neighborhood beyond, is in decline: brightly painted, but bypassed and worn. Mr. Shalvey grinned as if he had just stolen market share, which is of course what he hopes to do. "This," he said, "is exactly where we want to be."

Charter schools are publicly funded schools that operate outside the school-district bureaucracy -- an arrangement that is supposed to make them more agile and experimental. Since the first opened in Minnesota in 1992, charters have ballooned to 1,700 schools enrolling about 250,000 students. That's only a fraction of the 53 million U.S. schoolchildren, but in a few places, enrollment is large enough to begin challenging the districts: Charters account for 4% of all schoolchildren in Arizona and 9% in Washington, D.C.

With voters saying they are worried about education, moreover, charters are enjoying political clout far beyond their numbers. Both parties and presidential candidates endorse them. President Clinton, he wants to see 3,000 charters before he leaves. Even the teachers' unions have embraced them, largely to head off voucher plans that use taxpayer money to send children to private schools.

Beyond that, the new state laws that authorized charters have, in effect, deregulated education, making possible a for-profit education industry and nationwide chains of schools. For-profit educational-management organizations, or EMOs, haven't captured investors' hearts. "There are easier ways to make money," says Gene Wade, whose for-profit LearnNow Inc. plans to open its first four charters in the fall. Still, they already account for 10% of all charter schools.

Charters are so new that there isn't much evidence they are fueling change in the district schools yet, though the U.S. Department of Education says seven in 10 have waiting lists, a sign that demand is growing faster than supply. It's also too soon to claim they're doing a better job of educating kids; most researchers say that will take at least five years to prove. "This isn't a chip shot," says Henry Levin, who heads a center on the privatization of education at Columbia University. "It's much harder to run schools and get results than these charter operators think."

Charter of Determination

But those doubts don't deter or even slow the 55-year-old Mr. Shalvey, whose wife also is a career public-school teacher and principal, and whose two children attended public schools and universities. Mr. Shalvey says he watched California's charter law work its way through the legislature in 1992 and was determined to win one of the first charters (as it turned out, few others applied). Mr. Shalvey, then an assistant superintendent in Lodi, Calif., was interviewing for the superintendent's job in the San Carlos district, and the teachers there "were asking for some new thinking," says Beth Hunkapiller, president of the San Carlos board. "They felt they needed some change."

Change isn't easy under California's 9,000-page education code, which tells schools, among other things, how to teach phonics, which textbooks to buy, how to do on-the-job teacher training -- and that they will have cafeterias with full-service kitchens. Wealthy and well-educated, San Carlos was the ideal place to experiment with charters, Mr. Shalvey says he reasoned, so he sold the idea at a town meeting. "I wanted to start somewhere they weren't needed," he explains and then expand the concept in places with poor schools.

For a superintendent to ask the state to approve a charter in his district isn't unlike Kmart offering Wal-Mart a storefront down the street. A charter draws children and money away from the district schools, and the district doesn't have any control over it. "They're inconvenient," says Mr. Shalvey, mimicking the opposition to charters. "There's risk: What happens if you fail? What happens if you succeed?"

Michael Kirst, who runs a program that offers joint master's degrees in business and education at Stanford University, says that fear of risk is what keeps many superintendents from trying new ideas, even when the old ones don't work. A superintendent's "career trajectory" takes him up through layers of administration where risk is discouraged -- because who wants to risk an eight-year-old's education? "We weren't trained that way," says Robert Stremple, who was superintendent of the U.S. Department of Defense schools and now sits on Mr. Shalvey's UPS board, "and we're perpetuating ourselves in the way we train others."

Only 55 children showed up when the San Carlos charter opened in 1993 -- the first in California -- and many of those came from other districts, seeking the San Carlos imprimatur. But the charter quickly turned into an R&D lab, pioneering technology, multiage classrooms, individual student-learning plans and teacher bonus pay, most of which have since been adopted by the district schools, too. With enrollment now at 184, and 100 on the waiting list, the charter also has set off competition for students in a district where enrollment is falling because families can't afford to move in (two-bedroom bungalows may fetch $600,000).

"The competition is intense," says Kaaren Andrews, the 29-year-old "instructional coordinator" who heads the charter. Faced with competition from the charter, two other San Carlos elementaries converted to charters this year -- with 80% of the unionized teachers voting for the change -- and Mr. Shalvey has sent letters to all the other schools in the district, urging them to do the same.

Freed of state restrictions, says Robert Winslow, Heather School, where he is principal, chooses its textbooks and receives state funding in a lump sum, rather than in a dozen smaller pots linked to programs. But beyond that, charter status enables Heather to solicit for students in other districts -- and worried about low kindergarten enrollment next September, the third year in a row, Mr. Winslow already has started an ad campaign. "If we weren't a charter, we'd lose staff," he says simply. "If we lose staff, we lose programs" and then possibly more kids and still more staff.

Trolling for Voters

Two years ago, with a leave of absence and the unanimous approval of his school board, Mr. Shalvey took his evangelism for charters statewide by launching a voter initiative to lift the 100-school cap on charters in California. Thirty-six states permit charters, but most control their spread: Oregon limits charters to 10% of a district's enrollment; Missouri allows charters only in St. Louis and Kansas City. California's high-tech community endorsed the initiative, which, as it turned out, put so much pressure on legislators that they lifted the cap themselves. Mr. Hastings, the software entrepreneur, says that in an economy fueled by ideas, "the least we could do is spread the net of opportunity."

But traveling the state together, Mr. Hastings says he and Mr. Shalvey concluded that even if they got the charter law changed, "that wouldn't get schools built or kids served. We decided our next project should be a really big network of charter schools." Mr. Shalvey announced he would retire from San Carlos this fall (the school board has begun a search for a charter-friendly replacement), and UPS launched itself with a virtual office -- everyone in different cities, but linked by e-mail.

California gives charters about $4,000 a year per child to operate. But like many states, it doesn't provide money to buy or renovate a building, and few charters have the collateral for a loan. The need for capital has helped fan the growth of for-profit charters, which can raise money from investors. LearnNow's Mr. Wade says he first planned a nonprofit chain of inner-city schools, but rethought it when he realized he needed at least $22 million in the first two years. "No way could I get that from foundations," he says.

But Mr. Shalvey's goal isn't profits, he says (he will earn $115,000 as chairman of UPS, the same as he earns in San Carlos -- "a lateral move," he calls it). It's to have his charters spread their best ideas to other schools, much as the San Carlos charter does. "There are no trade secrets" in a nonprofit, he says.

The migration of ideas already is starting in Stockton, where the UPS charter opened in a converted grocery store, its renovation paid for by Mr. Hastings. In a district so crowded that the schools run on shifts, the UPS charter offers 190 days of teaching, vs. 163 in other schools. Cleaning, food service and even gym classes are contracted out to save money. Teachers get a month of training -- nationally, three or four days is common -- and will depend for part of their pay on how well students perform on statewide tests and how many return for the next school year.

Although one-quarter of the students are poor, the message in Stockton is that everyone will go to college. Each classroom is named for a university -- there's the San Diego State class, the Pepperdine University class -- and the school puts aside 1% of its $1.5 million budget for college scholarships. "Everyone wants in," says parent Yvonne Sousa. The school will have spots for 60 new kids in the fall; it stopped taking applications when the list hit 200.

Del Alberti, superintendent of the Lodi Unified School District that feeds into the charter, says he welcomed the nonunionized school because it gives him the chance to try out ideas that either the state education code or the teachers' union contract precludes in his schools. UPS schools, for example, combine two grades in the same classroom; the idea is that kids develop different skills at different ages. "We couldn't get a buy-off from the union on that," says Mr. Alberti. With what Lodi has learned from the UPS charter, though, Mr. Alberti says it will open its own charter in August -- and this

UPS plans another Stockton elementary *this fall, and two charters in* Oakland (St. Louis Bertrand has decided to rent its school to UPS). Oakland Mayor Jerry Brown is encouraging charters as part of his effort to turn around a woeful school district. "I don't think they can reinvent from the inside without someone like us on the outside," Mr Shalvey says, "and I don't think we'd do as well if we weren't looking over our shoulders at them."

What's next? San Jose, San Francisco and Los Angeles are on Mr. Shalvey's master plan. "People are going to get really mad at us" as his schools compete and expand, Mr. Shalvey predicts. The idea doesn't seem to trouble him.

Write to June Kronholz at june.kronholz@wsj.com

Published Sunday, July 25, 1999, in the San Jose Mercury News

Millions to benefit schools

• **New Schools Fund:** Group hopes to distribute $20 million for education and to provide other support.

BY S.L. WYKES
Mercury News Staff Writer

Some of Silicon Valley's most savvy venture capitalists are about to test whether the same techniques that nurtured the nation's high-tech industry to success can be used to help educate the nation's children.

The New Schools Fund, with offices in Redwood City, will start relatively small, aiming to fill and then distribute an initial purse of $20 million. Although its mission will include public education about being an educational entrepreneur, it also will organize conferences, publish materials and encourage networking on important educational issues, said executive director Kim Smith.

In its first round of funding, New Schools will be looking for a dozen or so projects, drawn from an initial pool of profit and non-profit candidates. Some have a technological focus, others offer new management ideas. The first round of funding will be focused on programs for disadvantaged youth, Smith said, but the higher mission is to find ways to improve the educational system.

Following the classic venture capital model, New Schools will offer assistance to those projects, working collaboratively with the projects to support their growth. That could mean anything from helping a project find good managers to offering business expertise, Smith said.

In another departure from standard foundation form, the fund also will work closely with its grantees to create ways of measuring results, something that has been an ongoing topic of debate in education.

What New Schools wants to capitalize on is the entrepreneurial spirit that spots windows for change, then apply that to education, Smith said.

It's another form of the venture philanthropy that has picked up speed recently, with organizations such as the Entrepreneur Foundation, Silicon Valley Community Ventures and Lenders for Community Development bringing that venture capital model to non-profit organizations and would-be businesses in low-income communities.

Education plus business

New Schools is directing its attention to education, where models of behavior standard in business have rarely been followed. But New Schools' board will feature a blend of viewpoints: Ted Mitchell, president of Occidental College and former vice president of the J. Paul Getty Trust, experienced foundation directors such as Ann Bowers of the Noyce Foundation and more business-oriented fund partners such as John Doerr of Kleiner Perkins Caufield & Byers, Netscape's Marc Andreessen and Marimba's Kim Polese.

``Our first goal is to look at projects (and ask), `Can this substantially improve education?' and then figure out the best way to support it," Smith said. ``We're not trying to reinvent the wheel. We wouldn't expect to become an advanced think tank. . . We want to find education entrepreneurs . . . and bring to them additional energy."

Reed Hastings, a Silicon Valley CEO and former chief of Technology Network, described the New Schools group as ``admittedly amateurs at philanthropy (but) we're banding together to get better faster. And we wouldn't try to create something that's done very well already. We definitely want to create a new paradigm for venture philanthropy."

New Schools will retain one quality of standard venture capital thinking, Hastings said. ``If we don't have some big failures," he said, ``we'll think we weren't aggressive enough. That's not a typical foundation mind-set."

How big the fund might grow is anyone's guess, although Hastings made one: ``If we're successful with the first round, I think there will be a lot of donor interest and clearly a lot of investor interest."

Driving force

Matt Glickman, a thirtysomething Silicon Valley entrepreneur whose babycenter.com recently was acquired by eToy, is an example of the intersection between two passionate interests driving New Schools.

With master's degrees in business and education, Glickman spent a year doing administrative work for Teach for America, an ambitious program that puts recent college graduates to work teaching in schools with big educational challenges.

Now, as an experienced entrepreneur, Glickman sees New Schools as a way to bring together ``two different worlds that don't talk to each other much, and they could both benefit from talking to each other."

New Schools already has become a part of the funding for a reading program called Success for All (SFA). A non-profit organization begun as a Johns Hopkins University research project, Success for All clearly fits in with New Schools' mission to fund ideas that can be duplicated in many school settings. ``What we set out to do was build a (reading) program we call replicable," said Nancy Madden, SFA's director.

After years of operating on research grants, SFA left Johns Hopkins and acquired a business plan. New Schools will be a small part of SFA's next step -- expanding to 3,000 schools in the next five years.

``That just can't be done within a university context," Madden said.

Model charter schools

Don Shalvey is in talks with New Schools to fund University Public Schools, a group that hopes to create model charter schools. Shalvey, who also is the superintendent of the San Carlos Elementary School District, knows the traditional funding sources for such projects -- foundations or the federal government.

He sees the venture capital investment technique as adding essential elements for success. ``Foundations can champion you, but not coach you," he said. ``It's like walking in a whole different world . . . that can inform and enhance public education."

Just what the impact will be of New Schools' funding -- and that of other new funds with an educational bend, such as the Gates Foundation -- will depend on how well they do their homework, said Dee Dickinson, head of the two-decades-old education reform collaborative, New Horizons for Learning.

The biggest obstacle to any reform effort, however, may be the nature of the system. ``Schools have always found it difficult to change," said Dickinson, who remains supportive of new efforts like New Schools. ``The problems (of education) today are of such magnitude that schools alone cannot deal with it. They need the resources of the entire community."

IF YOU'RE INTERESTED

The New Schools Fund can be contacted at (650) 556-2340, e-mailed at info@newschools.org or on its Web site: www.newschools.org

newschools

What is New Schools?

Background

- Created by technology venture capitalists and entrepreneurs who want to translate what they know into improving public education

- Staffed with "hybrids" who combine education entrepreneurship and business management expertise

Experience of Our Founders

- There is a New Economy -- a Knowledge Economy

In which…

- Networks and Scale matter
- Entrepreneurs and leverage matter

newschools

Old vs. New Economy

Old	New Economy
a skill	life-long learning
labor v. mgmt.	teams
monopolies	competition
plant, equipment	intellectual property
security	risk taking
wages	options, accountability
status quo	speed, change
standardization	custom, choice
hierarchical	networked, chaordic
regulation	convergence of sectors

Reference Points:

- VC: Doerr backed Amazon, Netscape, AOL, Intuit, SUN, Lotus, Freemarkets, co-founded @home Networks, etc.
- Entrepreneur: Barksdale - Fed Ex transformed postal service, Netscape changed our lives w/ the internet
- Social Entrepreneur: Teach For America, AmeriCorps

Venture Approach

- Specialize by industry-- pattern recognition is key to value add
- Look for levers for change
- Build scalable ventures
- Hands-on -- value-add; BOD member, advisors, resources, team members
- Networks -- connect ventures with new economy resources

Social Entrepreneurs, like business entrepreneurs...

- Are **visionary** -- not satisfied with status quo, nor constrained by "the rules"
- Are **passionate**, driven, determined, **tenacious**
- Act with a sense of **urgency**
- Lead with integrity and **inspire** others to join the cause
- **Need investors** ("venture philanthropists") willing to contribute substantial financial, intellectual and human capital over time.

newschools

The New Schools Venture Fund is a nonprofit venture philanthropy fund dedicated to improving public K-12 education by supporting outstanding education entrepreneurs.

We achieve this mission by creating:

- A portfolio of 10-20 of the best education ventures, both non-profit and for-profit
- A nationwide network connecting education entrepreneurs with New Economy resources.

newschools

How New Schools Operates:

- Industry focus (K-12 public educ)
- Review incoming business plans (non π and π)
- Due diligence -- extensive
- Investment Partners
  - meet quarterly to make decisions on grants, loans, or equity investments
  - include donors and education experts
- Fewer but larger investments; BOD seat
- Capacity building for the field, network development, incubations

newschools

New Schools Investment Criteria

1. **Scalable**
2. **Sustainable**
3. Passionate **Hybrid** Leadership - understand and combine education and business management
4. There is an important strategic reason for New Schools specifically to be at the table
5. **High Leverage** opportunity to improve public K-12 education, as indicated by:
   - **Targets** a vulnerability in the system, meets a real need
   - **Measurable**: progress towards outcomes can be assessed
   - **Catalytic:** designed to overcome systemic inertia

June 2, 2000

MEMORANDUM FOR BRUCE REED

From: Andrew Rotherham

Re: Teacher Tax Proposal

You asked for a brief analysis of a proposal to exempt some or all of teacher salaries from federal income taxes.

There are two models for a proposal of this nature. First, Representative George Miller (CA) has introduced a bill in the House (HR 2611) that would exempt qualified teachers in high poverty communities earning up to $120,000 annually from federal income tax. The Miller bill has not been officially scored, but unofficial estimates put the cost at approximately $4 billion annually.

Second, in California, Governor Gray Davis recently proposed to exempt teachers from state income tax there. This will save a teacher there earning $30,000 annually approximately $500 and a teacher earning $50,000 approximately $1,350. Not all the details of the Davis proposal have been developed yet. His proposal has met with mixed reaction within the state including some criticism from teachers and groups representing teachers.

To consider a proposal of this nature at the national level, several threshold questions must be answered:

Do all teachers or only teachers in high poverty areas receive a tax-benefit?

The Miller bill would extend the federal tax benefit only to teachers in high poverty school districts (defined as 50 percent or more students receiving free and reduced price lunch). The Davis proposal extends the benefit to all teachers in the state.

By limiting the exemption to high poverty districts the proposal gains the advantage of being a recruitment initiative targeted to high need areas. This deflects criticism that it is just a political gimmick in an election year and that it is simply a way to dodge the thornier issue of directly raising teacher salaries.

Do all teachers or only certified teachers receive the benefit?

The Miller proposal requires that teachers be certified to be eligible and that middle and high school teachers have demonstrated expertise or an academic major in the subject that they teach. These provisions dovetail with the President's teacher quality proposals.

The Davis proposal would also require that teachers be certified although it is silent on the issue of out-of-field teaching.

Because it would be difficult from a compliance point of view to make the initiative performance-based in a meaningful way, requiring certification and in-field qualifications is the best proxy for quality that can be incorporated. Not including include provisions of this nature would put the initiative at odds with the President's teacher quality agenda.

Exempt the entire salary or just a portion of it?

Both the Davis proposal and the Miller bill would exempt salary up to a capped amount (adjusted gross of $120K for Miller).

There are pros and cons, fiscal and otherwise, as to whether a total or partial exemption is more advantageous. I believe that a partial exemption has more political appeal because it is again easier to sell as a recruitment piece.

Are administrators, principals, and other officials eligible or only teachers?

While there are legitimate shortages in administrator and principal positions it becomes difficult to broaden the initiative beyond teachers without encountering political issues. For example, if administrators and other non-teaching personnel including security and/or health related personnel are included it becomes even harder to argue why the initiative should not be expanded to include nurses and police officers.

Other Issues

There are legitimate implementation issues associated with this proposal. Local circumstances dictate a variety of hiring practices with regard to teachers and so broad based policies can create confusion. For example, in school districts without a teacher shortage, fully qualified teachers are often used as substitute teachers until fulltime positions become available. Under this proposal would these teachers be eligible?

The Miller bill does not appear to answer this question because it is more focused on teacher qualification than teacher status. Because of variances in the operations of schools and school districts from state to state, the issues need to be examined in any legislative proposal.

Recommendations:

If you decide to pursue a proposal of this nature, I recommend that the proposal provide an exemption from federal income tax up to the national average for starting teachers ($25,735). Under this model the exemption would entirely cover the starting salary of many new teachers and give a sizeable tax-break to existing teachers. The exemption should be contingent upon both certification and subject area expertise (at the middle and high school levels) and should apply only to high poverty communities. Hence, rather than a broad-based tax-break this initiative would be a targeted federal effort to help high poverty school districts attract high quality teachers.

Short of an exemption proposal a smaller—and hence less politically potent—option would be to exempt teacher recruitment bonuses and performance bonuses from federal taxes. Although this option is smaller scale, by incorporating performance bonuses the proposal would gain an additional quality component.

Pros and Cons:

Two prominent issues quickly emerged in California after Davis proposed his initiative. First, why should an initiative of this nature help only teachers as opposed to fire fighters, police officers, nurses, etc? Second, if your goal is to raise teacher salaries, then why not just raise teacher salaries directly rather than through indirect subsidies?

Davis addressed the first issue head-on by arguing that while there are many worthwhile professions that because teaching is such an imperative one and because the teacher shortage is so acute it requires immediate and special action. Davis cited the 1958 National Defense Act as an example of how a pressing educational need requires immediate leadership and action. This argument has the same relevance nationally. Davis also pointed out that California does give special inducements to some other fields including peace officers.

The argument about teacher salaries is easier to refute on a national basis. Despite the President's class size initiative and the Higher Standards-Higher Pay initiative in the FY2001 budget we can argue that directly raising salaries for teachers is not primarily a federal issue and that initiatives like this are a better way to address this issue from the national level.

A third point that was raised in California and would probably arise in connection with this proposal is, why not private schools? Davis argues that the government's responsibility is the public schools and that government attention should be focused there.

The overriding "pro" for this proposal is that it is a direct way to help teachers, is easy to understand, and is politically attractive. Although some education groups in California have criticized the Davis proposal some of this criticism seems to be based more on some simmering tensions related to other issues than this particular proposal. As preliminary polling seems to indicate, this is popular proposal.

Important Facts:

Number of teachers nationwide:	Approximately 2.7 million[1]
Average annual salary for teachers[2]:	$39,347

[1] National Center for Education Information

Highest state, Connecticut:	\$51,727 (131.5% of national average)
Lowest state, South Dakota:	\$27,839 (70.8 % of national average)
Annual starting salary[3]:	\$25,735
Highest state, Alaska:	\$33,162 (128.8 % of national average)
Lowest state, North Dakota	\$19,146 (74.3 % of national average)

[2] American Federation of Teachers: 1998 Salary Survey
[3] ibid.

newschools

Layers of Impact:

4. Mobilize *significant* capital

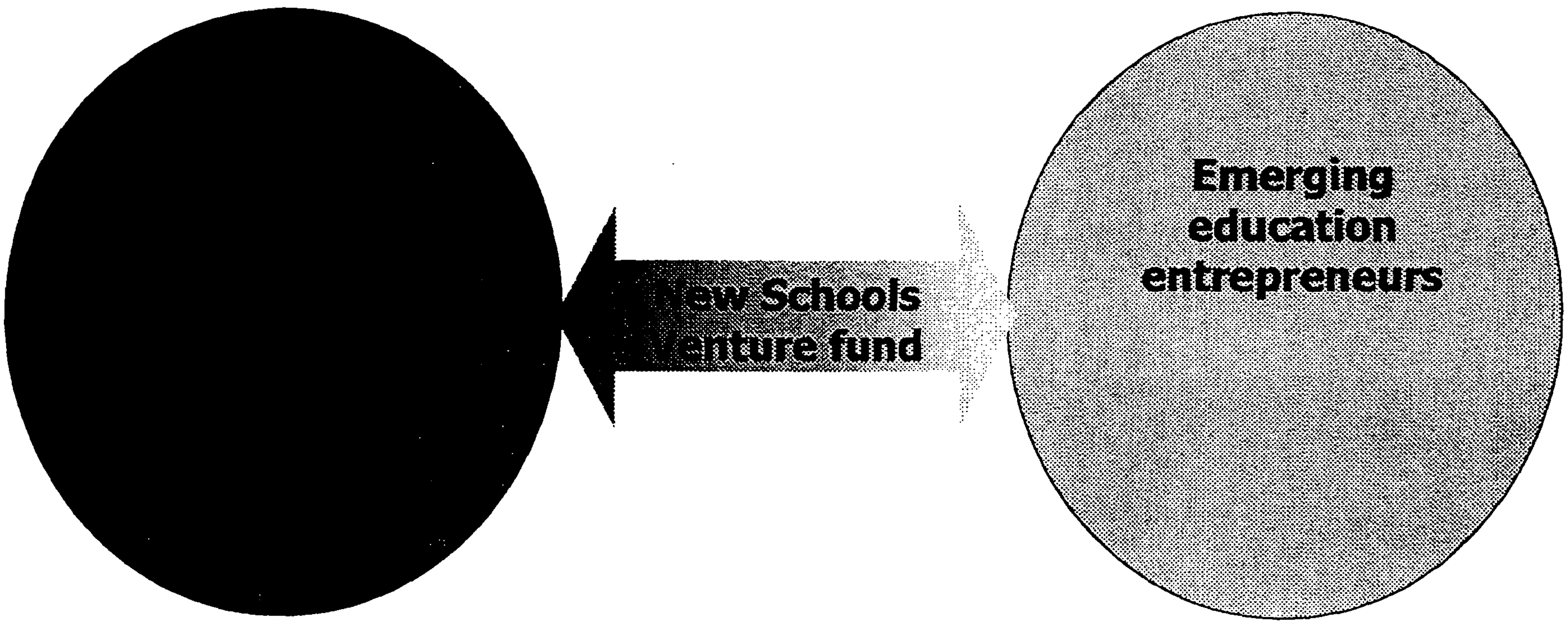
3. Efficient Non Profit Capital Market

2. Catalytic Effect on Education System

1. Portfolio educational outcomes for kids

newschools

"Hybrid" Translator



New Schools' Unique Combination:

- Industry focus: public K-12 education for poor and underserved children
- Network of New Economy donors, with Investment Partners decision making process
- For profit and non profit ventures

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE SOLICITOR GENERAL
10th & Constitution Avenue, N.W.
Washington, DC 20530

TELEFAX TO:

RECIPIENT'S NAME: Bill Marshall

AGENCY/FIRM:

ADDRESS:

TELEPHONE NUMBER: (202) 456-6111

TELEFAX NUMBER: (202) 456-6279

NUMBER OF PAGES SENT (INCLUDING COVER PAGE): 31

IF YOU DO NOT RECEIVE THIS NUMBER OF PAGES, PLEASE CALL THE NUMBER BELOW.

TELEFAX FROM:

SENDER'S NAME: Barbara D. Underwood

ROOM NUMBER:

TELEPHONE NUMBER: (202) 514-2206

TELEFAX NUMBERS: (202) 514-9769

COMMENTS:

- OFFICIAL INFORMATION ENCLOSED -

Pursuant to 26 U.S.C. § 6103 and other applicable restrictions, the information contained in this transmission is intended only for the sole use of the individual or entity named above and may contain information that is privileged, confidential, and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient or the employee responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this transmission is strictly prohibited. If you have received this communication in error, please notify us immediately. Thank you.

TRANSMITTED: DATE: 6/1/2000 TIME: 4:05pm INITIALS: [illegible]

U.S. Department of Justice
Office of the Solicitor General

Principal Deputy Solicitor General

Washington, D.C. 20530

6/1/00

Bill:

Here is a draft that includes much of Education's proposed language and all of their points — I've just e-mailed to Education and asked for expedited review, with a view to filing tomorrow if possible, or — if not — as soon thereafter as possible.

Barbara

FAX: 456-6279

6/1 - 2:30pm

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 96-17131, 97-15422

THE ASSOCIATION OF MEXICAN-AMERICAN EDUCATORS, et al.,

Plaintiffs-Appellants-
Cross-Appellees

v.

THE STATE OF CALIFORNIA AND
THE CALIFORNIA COMMISSION ON TEACHER CREDENTIALING,

Defendants-Appellees-
Cross-Appellants

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The federal government supports fully the use of standardized testing as one factor in assessing teacher quality. Indeed, the Department of Education has made substantial grants to numerous states and local school districts, including California, to improve their systems of teacher testing. Of course, such testing must be properly validated as required by federal civil rights laws, and we believe that compliance with such laws is fully consistent with the federal government's commitment to teacher quality. The only question we address here is whether California's system of testing is subject to judicial review under Titles VI and VII of the Civil Rights Act of 1964. We submit that it is.

Pursuant to 42 U.S.C. 2000d-1, numerous federal agencies have promulgated regulations to implement Title VI, which prohibits a recipient of federal financial assistance from discriminating on the basis of race, color, or national origin in its programs or activities. 42 U.S.C. 2000d. Those regulations prohibit, among other forms of discrimination, the use of criteria that have unjustified discriminatory effects. See, e.g., 34 C.F.R. 100.3(b)(2) (Department of Education); 32 C.F.R. 195.4(b)(2) (Department of Defense). A federal agency may initiate administrative action if it finds a recipient is not in compliance with Title VI or its implementing regulations. See, e.g., 34 C.F.R. 100.6-100.10. In addition, the Department of Justice coordinates federal agencies' enforcement of Title VI, Exec. Order No. 12,250 (45 Fed. Reg. 72,995 (1980)), and has authority to enforce Title VI in federal court. 42 U.S.C. 2000d-1.

Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(f), the Department of Justice has authority to initiate suits against public employers, and the Equal Employment Opportunity Commission (EEOC) has authority to initiate suits against private employers. Title VII prohibits, among other things, employment practices that have an unjustified disparate impact. See 42 U.S.C. 2000e-2(k).

The U.S. Department of Education's statutory mission is to assist State and local educational agencies and other educational institutions in improving the quality of, and promoting equal access to, education. 20 U.S.C. 3402. To carry out this mission, the Department administers over 100 grant programs that award over $35 billion a year, and supports and directly conducts educational research, evaluations, and data collection. It also provides technical assistance and information to educational agencies and schools. A central priority of the Department is to assist States in developing higher content and performance standards for elementary and secondary school students and in aligning their curriculum, testing, and teacher standards and preparation with these higher standards for students. 20 U.S.C. 5801, 5881-5889, 6311.

Teacher preparation and the enhancement of teacher quality are central purposes of many statutes administered by the Department of Education, including, for example, the Teacher Quality Enhancement Grant Program, which makes grants to States to support systemic efforts to improve teaching quality.[1] See 20 U.S.C. 1021 et seq. This program includes a competitive priority for States that strengthen their teacher certification requirements to ensure that new teachers have strong content knowledge and teaching skills. See 20 U.S.C. 1025(b)(2). The statute also includes accountability provisions that require annual State reports to the Secretary of Education on the quality of teacher preparation in the State, including the performance of teacher candidates on State certification examinations and annual reports to the public by teacher preparation institutions on the

---

1/ In September 1999, the U.S. Department of Education funded a three-year, $10.4 million grant to the State of California for reforming State teacher certification requirements and for the development of a new statewide assessment to evaluate teacher candidates for subject matter and pedagogical competence prior to initial certification.

pass rates of their graduates on teacher certification assessments of the State in which the institution is located. 20 U.S.C. 1027.

The district court correctly observed that "the State has an obligation 'to the public to maintain the highest standards of fitness and competence for the weighty task of educating young impressionable students.'" Association of Mexican-American Educators v. California, 937 F. Supp. 1397, 1402-1403 (N.D. Cal. 1996) (citation omitted). Moreover, this obligation has become increasingly urgent. As the National Commission on Teaching & America's Future explained:

> Good teaching is more important than ever before in our nation's history. Due to sweeping economic changes, today's world has little room for workers who cannot read, write, and compute proficiently; find and use resources; frame and solve problems with other people; and continually learn new technologies and occupations. Blue-collar jobs that most people once held will comprise only 10% of total employment by the year 2000, and the "knowledge work" jobs that are replacing them require levels of knowledge and skill previously taught to only a very few students.

"What Matters Most: Teaching for America's Future," Report of the National Commission on Teaching & America's Future, Summary Report at 7-8 (September 1996).

Teacher quality is the single most important in-school factor influencing student achievement. What teachers know and do is the most important influence on what students learn. "[S]tudies show that teacher expertise is the most important factor in student achievement." Id. (Full report) at 6.[2]

---

[2]/One study found that differences in teacher qualifications (continued...)

Properly validated basic skills tests are an effective means to ensuring teacher quality. The very nature of every teaching position is to impart knowledge and skills to children and to provide an educational role model for students. The recently released interim report of the National Academy of Sciences' National Research Council on testing and teacher quality concludes that:

> A single test or set of tests can only measure some of the characteristics associated with competent teaching. Nevertheless, this difficulty does not negate the value of assessing basic skills, subject-matter knowledge, and pedagogical knowledge.

Tests and Teaching Quality: Interim Report, Committee on Assessment and Teacher Quality, Board on Testing and Assessment, National Research Council at 23-24 (2000)[hereinafter "Interim Report"].

Although there has been limited research on the extent to which State tests are effective in distinguishing between candidates who are competent to teach and those who are not, id., evidence from studies that have addressed the relationships

---

[2/] (...continued)
accounted for more than 90 percent of the variation in reading and mathematics achievement among students in high-achieving and low-achieving elementary schools. See id. at 7 (citing Eleanor Armor-Thomas et al., An Outlier Study of Elementary and Middle Schools in New York City: Final Report (New York City Board of Education, 1989)). A review of 60 studies found that teachers' ability, experience, and education are clearly associated with increases in student achievement, and that devoting additional resources to teacher education is the most productive investment schools can make to raise student achievement. R. Greenwalls, L.V. Hedges, and R.D. Laine, "The Effect of School Resources on Student Achievement," Review of Educational Research, Vol. 66, pp. 361-396, Fall 1996.

between students' and teachers' scores suggests that teachers' test scores do help in predicting their students' achievement.[3] There is broad educational consensus that teacher employment or certification tests are needed to help ensure teacher competence. Forty-one States require prospective teachers to pass one or more tests, either of basic skills, subject matter knowledge, pedagogical knowledge and skills, or a combination of these measures. See Interim Report at 10. Most of these states require a test of basic reading and math. See id. at 11. Although Congress has not endorsed any particular state teacher exam, it has implicitly endorsed state practices to administer these exams by holding States and institutions of higher education accountable for, among other things, the pass rate for initial state teacher certification. 20 U.S.C. 1021-1030. Of course, such tests must comply with civil rights laws.

The United States agrees that states should insist on high levels of skills from their teachers. The National Research Council Report cited above makes clear that testing basic skills is not alone sufficient to determine whether a teacher candidate will be successful. Therefore, the Department of Education

---

[3]/See, e.g., Ronald F. Ferguson with Jordana Brown, "Certification Test Scores, Teacher Quality, and Student Achievement" (Malcolm Wiener Center for Social Policy, John F. Kennedy School of Government, Harvard University), at 133-157 (April 1998); Linda Darling-Hammond, "Teacher Quality and Student Achievement: A Review of State Policy Evidence," Education Policy Analysis Archives at 1, 9 January 2000; Robert P. Straus & Elizabeth A. Sawyer, "Some New Evidence on Teacher and Student Competencies," Economics of Education Review, Vol. 5, at 41-48 (1986).

provides millions of dollars in federal aid to assist in recruiting, preparing, and supporting high quality teachers who have not only basic skills, but also subject matter expertise and excellent teaching skills.

While fully supporting the use of tests to ensure teacher quality, the United States maintains that teaching positions are not exempt from Title VI and Title VII standards. These standards require job criteria that have a disparate impact to be justified as job related for the positions in question and consistent with business necessity. Teacher testing, like testing of other employees, must be conducted within the requirements of federal law. Indeed, we believe that compliance with federal civil rights laws is fully consistent with a commitment to teacher quality. The civil rights protections are designed to ensure that standards accurately measure and identify the best candidates for the job. It is the position of the United States that a properly validated test that measures basic skills is an appropriate requirement for elementary and secondary school teachers. Federal nondiscrimination laws are consistent with the establishment of high standards for all students and teachers.

STATEMENT OF THE ISSUES

The United States as amicus curiae will address two jurisdictional issues:

1. Whether California's Commission on Teacher Credentialing's (CTC's) administration of the California Basic

Educational Skills Test (CBEST) is subject to scrutiny under Title VI.

2. Whether the panel erred in ruling that the CTC's administration of the CBEST is not subject to Title VII.

STATEMENT OF THE CASE

1. Plaintiffs, black, Hispanic, and Asian prospective teachers and administrators in California's public schools, challenge the State's and California's Commission on Teacher Credentialing's (CTC's) administration of the California Basic Educational Skills Test (CBEST), a basic reading, writing, and mathematics test. This test is given only to those persons who seek teaching or administrative positions in California's public schools; private school teachers and administrators are not required to take the CBEST. Plaintiffs assert that the test violates Titles VI and VII of the Civil Rights Act of 1964 because it has a disparate impact on blacks, Hispanics, and Asians, and is not job-related or consistent with business necessity.

California's Board of Education has received substantial federal financial assistance continuously since 1983. The majority of these funds are distributed by the State's Department of Education to local school districts. See Association of Mexican-American Educators v. California (AMAE I), 836 F. Supp. 1534, 1537 (N.D. Cal. 1993). However, the parties agreed, in the district court, that the CTC itself did not receive any federal funds.

The district court denied cross-motions for summary judgment, holding that the test was subject to judicial scrutiny under Titles VI and VII. See AMAE I, 836 F. Supp. at 1541-1543. The district court held that since the State of California created the CTC and required passing the CBEST as a condition for certificated employment in the State's public schools, it was responsible for ensuring that the CBEST satisfies the antidiscrimination standards of Title VI. See id. at 1541, 1543. In addition, the district court concluded that the CTC is part of a public "school system" that receives federal financial assistance, and thus is subject to Title VI. See id. at 1544-1545; 42 U.S.C. 2000d-4a(2)(B). While the CTC does not itself participate in a school district's hiring decisions, the court noted that the districts may not hire anyone who has not passed the CBEST. See AMAE I, 836 F. Supp. at 1544.

The district court rejected the State's assertion that the CBEST is akin to a licensing exam and, for that reason, not subject to Title VII. See AMAE I, 836 F. Supp. at 1549. Moreover, following the analysis of Sibley Mem'l Hosp. v. Wilson, 488 F.2d 1338 (D.C. Cir. 1973), the district court held that if the test does not satisfy the anti-discrimination requirements of Title VII, then defendants can be liable under Title VII for interference with the plaintiffs' employment relationship with a third party.

At trial, the parties debated the sufficiency and adequacy of three content validity studies submitted by the State. The district court ultimately rejected the merits of plaintiffs' claims. While the CBEST had a disparate impact on minorities, the court concluded it was lawful because it was job-related and justified by business necessity. See Association of Mexican-American Educators v. California (AMAE II), 937 F. Supp. 1397, 1403 (N.D. Cal. 1996).

2. Both parties appealed and a divided panel issued an opinion on July 12, 1999. See Association of Mexican-American Educators v. California, 183 F.3d 1055, amended and superseded, 195 F.3d 465 (9th Cir. 1999). The panel reversed a portion of the district court ruling and held that the test was not subject to the requirements of either Title VI or Title VII. See AMAE, 195 F.3d at 474-484. The panel also affirmed the validity of the CBEST. See id. at 485-492.

3. The plaintiffs filed a Petition for Rehearing and Rehearing En Banc. Approximately two weeks later, the defendants notified the court that the CTC, in fact, had received federal funds from the Department of Defense since March 3, 1996, under the federal Troops to Teachers Program. See 20 U.S.C. 9301 et seq. Under this program, CTC serves as an information clearinghouse for California programs that help former members of the Armed Forces and defense contractor employees to begin a second career in teaching. The defendants conceded that "for purposes of this appeal, * * * since March 7, 1996, the CTC is covered by Title VI." Notice To The Court Of A Change In Circumstances at 2 (August 17, 1999).

On October 28, 1999, the panel amended its opinion by adding a footnote. See AMAE, 195 F.3d at 475 n.3. After noting the defendants' Notice and CTC's receipt of federal funds beginning in 1996, the court stated:

> [A]s Plaintiffs have argued that Defendants are liable for actions before 1995, our findings as to the non-applicability of Title VI before 1995 are still relevant. To the extent that Plaintiffs have sought recovery under Title VI after 1995, we rely upon the alternative holding that Title VI was satisfied. Ibid. (emphasis added).

The plaintiffs again petitioned for rehearing and rehearing en banc. In response, the defendants retracted their concession of Title VI jurisdiction since March 1996, based on the Third Circuit's opinion in Cureton v. NCAA, 198 F.3d 107 (1999). On March 27, 2000, this Circuit ordered rehearing en banc and vacated the panel opinion except to the extent it is reinstated by the en banc Court.

4. In July 1999, approximately one month before defendants filed their Notice Of Change In Circumstances stating that CTC was, in fact, a recipient of federal funds since early 1996, the U.S. Department of Education awarded California's Title II Teacher Quality Enhancement State Grant.[4] Pursuant to this three-year grant, beginning September 1, 1999, the CTC has received federal funds to lead the State's effort to develop a

---

4/ California's Office of the Governor submitted the application although the CTC is the recipient, fiscal agent, and payee of funds from the Department of Education. A copy of the Application for Federal Financial Assistance, California's Revisions to the Year One Budget Proposal and award documents from the Department of Education are included in the Addendum at pages 1-___.

standards-based Teaching Performance Assessment (TPA) and reform the State's teacher licensure and certification requirements.[5] Funding for the first year totals $3,257,866.

SUMMARY OF ARGUMENT

Plaintiffs assert a "disparate impact" challenge to CBEST under both Titles VI and VII of the Civil Rights Act of 1964. It is generally recognized -- and the parties do not dispute -- that an employment test that has a disparate impact upon minorities is lawful under Titles VI and VII only if the defendant can demonstrate that the test is "job-related for the position in question and consistent with business necessity," and there is no equally effective alternative with less adverse impact. 42 U.S.C. 2000e-2(k); see <u>In re: Employment Discrimination Litig. Against The State Of Alabama</u>, 198 F.3d 1305, 1311-1314 (11th Cir. 1999); <u>Lanning</u> v. <u>Southeastern Pa. Transp. Auth.</u>, 181 F.3d 478, 487 (3d Cir. 1999), cert. denied, 120 S. Ct. 970 (2000); see also <u>Larry P.</u> v. <u>Riles</u>, 793 F.2d 969, 982 n.9 (9th Cir. 1984) (Title VII disparate impact standards apply to disparate impact claims brought pursuant to Title VI regulations).

Defendants contend, however, that the CBEST is beyond the reach of both Title VI and Title VII, because CTC neither receives federal funds in connection with this test, nor employs plaintiffs. In our view, both statutes apply to CTC, and thus

---

5/ Under the grant, CTC, with other state education agencies and universities, also will take steps to increase teacher quality, develop strategies to better prepare undergraduates for the teaching profession, and reduce the mathematics teacher shortage in targeted locations.

the test is subject to judicial scrutiny under both statutes. First, as a recipient of federal funds, the CTC is subject to the requirements of Title VI. See Department of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 605 (1986). In addition, given the Civil Rights Restoration Act of 1987, a claim asserting a disparate impact violation of Title VI need not be "program specific"; that is, the alleged discrimination need not be in a program or activity that receives federal assistance. See 42 U.S.C. 2000d-4a; S. Rep. No. 64, 100th Cong., 1st Sess. 7-10 (1987).

Second, the State and CTC need not be the plaintiffs' direct employer to be subject to Title VII. A claim alleging that the defendants' requirement of the CBEST for public school employment unlawfully interferes with a failing applicant's ability to seek such employment is cognizable under Title VII. See Gomez v. Alexian Bros. Hosp., 698 F.2d 1019, 1021-1022 (9th Cir. 1983); Sibley Mem'l Hosp. v. Wilson, 488 F.2d 1338, 1341 (D.C. Cir. 1973). Moreover, the CBEST constitutes a condition of employment subject to Title VII -- as opposed to a licensing examination exempt from Title VII -- because the examination is limited to individuals seeking public school employment, and applicants cannot obtain such employment without passing the CBEST. See 42 U.S.C. 2000e-2(k); Cal. Educ. Code 44252(b).

ARGUMENT

I

DEFENDANTS' ADMINISTRATION OF THE CBEST IS SUBJECT TO CHALLENGE UNDER TITLE VI

1. Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq., prohibits a recipient of federal financial assistance from discriminating in its programs or activities on the basis of race, color, and national origin. See Department of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 605 (1986) (recipient of federal funds agrees, in nature of contract, to comply with nondiscrimination obligations). Since March 1996, the California Commission on Teacher Credentialing has received federal funds from the Department of Defense as part of the Troops to Teachers program, 20 U.S.C. 9301 et seq. More recently, the CTC also has received funds from the U.S. Department of Education.

If a recipient is a public entity, all of its programs and activities or operations are subject to Title VI, without regard to the specific purpose of federal assistance. See 42 U.S.C. 2000d-4a(1)-(2); S. Rep. No. 64, 100th Cong., 1st Sess. 4, 16 (1987). For example, all of the operations of a state agency or instrumentality are subject to Title VI even though federal funding may be limited to one specific program. See 42 U.S.C. 2000d-4a; S. Rep. No. 64, supra, at 16.[6] Moreover, if one agency receives federal funds and transfers funds to a second agency, all of the operations of both entities are subject to Title VI.

---

[6] "For the purposes of this subchapter, the term 'program or activity' and the term 'program' mean all of the operations of * * * a department, agency, special purpose district, or other instrumentality of a State or of a local government * * * any part of which is extended Federal financial assistance." 42 U.S.C. 2000d-4a(1) (emphasis added).

See ibid.

The CTC was created by the California legislature and, therefore, constitutes an instrumentality of the State. See 42 U.S.C. 2000d-4a(1)(A). Because CTC receives federal funds, all of its operations, including the administration of the CBEST, are subject to Title VI. See 42 U.S.C. 2000d-4a(1); cf. Radcliff v. Landau, 883 F.2d 1481, 1483 (9th Cir. 1989) ("[r]eceipt of federal financial assistance by any student or portion of a school thus subjects the entire school to Title VI coverage"). Thus, the panel correctly concluded that Title VI applies to the CTC after 1995 by virtue of its receipt of federal funds under the Troops to Teachers program. See Association of Mexican-American Educators v. California, 195 F.3d 465, 475 n.3 (9th Cir. 1999) ("To the extent that Plaintiffs have sought recovery under Title VI after 1995, we rely upon the alternative holding that Title VI was satisfied.").[7]

2. In their Response To The Petition For Rehearing, defendants asserted that this Circuit should follow the Third Circuit's analysis in Cureton v. NCAA, 198 F.3d 107 (1999), and dismiss plaintiffs' Title VI disparate impact claim. Defendants now assert that since plaintiffs' disparate impact claim derives from the Title VI regulations, that claim must fail because the regulations require a "program specific" connection between the

---

[7] Given the unequivocal Title VI coverage since March 1996, the United States will not address in this brief whether the CTC was subject to Title VI prior to 1996, particularly as this analysis turns, in part, on issues of state law.

funding and the alleged violation.

The Third Circuit in Cureton was wrong, and this Court should not adopt its analysis. The Cureton holding directly conflicts with the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (Restoration Act), which Congress enacted to overturn the Supreme Court's holding in Grove City. See S. Rep. No. 64, 100th Cong., 1st Sess. 2, 4 (1987). In that case, the Supreme Court interpreted the phrase "program or activity" in Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq. (a statute patterned after Title VI) to limit the coverage of Title IX to only those portions of an entity that receives federal funds. In response, the Restoration Act amended Title VI, Title IX, and analogous statutes to define "program or activity" to include "all of the operations of" an entity, "any part of which is extended Federal financial assistance." Pub. L. No. 100-259, § 6, 102 Stat. 31, codified at 42 U.S.C. 2000d-4a.

The language and legislative history of the Restoration Act make clear that the statute's broad definitions of "program" and "program or activity" apply to all Title VI regulations, including the discriminatory effects regulations. The Restoration Act states that its purpose is "to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered." Pub. L. No. 100-259, § 2(2), 102 Stat. 28 (emphasis added). This reference to "executive branch interpretation" indicates that Congress intended its overruling of Grove City to apply not only to Title VI itself, but also to the administrative regulations interpreting the statute.

The legislative history confirms this interpretation. A Senate committee report found "overwhelming" evidence that for nearly two decades prior to Grove City, both Republican and Democratic administrations had interpreted Title VI, Title IX, and their implementing regulations as having "the institution wide coverage that Congress intended." S. Rep. No. 64, supra, at 10; accord id. at 3, 7-9. For example, the Report emphasized that a former cabinet secretary had testified that coverage of Title IX "was exceedingly broad and that this broad coverage was reflected in the Title IX regulations promulgated during his tenure." Id. at 9. The Report confirmed that the purpose of the Restoration Act was "to reaffirm" these "pre-Grove City College * * * executive branch interpretations." Id. at 2. Similarly, the House Judiciary Committee recognized that "[f]rom the outset," the "Title VI enforcement regulations" provided "broad coverage" and were "intended to apply to the entity which has received federal funds, not just to previously identified particular programs for which funds are earmarked." H.R. Rep. No. 829, Pt. 1, 98th Cong., 2d Sess. 23-24 (1984).

When Congress enacted the Restoration Act it was well aware of the Title VI effects regulations, which the Supreme Court had already held valid in Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983). See, e.g., H.R. Rep. No. 829, Pt. 1, supra, at 24 (discussing Guardians). Senator Kennedy, a primary sponsor of the legislation, explained that "title VI regulations use an effect standard to determine violations and that the Federal courts have upheld the use of an effect standard." 134 Cong. Rec. 229 (1988); see also 130 Cong. Rec. 27,935 (1984) (Sen. Kennedy) (judicial decisions approving discriminatory effects regulations "will remain in effect after enactment of this bill"). A case involving the discriminatory effects of certain educational practices was included among the Senate Report's examples of pending administrative cases that were not being addressed on the merits because of Grove City, but for which the Act would restore coverage. See S. Rep. No. 64, supra, at 13.[8]

Consistent with that congressional intent, federal agencies have interpreted the coverage of the Title VI regulations, including the discriminatory effects regulations, to reach those programs that fall within the broad statutory definition of "program." See 42 U.S.C. 2000d-4a. The Department of Justice, which coordinates executive branch enforcement of Title VI, has emphasized that the Restoration Act was designed to restore "the broad interpretation of coverage" reflected in the "original regulations implementing Title VI"; thus, federal agencies "should consistently apply the Act's definition to all of the activities of a recipient," and "should review their own compliance programs to ensure that decisions regarding

---

8/ Individual members of Congress also expressed their understanding that prior administrations had interpreted the regulations as having institutionwide coverage. See, e.g., 134 Cong. Rec. 247 (1988)(Senator Packwood); 130 Cong. Rec. 18,837(1984)(Representative Panetta).

jurisdiction currently reflect the Restoration Act's definition of program or activity." 9 Civil Rights Forum No. 1, at 3 (Spring 1995) (Excerpts in Addendum, pp. 119-120). The Department has taken the same position in policy guidance to agencies in enforcing Title VI. See, e.g., Memorandum from Acting Assistant Attorney General, Civil Rights Division, "Enforcement of Title VI of the Civil Rights Act of 1964 and Related Statutes in Block Grant-Type Programs" 5 (Jan. 28, 1999) (See Addendum, pp. 113-118).

Moreover, on May 5, 2000, the Department of Education issued a Notice of Proposed Rulemaking (NPRM) that modifies its Title VI implementing regulations to incorporate the statutory definition of "program." See 65 Fed. Reg. 26464 (May 5, 2000). As set forth in the Preamble, this modification does not reflect any change in the Department of Education's institutionwide interpretation of its regulations. See 65 Fed. Reg. 26464-26465. This NPRM is merely cautionary action to avoid any further judicial rulings that adopt the Cureton analysis and improperly limit the agency's enforcement authority.[9]

In addition, CTC has received federal funds since September 1999 for the Title II Teacher Quality Enhancement State Grant. See infra, p.__; Addendum, pp. __. A primary purpose of this

---

[9/] This modification does not have any effect on the assessment of plaintiffs' claims prior to its issuance as a final rule. The preamble, however, illustrates the Department of Education's prior interpretation of the institutionwide coverage of its regulations, including the discriminatory effects prohibition.

grant is to modify the State's teacher certification and licensing program. The CBEST is a central element of the defendants' existing certification program. See Cal. Educ. Code 44252(b), 44830(b). Thus, plaintiffs' challenge to the administration of the CBEST encompasses the very "program" now funded. Accordingly, even if this Circuit adopted the Third Circuit's "program specific" requirement as set forth in Cureton, Title VI indisputably applies to the CTC's administration of the CBEST since September 1999.

II

THE CBEST IS SUBJECT TO CHALLENGE UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

The panel erred in its conclusion that CTC's administration of the CBEST is not subject to challenge under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*. First, the panel erred in concluding that Title VII did not apply on the ground that the CTC and State are not the plaintiffs' employers. See AMAE, 195 F.3d at 482-483. Second, the panel erred in characterizing the CBEST as a licensing examination rather than a qualification for public employment. See *id*. at 483-484.

1. The panel concluded that the plaintiffs, if hired, would be employed by the local districts and not by either defendant. Given the absence of an employer-employee relationship between the parties, the panel held that there was no Title VII jurisdiction. See AMAE, 195 F.3d at 482-483. In reaching this conclusion, the panel failed to follow settled Title VII law, including Ninth Circuit precedent. See Gomez v.

Alexian Bros. Hosp., 698 F.2d 1019, 1021-1022 (9th Cir. 1983); Sibley Mem'l Hosp. v. Wilson, 488 F.2d 1338, 1341 (D.C. Cir. 1973).

Title VII prohibits action by an employer directed not only at its own employees and applicants, but also activity that interferes with another's employer-employee relationship on grounds prohibited by Title VII. See Sibley, 488 F.2d at 1341; 42 U.S.C. 2000e-2(a)(1). Title VII prohibits discriminatory acts against "any individual," rather than acts directed at an employee. 42 U.S.C. 2000e-2(a)(1); see Sibley, 488 F.2d at 1341.[10] In Sibley, a male private duty nurse hired by patients in defendant's hospital alleged that the hospital interfered with his employment relationship with patients at the hospital because of his sex. See Sibley, 488 F.2d at 1339-1340. As the D.C. Circuit explained:

> To permit a covered employer to exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual's employment opportunities with another employer, while it could not do so with respect to employment in its own service, would be to condone continued use of the very criteria for employment that Congress has prohibited.

10/ Cf. Robinson v. Shell Oil Co., 519 U.S. 337, 345, 346 (1997) ("employee," as used in Section 2000e-3(a), Title VII's prohibition on retaliation, encompasses former employees; "[t]o be sure, 'individual' [as used in Section 2000e-2, general prohibitions] is a broader term than 'employee and would facially seem to cover a former employee * * * as well as other persons who have never had an employment relationship with the employer at issue"). In addition, Title VII's remedies provision, 42 U.S.C. 2000e-5(g), encompasses relief that may be afforded an individual other than an employee; e.g., injunctive relief and backpay.

Id. at 1341. Many circuits, including this Circuit, have followed Sibley and concluded that Title VII extends beyond the direct employer-employee relationship to prohibit unlawful interference with a plaintiff's employment opportunities or relationship with another employer. See Bender v. Suburban Hosp., 159 F.3d 186, 188 (4th Cir. 1998) (without itself deciding, notes all circuits to consider question have followed Sibley).[11]

In Gomez, plaintiff, a contracting company president, alleged that a hospital refused to contract for his company's services based on race. This Circuit cited Sibley, 488 F.2d at 1431, and held that plaintiff stated a valid claim since the hospital's alleged discriminatory actions interfered with the plaintiff's employment relationship with his employer, albeit his own company. See Gomez, 698 F.2d at 1021.[12] A plaintiff's opportunities for future employment in a given field need not be foreclosed completely in order to state a claim of interference under Title VII; the plaintiff need only show that conditions or opportunities for employment are different than they would be absent discrimination. See ibid.; see also Lutcher v. Musicians

---

11/ See, e.g., Zaklama v. Mt. Sinai Med. Ctr., 842 F.2d 291, 293 (11th Cir. 1988); Spirt v. Teachers Insur. and Annuity Assoc., 691 F.2d 1054, 1063 (2d Cir. 1982), vacated on other grounds, 463 U.S. 1232 (1983).

12/ Subsequently, this Circuit clarified that Gomez concerned the consequences to several employees of the plaintiff's company, and not just the consequences of interference to a sole shareholder and sole employee. See Mitchell v. Frank R. Howard Mem'l Hosp., 853 F.2d 762, 767 (1988), cert. denied, 489 U.S. 1013 (1989).

Union Local 47, 633 F.2d 883 n.3 (9th Cir. 1980) (recognizes Title VII applies to instances where defendant interferes with an individual's "employment opportunities with another employer," but not business opportunities for an independent contractor); cf. Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship and Training Comm., 833 F.2d 1334 (9th Cir. 1987), cert. denied, 487 U.S. 1210 (1988) (defendant cannot avoid Title VII liability by delegating administration of neutral practice with disparate impact to third party).[13]

2. It is well established that the use of selection criteria, including an examination, to assess whether an applicant satisfies the minimum qualifications for a position is subject to Title VII. See 42 U.S.C. 2000e-2(a), (k); see also Allen v. Alabama State Bd. of Educ., 164 F.3d 1347 (11th Cir. 1999) (Title VII prohibits selection processes that "result in an unjustifiable discriminatory impact" on minorities); Griggs v. Duke Power Co., 401 U.S. 424, 432-436 (1971). If the test has a disparate impact, it may only be utilized if it is shown that it

---

13/ Notwithstanding the panel's statement that a parent corporation is "not usually" considered the employer of a subsidiary's employees under Title VII, see AMAE, 195 F.2d at 482, citing Watson v. Gulf and Western Indus., 650 F.2d 990 (9th Cir. 1981), a parent corporation may be liable when it actively participates in or directs the subsidiary's operations. See United States v. Bestfoods, 524 U.S. 51, 71-72 (1998); Watson, 650 F.2d at 993 ("very different case" of potential liability if parent corporation "participated in or influenced the [subsidiary's] employment policies"). Here, the statutory requirement that local districts hire only teachers and administrators who pass CBEST is comparable to a parent corporation participating in a subsidiary's employment policies and practices, and therefore defendants can be held liable for any discrimination that results from such statutory requirements.

is "consistent with business necessity" and is "job-related," and no less discriminatory alternative exists. 42 U.S.C. 2000e-2(k); see In re: Employment Discrimination Litig. Against The State Of Alabama, 198 F.3d 1305, 1311-1314 (11th Cir. 1999); Lanning v. Southeastern Pa. Transp. Auth., 181 F.3d 478, 487 (3d Cir. 1999), cert. denied, 120 S. Ct. 970 (2000).

In California, the CBEST is administered primarily by the CTC. Significantly, the governing board of a school district may also administer the CBEST. See Cal. Educ. Code 44830(b)(1). The panel relied heavily on its determination that the CTC and State are not the plaintiffs' employers to conclude that the CBEST cannot be an "employment" examination, and therefore must be a licensing examination. See Association of Mexican-American Educators v. California, 195 F.3d 465, 482-483 (9th Cir. 1999); see also Fields v. Hallsville Indep. Sch. Dist., 906 F.2d 1017, 1019-1020 (5th Cir. 1990) (State examination for prospective teachers considered a licensing exam because the defendant administering the exam is not the plaintiff's employer), cert. denied, 498 U.S. 1026 (1991).

The reasoning of the panel and the Fifth Circuit in Fields, 906 F.2d at 1019-1020, is fundamentally flawed. Under this analysis, the panel's conclusion would differ, despite the same examination (CBEST) with the same consequence (inability to apply for public school employment), based on whether the examination was administered by the CTC or a school district. The CBEST should not be considered a "licensing" exam when administered by the CTC, but an employment selection device subject to Title VII when administered by a school district. Who administers the CBEST should have no bearing; the significant fact is that applicants who fail the CBEST may not be considered for public school employment. The panel's and the Fifth Circuit's approach begs the central question of what is the nature and manner of utilization of the examination in question, i.e., is passage of this exam a condition of public employment? Cf. AMAE, 195 F.3d at 482-483; Fields, 906 F.2d at 1019-1020.

Cases holding that entities that issue licenses or administer licensing exams, such as boards of dentistry, are not subject to Title VII are inapposite. Cf. George v. New Jersey Bd. of Veterinary Med. Exam'rs, 794 F.2d 113, 114 (3d Cir. 1986) (agency performing police functions of State not subject to Title VII; agency is not an "employer" with respect to the plaintiff-applicant); Haddock v. Board of Dental Exam'rs, 777 F.2d 462, 464 (9th Cir. 1985) (board is not an "employer" with respect to the plaintiff and fellow examinees); Woodard v. Virginia Bd. of Bar Exam'rs, 598 F.2d 1345, 1346 (4th Cir. 1979) (per curiam) (board not an "employer"). This Circuit and other courts have concluded that the licensing entity is exempt from Title VII either because the state is creating the entity or imposing conditions pursuant to its police powers, or the entity does not meet Title VII's definition of "employer" vis-a-vis the applicant. See George, 794 F.2d at 114; Haddock, 777 F.2d at 464.

These licensing entities have been described as performing an "'in-or-out' screening function for the public — it has the power to decide, on behalf of and for the good of the public, who is and who is not qualified to participate in a given profession." Morrison v. American Bd. of Psychiatry and Neurology, Inc., 908 F. Supp. 582, 586 (N.D. Ill. 1996) (a board that assesses a psychiatrist's qualifications for certification, yet is not determinative of the psychiatrist's practicing in the field, is not a licensing entity exempt from Title VII). Thus, a licensing authority imposes standards on an entire profession and are given primarily to regulate private conduct. It is ordinarily unnecessary, however, for a public entity to issue a license to regulate the conduct of its own employees.

A critical distinction between the CTC's administration of the CBEST and dentistry or attorney licensing examinations that was recognized by the district court, see AMAE I, 836 F. Supp. at 1549-1550, yet was discounted by the panel, is that the CBEST is given only to prospective teachers and administrators in the public schools. See AMAE, 195 F.3d at 483. Teachers and administrators in California's private schools are not required to take the CBEST. Thus, the CBEST affects an individual's ability to pursue public employment, but does not bar all prospects of working in a given profession as a licensing exam would. Cf. Morrison, 908 F. Supp. at 586 (Title VII claim against psychiatry certification board survives motion to dismiss for failure to state a claim). Accordingly, the panel erred in concluding that the defendants' administration of the CBEST is not subject to Title VII.[14]

CONCLUSION

Defendants' administration of the CBEST is governed by the antidiscrimination requirements of both Titles VI and VII of the Civil Rights Act of 1964.

Respectfully submitted,

ANITA S. HODGKISS
Deputy Assistant Attorney General

DENNIS J. DIMSEY
JENNIFER LEVIN
Attorneys
Department of Justice
P.O. Box 66078
Washington, D.C. 20035-6078
(202) 305-0025

[14]/ Because we do not have the complete record and had limited time to prepare and file this brief, the federal government takes no position on the question whether CBEST has been properly validated, but argues only that it is not exempt from the laws requiring such validation.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief For The United States As Amicus Curiae contains ____ words.

____
Jennifer Levin
Attorney

CERTIFICATE OF SERVICE

I, Jennifer Levin, hereby certify that on this ___th day of May_____, 2000, I served by Federal Express, next business day delivery, two copies of the Brief For The United States As Amicus Curiae on the following counsel of record:

Public Advocates, Inc.
John T. Affeldt
Mark Savage
1535 Mission Street
San Francisco, CA 94103

The Impact Fund
Brad Seligman
Mari Mayeda
1604 Solano Avenue
Berkeley, CA 94707

Barry L. Goldstein
Saperstein, Goldstein, Demchak
& Baller
1300 Clay Street, 11th Floor
Oakland, CA 94612

Stephanie Wald
Supervising Deputy Attorney General
State of California
455 Golden Gate Avenue
Suite 1100
San Francisco, CA 94102-3664

R. Lawrence Ashe
Nancy Rafuse
Paul, Hastings, Janofsky & Walker
600 Peachtree Street, NE
Suite 2400
Atlanta, GA 30308

JENNIFER LEVIN
Attorney