UNITED STATES
DEPARTMENT OF EDUCATION

NEWS

For Release
June 23, 1997

Contact: Rodger Murphy
(202) 401-0774

STATEMENT BY U.S. SECRETARY OF EDUCATION RICHARD W. RILEY
On the U.S. Supreme Court's Decision on Agostini v. Felton

I am very pleased that the Supreme Court has overruled its 1985 decision in Aguilar v. Felton. I believe that this decision is a positive step forward for American education and good for the many children who need help in learning the basics of reading and math.

Today's decision by the Court in Agostini v. Felton will allow supplementary Title I instructional services by public school teachers to be provided to children attending parochial schools in their own schools, while requiring that safeguards be in place to ensure that the Title I program remains secular and neutral. This decision will have a positive impact on Title I services for both parochial and public school children by eliminating the legal necessity for costly and less educationally effective alternative arrangements for delivering Title I services to religious school students. Hundreds of millions of dollars have been spent in the past twelve years for mobile vans and other costs relating to providing Title I services for religious school children in locations outside their schools. We can now work to direct this money to the classroom and help many more needy public, private and parochial school children. The Department will issue guidance regarding implementation of the decision.

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Title I Decision Follow-Up

Last Friday the Education Department wrote Chief State School Officers regarding the Supreme Court's Agostini v. Felton decision, making clear that public school teachers may now provide Title I supplementary instructional services to eligible children in religiously-affiliated private schools. The letter emphasized the Department's expectation that school districts will meet with local private school officials to examine whether they can arrange to take advantage of the Supreme Court's decision for the upcoming school year. Question and answer guidance will go to the field in mid-July, and meetings with both public and private school officials (including state Title I directors and the U.S. Catholic Conference) are being planned over the next month.

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE GENERAL COUNSEL

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Leslie Thornton asked me to fax you a copy of the proposed guidance on the Agostini v. Felton decision.

Steve F.

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Dear :

I have attached guidance prepared by this Department on the Supreme Court's recent decision in Agostini v. Felton. This guidance was prepared to assist State educational agencies (SEAs), local educational agencies (LEAs), and representatives of private school children in implementing the Court's decision. It supersedes any conflicting guidance based on the Court's prior decision in Aguilar v. Felton in the April 1996 Policy Guidance for Title I, Part A--Improving Basic Programs Operated by Local Educational Agencies. The Policy Guidance will be updated at a later date to reflect the Court's decision in Agostini.

It is likely that additional questions and concerns regarding the Court's decision will surface in the next several months. Please do not hesitate to call me at (202) 260-0826 or e-mail me at mary_jean_letendre@ed.gov concerning these matters. We will respond to your specific questions as quickly as possible and issue additional guidance if necessary.

Sincerely,

Mary Jean LeTendre
Director
Compensatory Education Programs

Attachment

GUIDANCE ON THE SUPREME COURT'S DECISION IN AGOSTINI V. FELTON AND TITLE I OF THE ELEMENTARY AND SECONDARY EDUCATION ACT

Office of Elementary and Secondary Education
U.S. Department of Education

July 1997

INTRODUCTION

On June 23, 1997, the U.S. Supreme Court issued its decision in Agostini v. Felton holding that supplementary instructional services under Part A of Title I of the Elementary and Secondary Education Act (Title I) may be provided in religiously-affiliated private schools (private schools) without violating the Establishment Clause of the First Amendment. In doing so, the Court expressly overruled its 1985 decision in Aguilar v. Felton, 473 U.S. 402 (1985). The full text of the Court's decision may be found on the Internet (at http://supct.law.cornell.edu/supct/html/96-552.ZS.html) and in U.S. Law Week (at 65 U.S.L.W. 4524).

This decision will have a positive impact on Title I services for both public and private school children because it eliminates the legal necessity for costly and often less educationally effective alternative arrangements for delivering Title I services to private school students. Local educational agencies (LEAs) need to consult with representatives of private school children as soon as possible regarding implementation of the Court's decision.

The following guidance reflects the Department's interpretation of the Title I statute and regulations, and the Court's decision in Agostini. The Department will not take any enforcement action against State educational agencies (SEAs) and LEAs if they conform to this guidance.

THE SUPREME COURT'S DECISION

Question 1-What did the Supreme Court decide in Agostini v. Felton?

Answer-The Court decided that Title I instructional services may be provided by public school employees in private schools without violating the Establishment Clause. The Court also overruled a portion of another previous Supreme Court decision--Grand Rapids v. Ball, 473 U.S. 373 (1985)--that involved a state-funded "Shared Time" program under which certain enrichment classes were provided in private schools. The action of the Court regarding Grand Rapids does not directly affect how or where Title I services can be provided for private school children.

Question 2-Did the Court place any specific conditions on how or under what circumstances Title I services may be provided in private schools?

Answer-The Court was reviewing the constitutionality of New York City's Title I program as it existed prior to Aguilar and concluded that providing Title I services in private schools was constitutional under the safeguards that existed under that program. These safeguards included:

--only public employees could serve as Title I instructors and counselors;

--assignment of public school personnel to private schools was made without regard to the religious affiliation of the employee;

--all religious symbols were removed from classrooms used for Title I services;

--personnel were instructed to limit their consultations with the regular classroom teacher to discussions concerning mutual concerns regarding the students' education; and

--a publicly employed field supervisor made one unannounced visit to each teacher's classroom each month.

Title I personnel were also given a detailed set of instructions emphasizing the secular purpose of Title I and setting out rules to be followed to ensure that this purpose was not compromised, including that:

--they were public employees and accountable only to their public school supervisors;

--they could teach only students determined to be eligible by public school officials;

--their materials and equipment could only be used in the Title I program;

--they could not engage in team teaching or other cooperative instructional activities with private school personnel; and

--they could not introduce any religious matter into their teaching or become involved in the religious activities of the private school.

(For a more complete discussion of the safeguards in New York City's pre-Aguilar program, see the Court's decision.)

Question 3-Are LEAs required to implement the safeguards that existed in New York City (as set forth in the answer to Question 2 and the Court's decision) in providing Title I instructional services in private schools?

Answer-The Court relied on these safeguards in ruling that Title I instructional services could be provided in private schools without violating the Establishment Clause. While the Court did not say these safeguards are required, they are factors a court is likely to take into account in reviewing the constitutionality of any services in private schools, and the Department strongly encourages LEAs to adopt these or similar safeguards.

EFFECTIVE DATE OF DECISION

Question 4-When can LEAs begin providing Title I instruction in private schools?

Answer-LEAs may begin to provide Title I instruction in private schools immediately. In a very few instances, however, LEAs may be subject to an existing court injunction against this

practice. In that event, the injunction will need to be lifted by the court before these services can be provided.

LOCATION AND TYPES OF SERVICES

Question 5-Do Title I services have to be provided in private schools?

Answer-No. However, LEAs are required to provide Title I services for private school children that are equitable in comparison to the services and other benefits provided for public school participants and to consult with private school officials on important issues such as the location of any services.

Question 6-Is it permissible to continue to provide Title I services to private school students at neutral sites or at public schools, or through computer-assisted instruction (CAI)?

Answer-Yes. These are all permissible options for providing Title I services, so long as the equitability and consultation requirements are met. The Department expects some LEAs may need a reasonable transition period before Title I services can be provided in private schools.

Question 7-May Title I instructional services be provided in private schools before and after regular school hours and during the summer?

Answer-Yes. These are additional, permissible options for providing services for private school children so long as the equitability and consultation requirements are met. In fact, the Title I statute requires, with respect to public and private school children, that LEAs use effective instructional strategies that give "primary consideration to providing extended learning time." These options may be useful particularly in situations where there is no space available in the private school during the regular school day.

Question 8-Do Title I services for private school children need to be in the same subject areas or grade levels as public school students?

Answers-No. The needs of the private school children determine what Title I services are appropriate. However, because eligibility for services is determined by residence in a participating public school attendance area, private school students being served need to reside in an eligible participating public school attendance area. Therefore, for example, if a public middle school attendance area is not participating in Title I, Title I services may not be provided to private school students in middle school grades who reside in the area.

Question 9-Do Title I classrooms in private schools need to be free of any religious symbols?

Answer-In its decision in Agostini, in ruling that Title I instructional services can be provided in private schools, the Court relied on the safeguards in New York City's pre-Aguilar program,

including the fact that the Title I services were provided in rooms that had no religious symbols. While the Supreme Court did not specifically indicate whether the removal of religious symbols was required, it is a significant factor a court is likely to take into account in reviewing the constitutionality of services in private schools and the Department strongly encourages LEAs to provide Title I instruction in rooms that are free of any religious symbols.

Question 10-May a Title I classroom in a private school be used for non-Title I purposes at other times?

Answer-Yes. The LEA should have the exclusive use and control of the Title I classroom during the time period in which Title I services are being conducted, but the classroom may be used for other purposes at other times.

Question 11-May Title I services be provided in the regular private school classrooms through aides or joint teaching efforts?

Answer-The Department recommends that LEAs not provide these types of services. In holding that Title I instruction may be provided in private schools, the Court in Agostini emphasized that the Title I program was totally separate from the private school's educational program and under the sole control of the LEA. Providing Title I instruction as a part of private school classes raises significantly different issues that increase the risk that the services would be held unconstitutional.

Question 12-Are private schools required to make space available in their schools for Title I services?

Answer-No. If space is not available in a private school, or if the private school chooses not to make its facilities available to the LEA for this purpose, Title I services have to be provided in another location. The LEA still has the responsibility of providing equitable Title I services for private school children under these circumstances, although the services would be at a location outside the private school. The extra costs of providing services at a location outside the private school would be taken "off-the-top" of the LEA's Title I allocation before funds are allocated for instructional services for public and private school children (unless the costs are paid from capital expense funds). See the answers to Questions 19 and 21.

CONTACTS AND ACTIVITIES IN PRIVATE SCHOOLS

Question 13-Is it permissible for Title I teachers to use private school facilities other than the Title I classroom, such as the restroom, teachers' lounge, cafeteria, or the parking lot?

Answer-Yes. There is no prohibition against reasonable use of private school facilities by a Title I teacher or other Title I personnel.

Question 14-May Title I teachers and other public school personnel meet or have discussions with private school teachers and administrators?

Answer-Yes. Consultation and communication are essential to implementing an effective Title I program. Therefore, Title I personnel may have necessary discussions or meetings with private school officials concerning the design and development of the Title I program, as well as communications concerning the needs and progress of individual children.

USE AND DISPOSAL OF MOBILE VANS

Question 15-What procedures govern the use and disposition of vans purchased with Title I funds that are no longer needed to serve private school children?

Answer-A State's procedures concerning equipment govern the use and disposition of vans purchased with Title I funds that are no longer needed to provide services to private school children. Section 80.32(b) of the Education Department General Administrative Regulations (EDGAR) requires a State to use and dispose of equipment "in accordance with State laws and procedures." However, the State may follow as its State procedures the use and disposition provisions in section 80.32 of EDGAR. (For a discussion of these EDGAR procedures, see the answers to Questions 16 and 17.)

Question 16-What can LEAs do with vans that they have used to provide Title I services for private school children?

Answer-LEAs may continue to use vans to provide Title I services for private or public school children. If a State follows EDGAR (section 80.32(c)(1)), vans purchased with Title I funds that are no longer needed for Title I purposes may be used in other activities currently or previously supported by a Federal agency. If a State's procedures permit, LEAs also could use the vans for activities funded from other sources. If the vans are leased with Title I funds (rather than purchased), LEAs should terminate the lease arrangements as soon as possible if the vans are no longer needed for Title I purposes.

Question 17-What happens to the proceeds from the disposition of vans that are no longer needed?

Answer-A State's procedures govern the disposition of equipment purchased with Title I funds, including vans. If a State uses section 80.32(e) of EDGAR as its State procedures, the requirements for disposing of vans depend on the current fair market value. Vans with "a current per-unit fair market value of less than $5,000 may be retained, sold, or otherwise disposed of with no further obligation" to this Department. 34 C.F.R. 80.32(e) (1). Vans "with a current per-unit fair market value in excess of $5,000 may be retained or sold and [this Department] shall have a right to . . . the current market value or proceeds from sale . . . ." 34 C.F.R. 80.32(e)(2).

If vans were purchased from "regular" Title I funds (i.e., not from capital expense funds), the State may adopt procedures that allow funds obtained in the disposal of the vans to be used in the Title I program in lieu of returning funds to this Department.

Question 18-What can proceeds from the disposal of the vans be used for if the vans were purchased with capital expense funds?

Answer-If an LEA purchased vans from capital expense funds, the State may adopt procedures (in lieu of returning the proceeds to this Department) allowing LEAs to use funds obtained in the disposal of the vans for other capital expenses (see section 200.16(a)(2) of the Title I regulations) or, if the LEA's current needs for capital expenses have been met, as a reimbursement for capital expenses the LEA incurred in prior years for which it has not been reimbursed. Funds considered to be a reimbursement for prior capital expenses must be used for allowable Title I expenditures. The State may also adopt procedures whereby, if funds obtained in the disposal of vans cannot be used for other capital expenses or as a reimbursement for prior capital expenses in a particular LEA, the funds may be reallocated to other LEAs in the State for these same purposes. If there is no need elsewhere in the State for these capital expense funds, they must be returned to this Department for reallocation to other States with capital expense needs.

CAPITAL EXPENSE FUNDS

Question 19-Can Title I capital expense funds continue to be used for the costs of vans and transportation for private school children?

Answer-Yes. The capital expense funds already appropriated by Congress will still be available for these purposes, including the $41 million that became available on July 1, 1997. Many LEAs will continue to incur capital expenses as a result of the original Aguilar decision during a transition period. (For a description of what costs qualify as capital expenses, see section 200.16(a)(2) of the Title I regulations.) In addition, an LEA may apply for a payment to cover capital expenses it incurred in prior years for which it has not been reimbursed, if the LEA demonstrates that its current needs for capital expenses have been met.

Question 20-Can capital expense funds be used to buy out leases for mobile vans or neutral space, or for other costs relating to terminating arrangements for providing Title I services to private school children outside of their schools?

Answer-Yes. Reasonable and necessary costs of this nature are allowable Title I costs and may be paid for from capital expense funds.

OFF-THE-TOP REQUIREMENT

Question 21-Does the "off-the-top" requirement still apply?

Answer-Yes. Section 200.27 of the Title I regulations requires that LEAs reserve funds as are reasonable and necessary for certain purposes, including administration of programs for public and private school children, before funds are allocated to school attendance areas or schools. Therefore, if an LEA continues to provide Title I services in vans or employs noninstructional technicians in private schools to assist in CAI (and these costs are not paid from capital expense funds), these costs would come "off-the-top" of the LEA's Title I allocation before funds are allocated for instructional services for public and private school children. The Department anticipates, however, that the "off-the-top" costs of providing Title I services for private school children outside their own schools will be reduced greatly as a result of the Court's decision in Agostini.

Question 22-Do the costs of technicians to assist in CAI come "off-the-top" of an LEA's Title I allocation?

Answer-Yes. Technicians perform noninstructional duties such as operating and maintaining CAI equipment and keeping order in the Title I CAI classroom, and therefore these costs are considered administrative costs that come "off-the-top" of the LEA's Title I allocation (unless these costs are paid from capital expense funds) . In light of the Court's decision, however, Title I personnel now may provide instruction in conjunction with CAI in the private schools. The costs of these instructional personnel are not administrative and would not come "off-the-top" of the LEA's Title I allocation.

SCHOOLWIDE PROGRAMS

Question 23-Can schoolwide programs be operated in private schools?

Answer-No. Schoolwide programs may not be operated in private schools because private schools, as opposed to private school students, are not themselves eligible for Title I services.

NEW PRIVATE SCHOOL CHILDREN

Question 24-Can an LEA serve eligible private school children who previously declined Title I services?

Answer-Yes. An LEA may provide services to these children to the extent possible in the 1997-98 school year, but the LEA will have met its responsibility to offer equitable services to private

school children for the upcoming school year if it contacted representatives of these children on a timely basis in the normal course of designing the Title I program for the 1997-98 school year and services were declined. However, if possible, we strongly encourage these LEAs to contact representatives of these children to see what arrangements or modifications can be made for the upcoming school year. With respect to future years, LEAs should make renewed efforts to contact representatives of private school children that may have declined services because they could not be provided in the private school.

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE GENERAL COUNSEL

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EFFECTIVE DATE OF DECISION

Question 4-When can LEAs begin providing Title I instruction in private schools?

Answer-LEAs may begin to provide Title I instruction in private schools immediately. In a very few instances, however, LEAs may be subject to a pending court injunction against this practice.

In that event, the injunction will need to be lifted by the court before these services can be provided.

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was required, it is a significant factor a court is likely to take into account in reviewing the constitutionality of services in private schools and the Department strongly encourages Title I instruction to be in rooms that are free of any religious symbols.

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Answer-Yes. The LEA should have the exclusive use and control of the Title I classroom during the time period in which Title I services are being conducted, but the classroom may be used for other purposes at other times.

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Answer-These are not recommended practices. In holding that Title I instruction may be provided in private schools, the Court in Agostini emphasized that the Title I program was totally separate from the private school's educational program and under the sole control of the LEA. Providing Title I instruction as a part of private school classes raises significantly different issues that would lessen the likelihood that the services would be upheld as constitutional.

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Question 13-Is it permissible for Title I teachers to use private school facilities other than the Title I classroom, such as the restroom, teachers' lounge, cafeteria, or the parking lot?

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Answer-Yes. Consultation and communication are essential to implementing an effective Title I program. Therefore, Title I personnel may have necessary discussions or meetings with private school officials concerning the design and development of the Title I program, as well as communications concerning the needs and progress of individual children.

USE AND DISPOSAL OF MOBILE VANS

Question 15-What procedures govern the use and disposition of vans purchased with Title I funds that are no longer needed to serve private school children?

Answer-A State's procedures concerning equipment govern the use and disposition of vans purchased with Title I funds that are no longer needed to provide services to private school children. Section 80.32(b) of the Education Department General Administrative Regulations (EDGAR) requires a State to use and dispose of equipment "in accordance with State laws and procedures." However, the State may follow as its State procedures the use and disposition provisions in section 80.32 of EDGAR. (For a discussion of these EDGAR procedures, see the answers to Questions 16 and 17.)

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Answer-LEAs may continue to use vans to provide Title I services for private or public school children. If a State follows EDGAR (section 80.32(c)(1)), vans purchased with Title I funds that are no longer needed for Title I purposes may be used in other activities currently or previously supported by a Federal agency. If a State's procedures permit, LEAs also could use the vans for activities funded from other sources. If the vans are leased with Title I funds (rather than purchased), LEAs should terminate the lease arrangements as soon as possible if the vans are no longer needed for Title I purposes.

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Answer-A State's procedures govern the disposition of equipment purchased with Title I funds, including vans. If a State uses section 80.32(e) of EDGAR as its State procedures, the requirements for disposing of vans depend on the current fair market value. Vans with "a current per-unit fair market value of less than $5,000 may be retained, sold, or otherwise disposed of with no further obligation" to this Department. 34 C.F.R. 80.32(e) (1). Vans "with a current per-unit fair market value in excess of $5,000 may be retained or sold and [this Department] shall have a right to . . . the current market value or proceeds from sale . . . ." 34 C.F.R. 80.32(e)(2).

If vans were purchased from "regular" Title I funds (i.e., not from capital expense funds), the State may adopt procedures that allow funds obtained in the disposal of the vans to be used in the Title I program in lieu of returning funds to this Department.

Question 18-What can proceeds from the disposal of the vans be used for if the vans were purchased with capital expense funds?

Answer-If an LEA purchased vans from capital expense funds, the State may adopt procedures (in lieu of returning the proceeds to this Department) allowing LEAs to use funds obtained in the disposal of the vans for other capital expenses (see section 200.16(a)(2) of the Title I regulations) or, if the LEA's current needs for capital expenses have been met, as a reimbursement for capital expenses the LEA incurred in prior years for which it has not been reimbursed. Funds considered to be a reimbursement for prior capital expenses must be used for allowable Title I expenditures. The State may also adopt procedures whereby, if funds obtained in the disposal of vans cannot be used for other capital expenses or as a reimbursement for prior capital expenses in a particular LEA, the funds may be reallocated to other LEAs in the State for these same purposes. If there is no need elsewhere in the State for these capital expense funds, they must be returned to this Department for reallocation to other States with capital expense needs.

CAPITAL EXPENSE FUNDS

Question 19-Can Title I capital expense funds continue to be used for the costs of vans and transportation for private school children?

Answer-Yes. The capital expense funds already appropriated by Congress will still be available for these purposes, including the $41 million that became available on July 1, 1997. Many LEAs will continue to incur capital expenses as a result of the original Aguilar decision during a transition period. (For a description of what costs qualify as capital expenses, see section 200.16(a)(2) of the Title I regulations.) In addition, an LEA may apply for a payment to cover capital expenses it incurred in prior years for which it has not been reimbursed, if the LEA demonstrates that its current needs for capital expenses have been met.

Question 20-Can capital expense funds be used to buy out leases for mobile vans or neutral space, or for other costs relating to terminating arrangements for providing Title I services to private school children outside of their schools?

Answer-Yes. Reasonable and necessary costs of this nature are allowable Title I costs and may be paid for from capital expense funds.

OFF-THE-TOP REQUIREMENT

Question 21-Does the "off-the-top" requirement still apply?

Answer-Yes. Section 200.27 of the Title I regulations requires that LEAs reserve funds as are reasonable and necessary for certain purposes, including administration of programs for public

and private school children, before funds are allocated to school attendance areas or schools. Therefore, if an LEA continues to provide Title I services in vans or employs noninstructional technicians in private schools to assist in CAI (and these costs are not paid from capital expense funds), these costs would come "off-the-top" of the LEA's Title I allocation before funds are allocated for instructional services for public and private school children. The Department anticipates, however, that the "off-the-top" costs of providing Title I services for private school children outside their own schools will be reduced greatly as a result of the Court's decision in Agostini.

Question 22-Do the costs of technicians to assist in CAI come "off-the-top" of an LEA's Title I allocation?

Answer-Yes. Technicians perform noninstructional duties such as operating and maintaining CAI equipment and keeping order in the Title I CAI classroom, and therefore these costs are considered administrative costs that come "off-the-top" of the LEA's Title I allocation (unless these costs are paid from capital expense funds) . In light of the Court's decision, however, Title I personnel now may provide instruction in conjunction with CAI in the private schools. The costs of these instructional personnel are not administrative and would not come "off-the-top" of the LEA's Title I allocation.

SCHOOLWIDE PROGRAMS

Question 23-Can schoolwide programs be operated in private schools?

Answer-No. Schoolwide programs may not be operated in private schools because private schools, as opposed to private school students, are not themselves eligible for Title I services.

NEW PRIVATE SCHOOL CHILDREN

Question 24-Can an LEA serve eligible private school children who previously declined Title I services?

Answer-Yes. An LEA may provide services to these children to the extent possible in the 1997-98 school year, but the LEA will have met its responsibility to offer equitable services to private school children for the upcoming school year if it contacted representatives of these children on a timely basis in the normal course of designing the Title I program for the 1997-98 school year and services were declined. However, if possible, we strongly encourage these LEAs to contact representatives of these children to see what arrangements or modifications can be made for the upcoming school year. With respect to future years, LEAs should make renewed efforts to contact representatives of private school children that may have declined services because they could not be provided in the private school.

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE GENERAL COUNSEL

FAX: 202-205-2689

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UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF ELEMENTARY AND SECONDARY EDUCATION
THE ASSISTANT SECRETARY

JUN 27 1997

MEMORANDUM TO CHIEF STATE SCHOOL OFFICERS

Re: U.S. Supreme Court's decision in Agostini v. Felton

I am very pleased that the Supreme Court has overruled its 1985 decision in Aguilar v. Felton. Under the Supreme Court's June 23 decision in Agostini v. Felton, public school teachers may now provide supplementary instructional services under Title I of the Elementary and Secondary Education Act to eligible Title I children in religiously-affiliated private schools. This decision will have a positive impact on Title I services for both private and public school children by eliminating the legal necessity for costly and often less educationally effective alternative arrangements for delivering Title I services to religious school students. The full text of the Court's decision may be found on the Internet (at http://supct.law.cornell.edu/supct/html/96-552.ZS.html).

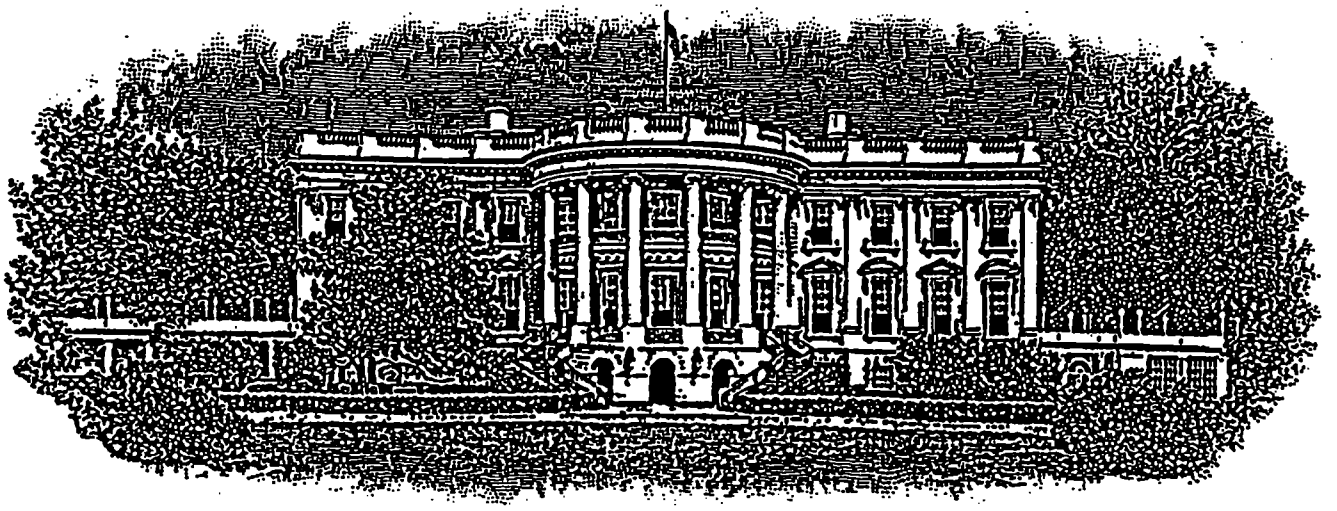
We are working on guidance concerning specific implementation questions that we hope to issue within the next few weeks. In the meantime, I want to emphasize that local educational agencies (LEAs) may begin to implement the Court's decision as soon as practical. It is, of course, expected that LEAs will consult with appropriate private school officials to determine whether arrangements can be made to take advantage of the Supreme Court's decision in the upcoming school year. If space is available in the private schools of the children being served, LEAs may offer Title I services in those schools for the 1997-98 school year. On the other hand, LEAs may continue to provide Title I services outside the private schools if, for example, there is no space available in the private schools or the LEA has incurred and cannot terminate contractual obligations for neutral space or mobile vans. The fiscal year 1997 Title I funds that will be awarded on July 1 include funds for capital expenses to cover the costs of implementing such alternative delivery systems.

Although I realize that plans have already been made for the upcoming school year, the Supreme Court's decision presents a long-awaited opportunity to provide more effective Title I services to private school children with less disruption and cost.

Gerald N. Tirozzi

cc: State Title I Coordinators

The White House



Domestic Policy Council
Old Executive Office Building, Room 220
Washington, DC 20502

Telephone Number: (202) 456–2857 **FAX Number: (202) 456–7028**
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FAX COVER SHEET

TO: Bruce Reed & Elena Kagan

FAX: 6-2878

FROM: **BILL KINCAID**

THIS FAX INCLUDES THE COVER SHEET PLUS 5 **PAGES.**

IF YOU DID NOT RECEIVE THE COMPLETE FAX, PLEASE CALL (202) 456–2857.

MESSAGE:

ED Malarky on Agostini v. Felton.

QUESTIONS AND ANSWERS ON AGOSTINI V. FELTON:

1. What is your reaction to the Supreme Court's decision in Agostini v. Felton?

   We are very pleased with the Court's decision. Title I instructional services can now be provided in religious schools. This will benefit both public and parochial school students, because funds will not need to be spent on alternative delivery systems such as mobile vans for private school children.

2. What was the Administration's position in this case?

   The Administration asked the Court to overrule its prior decision in Aguilar v. Felton which prohibited public school Title I teachers from providing instructional services in private, religious schools.

3. Why did the Administration take that position?

   We felt the 1985 decision was an overly strict interpretation of what the Constitution requires. It was inconsistent with virtually all of the Court's decisions both before and after it was issued. It was also very costly and has been criticized as educationally less effective. Hundreds of millions of dollars have been spent for mobile vans and other costs related to providing Title I services for private school children in locations outside their schools. These costs will no longer be necessary. Our position is consistent with the position which we took in the 1985 case.

4. Doesn't this amount to aid to religious schools?

   No. Title I services are supplementary to what parochial school children would otherwise receive and no money flows to any private school. The only question here was where the educational services could be provided by public school employees--inside the private school or at some other less convenient and more expensive location.

5. What was the Administration's position in the lower courts?

   We have been on record as supporting efforts to overturn Felton in an appropriate case. Secretary Riley called for the overruling of Felton as early as October of 1995. In the lower courts in this case, our position was simply that those courts could not overturn a Supreme Court decision; only the Supreme Court can do that.

6. Has the Administration's position on vouchers changed?

No. The Administration opposes vouchers for children to attend private schools. We are in favor of choice within the public school system, but we do not believe that public tax dollars should be used to send children to private schools. 90% of all American children go to public school and at a time of record enrollment this is where we need to invest public tax dollars.

7. Doesn't the Court's decision lend support to arguments that private school vouchers are constitutional?

No. The issue here was very different. The issue in Felton was whether providing services in the private schools creates excessive entanglement between government and religion. It did not involve vouchers or any money flowing to private schools or to parents. The control of the Title I program and its funds remains in the public sector. Felton only dealt with the narrow issue of where Title I services could be provided. Voucher programs, on the other hand, raise a variety of other legal issues, most notably whether those programs have the primary effect of advancing religion. The portion of the Court's decision in Agostini concluding that Title I does not advance religion does not break any new ground in the law in this area [CHECK DECISION] and therefore does not lend any new support to the argument that private school vouchers are constitutional.

(NOTE: We have not expressed any views previously on whether private school voucher programs are constitutional, and we are not involved in any of the pending litigation on this issue. It would probably be best to refrain from expressing any views on the constitutionality of vouchers--the analysis depends a great deal on the structure and facts of any specific program.)

8. Did the Administration ask the Court to reconsider its overall approach in Establishment Clause cases? For example, did you ask the Court to discard the three-part test from Lemon v. Kurtzman?

No. We believe that Felton was an aberrant decision that could be overruled on narrow grounds. The Court did not need to, and did not, reconsider its overall approach or overrule Lemon v. Kurtzman. [CHECK DECISION]

9. Isn't this case unique in that the Supreme Court has never previously overruled one of its decisions in the same case?

Yes. However, the Felton decision presented unusual circumstances that resulted in the loss of needed educational services to thousands of school children each year and was not consistent with nearly all of the Court's decisions both before and after the ruling.

10. Won't the Court's decision lead to a flood of litigation where losing parties try to get their decisions overruled.

We don't think so. This case is unusual in a number of respects. There was a continuing injunction against Title I services in private schools despite a clear trend by the Court to be less strict in this area, and five justices took the unusual step of stating in another decision (Kirvas Joel) that Felton should be reconsidered. The court system has safeguards against frivolous efforts to reopen old cases. The Supreme Court could simply decline to hear a case in that situation.

11. Is this process authorized?

Yes. The Court ruled that the vehicle used here (Rule 60(b) of the Federal Rules of Civil Procedure) was an appropriate one. [CHECK DECISION]

12. What will happen to all the mobile vans now in use?

Those decisions will be made by local public school districts, but generally the vans can be used for other educational purposes or disposed of. In many districts, the vans are leased so those districts will just have to end their lease arrangements.

13. What happens to the money appropriated by Congress for the vans and the other costs of implementing Aguilar v. Felton (so-called capital expenses)?

The capital expense funds already appropriated by Congress will still be available for this purpose, including the 41 million dollars that will become available for this purpose on July 1, 1997. Many school districts will continue to incur costs relating to vans and transportation of private school children as a result of the original Felton decision during a transition period. In the long term we hope to shift this funding to the classroom to respond to the increasing demand for Title I services.

14. When can school districts start to provide Title I services in religious schools?

The Supreme Court's decision is effective immediately. (However, in New York City, the injunction will need to be lifted by the district court before Title I services can provided in religious schools in that school district.) [CHECK DECISION]

(NOTE: With respect to other questions and details about implementation of the Court's decision, the Department will be issuing guidance in the next few weeks.)

Leslie_Thornton @ ed.gov
07/01/97 09:50:00 AM

Record Type: Record

To: William R. Kincaid

cc:
Subject: Re: SCt decision follow-up

FYI.

_____ Forward Header _____

Subject: Re: SCt decision follow-up
Author: Michelle Doyle at WDCE01
Date: 7/1/1997 10:39 AM

A memo from Tirrozzi went out to Chiefs with a cc to State Title I directors on Friday; it is going out to non-public school officials today. The guidance is nearly finalized and will go out mid-July. The guidance is a question and answer format of approximately 20 questions.

I have talked with Mary Jean regarding a meeting for public and non-public school officials with a focus on the big cities regarding the Felton decision. We are considering July 31.

There is a meeting of state Title I directors July 24-26 (I may be off by a day) where Mary Jean will talk about Felton and distribute the guidance. Also, there will be technical assistance on Felton at the three IASA regional conferences. I will be taking part in a meeting being held on Felton by the U.S. Catholic Conference on August 1 (part of the reason for choosing July 31 for the Department's meeting with public and private school officials). Also, I will be speaking on Felton at the meeting of the U.S. Catholic Conference Federal Assistance Advisory Committee in October.

I have not had any discussion regarding RWR's further follow up.

_____ Reply Separator _____

Subject: SCt decision follow-up
Author: Leslie Thornton at WDCB01
Date: 6/30/97 6:49 PM

Do you know where we are on this???

_____ Forward Header _____

Subject: SCt decision follow-up
Author: William_R._Kincaid@oa.eop.gov at Internet
Date: 6/30/1997 3:28 PM

Message Creation Date was at 30-JUN-1997 15:28:00

Leslie--

Have you heard anything further from Michelle Doyle or Steve Winnick on plans/timeline for disseminating guidance and other follow-up to the Title I decision? And has there been any further discussion on whether Riley should follow up in some way?

Thanks.

Leslie_Thornton @ ed.gov
07/01/97 09:03:00 AM

Record Type: Record

To: William R. Kincaid

cc:
Subject: Re: SCt decision follow-up

Bill --

FYI.

_____ Forward Header _____
Subject: Re: SCt decision follow-up
Author: Steve Winnick at WDCE05
Date: 7/1/1997 9:11 AM

Leslie,

gerry tirozzi sent a memo to chief state school officers advising them of the decision and promising guidance within a few weeks. OGC has drafted and circulated internally for comment the guidance. We need to send it to Justice for review. Also, we are checking whether it needs to be cleared by OMB. If we can get prompt clearance from Justice/OMB, we should be able to send it out by later this week or early next week. Do you also want to send it to Bill for comment? I'll send you copies as soon as I retrieve the current versions.

As to follow-up activities for Secretary Riley, I think it would be appropriate for him to reach out to the Catholic Conference and other groups with whom we cooperated on the case and discuss what we will be doing (and, in effect, reap some of the credit for this victory). Also, given the Secretary's effort to reach out to the religious community, it may be worth discussing where we are in light of the Felton decision and the RFRA decision, which was of great concern to that community.

Steve W.

Do you know where we are on this???

_____ Forward Header _____

Subject: SCt decision follow-up
Author: William_R._Kincaid@oa.eop.gov at Internet
Date: 6/30/1997 3:28 PM

Message Creation Date was at 30-JUN-1997 15:28:00

Leslie--

Have you heard anything further from Michelle Doyle or Steve Winnick on plans/timeline for disseminating guidance and other follow-up to the Title I decision? And has there been any further discussion on whether Riley should follow up in some way?

Thanks.

For Release
June 24, 1997

Contact: Rick Miller
(202) 401-3026

STATEMENT BY U.S. SECRETARY OF EDUCATION RICHARD W. RILEY
On Agostini v. Felton and Vouchers

The Supreme Court's decision yesterday in Agostini v. Felton did not address the constitutionality of educational vouchers for private school children. The decision only concerned the narrow issue of where Title I teachers employed by the public schools can provide supplemental educational services to parochial school children. Without changing established church-state principles, the Court reached the common sense result of permitting these public, secular, supplemental services to be moved out of vans into school classrooms, with appropriate safeguards to ensure there is no improper appearance of state endorsement of religion. The Administration argued for and strongly supports the Court's decision.

At the same time, the Administration remains firmly opposed, on policy grounds, to educational vouchers. While we support choice within the public school system, private school vouchers would drain much-needed resources from public schools at a time of increasing enrollments and demands on our public school systems. Our limited resources should be focused on improving our public schools, which will continue to serve the overwhelming majority of students. Private school vouchers also would make parochial schools less parochial and private schools less private -- subjecting them to public supervision and compromising their independence.

1ST CASE of Level 1 printed in FULL format.

RACHEL AGOSTINI, ET AL., PETITIONERS 96-552 v. BETTY-LOUISE FELTON ET AL. CHANCELLOR, BOARD OF EDUCATION OF THE CITY OF NEW YORK, ET AL., PETITIONERS 96-553 v. BETTY-LOUISE FELTON ET AL.

Nos. 96-552, 96-553

SUPREME COURT OF THE UNITED STATES

1997 U.S. LEXIS 4000

April 15, 1997, Argued

June 23, 1997 * , Decided

* Together with No. 96-553, Chancellor, Board of Education of the City of New York, et al. v. Felton et al., also on certiorari to the same court.

NOTICE: [*1] This preliminary LEXIS version is unedited and subject to revision.

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

SYLLABUS:

In Aguilar v. Felton, 473 U.S. 402, 413, this Court held that New York City's program that sent public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to Title I of the Elementary and Secondary Education Act of 1965 necessitated an excessive entanglement of church and state and violated the First Amendment's Establishment Clause. On remand, the District Court entered a permanent injunction reflecting that ruling. Some 10 years later, petitioners--the parties bound by the injunction--filed motions in the same court seeking relief from the injunction's operation under Federal Rule of Civil Procedure 60(b)(5). They emphasized the significant [*2] costs of complying with Aguilar and the assertions of five Justices in Board of Ed. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687, that Aguilar should be reconsidered, and argued that relief was proper under Rule 60(b)(5) and Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 388, because Aguilar cannot be squared with this Court's intervening Establishment Clause jurisprudence and is no longer good law. The District Court denied the motion on the merits, declaring that Aguilar's demise has "not yet occurred." The Second Circuit agreed and affirmed.

Held:

1. A federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees under a program containing safeguards such as those

present in New York City's Title I program. Accordingly, Aguilar, as well as that portion of its companion case, School Dist. of Grand Rapids v. Ball, 473 U.S. 373, addressing a "Shared Time" program, are no longer good law. Pp. 8-31.

(a) Under [*3] Rufo, supra, at 384, Rule 60(b)(5)--which states that, "upon such terms as are just, the court may relieve a party . . . from a final judgment . . . [when] it is no longer equitable that the judgment should have prospective application"--authorizes relief from an injunction if the moving party shows a significant change either in factual conditions or in law. Since the exorbitant costs of complying with the injunction were known at the time Aguilar was decided, see, e.g., 473 U. S., at 430-431 (O'CONNOR, J., dissenting), they do not constitute a change in factual conditions sufficient to warrant relief, accord, Rufo, supra, at 385. Also unavailing is the fact that five Justices in Kiryas Joel expressed the view that Aguilar should be reconsidered or overruled. Because the question of Aguilar's propriety was not before the Court in that case, those Justices' views cannot be said to have effected a change in Establishment Clause law. Thus, petitioners' ability to satisfy Rule 60(b)(5)'s prerequisites hinges on whether the Court's later Establishment Clause cases have so undermined Aguilar that it is no longer good law. Pp. 8-11.

(b) To answer that [*4] question, it is necessary to understand the rationale upon which Aguilar and Ball rested. One of the programs evaluated in Ball was the Grand Rapids, Michigan, "Shared Time" program, which is analogous to New York City's Title I program. Applying the three-part Lemon v. Kurtzman, 403 U.S. 602, 612-613, test, the Ball Court acknowledged that the "Shared Time" program satisfied the test's first element in that it served a purely secular purpose, 473 U. S., at 383, but ultimately concluded that it had the impermissible effect of advancing religion, in violation of the test's second element, id., at 385. That conclusion rested on three assumptions: (i) any public employee who works on a religious school's premises is presumed to inculcate religion in her work, see id., at 385-389; (ii) the presence of public employees on private school premises creates an impermissible symbolic union between church and state, see id, at 389, 391; and (iii) any public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking, see [*5] id., at 385, 393, 395-397. Additionally, Aguilar set forth a fourth assumption: that New York City's Title I program necessitates an excessive government entanglement with religion, in violation of the Lemon test's third element, because public employees who teach on religious school premises must be closely monitored to ensure that they do not inculcate religion. See 473 U. S., at 409, 412-414. Pp. 11-16.

(c) The Court's more recent cases have undermined the assumptions upon which Ball and Aguilar relied. Contrary to Aguilar's conclusion, placing full-time government employees on parochial school campuses does not as a matter of law have the impermissible effect of advancing religion through indoctrination. Subsequent cases have modified in two significant respects the approach the Court uses to assess whether the government has impermissibly advanced religion by inculcating religious beliefs. First, the Court has abandoned Ball's presumption that public employees placed on parochial school grounds will inevitably inculcate religion or that their presence constitutes a symbolic union between government and religion. Zobrest v. Catalina Foothills [*6] School Dist., 509 U.S. 1, 12-13. No evidence has ever shown that any New York City instructor teaching on parochial school premises attempted to inculcate

religion in students. Second, the Court has departed from Ball's rule that all government aid that directly aids the educational function of religious schools is invalid. Witters v. Washington Dept. of Servs. for Blind, 474 U.S. 481, 487; Zobrest, supra, at 10, 12. In all relevant respects, the provision of the instructional services here at issue is indistinguishable from the provision of a sign-language interpreter in Zobrest. Zobrest and Witters make clear that, under current law, the "Shared Time" program in Ball and New York City's Title I program will not, as a matter of law, be deemed to have the effect of advancing religion through indoctrination. Thus, both this Court's precedent and its experience require rejection of the premises upon which Ball relied. Pp. 16-24.

(d) New York City's Title I program does not give aid recipients any incentive to modify their religious beliefs or practices in order to obtain program services. Although Ball and Aguilar completely ignored this [*7] consideration, other Establishment Clause cases before and since have examined the criteria by which an aid program identifies its beneficiaries to determine whether the criteria themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination. Cf. e.g., Witters, supra, at 488; Zobrest, supra, at 10. Such an incentive is not present where, as here, the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis. Under such circumstances, the aid is less likely to have the effect of advancing religion. See Widmar v. Vincent, 454 U.S. 263, 274. New York City's Title I services are available to all children who meet the eligibility requirements, no matter what their religious beliefs or where they go to school. Pp. 24-26.

(e) The Aguilar Court erred in concluding that New York City's Title I program resulted in an excessive entanglement between church and state. Regardless of whether entanglement is considered in the course of assessing if a program has an impermissible [*8] effect of advancing religion, Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 674, or as a factor separate and apart from "effect," Lemon v. Kurtzman, 403 U. S., 612-613, the considerations used to assess its excessiveness are similar: The Court looks to the character and purposes of the benefited institutions, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority. Id., at 615. It is simplest to recognize why entanglement is significant and treat it--as the Court did in Walz--as an aspect of the inquiry into a statute's effect. The Aguilar Court's finding of "excessive" entanglement rested on three grounds: (i) the program would require "pervasive monitoring by public authorities" to ensure that Title I employees did not inculcate religion; (ii) the program required "administrative cooperation" between the government and parochial schools; and (iii) the program might increase the dangers of "political divisiveness." 473 U. S., at 413-414. Under the Court's current Establishment Clause understanding, the last two considerations are insufficient to create an "excessive entanglement" [*9] because they are present no matter where Title I services are offered, but no court has held that Title I services cannot be offered off-campus. E.g., Aguilar, supra. Further, the first consideration has been undermined by Zobrest. Because the Court in Zobrest abandoned the presumption that public employees will inculcate religion simply because they happen to be in a sectarian environment, there is no longer any need to assume that pervasive monitoring of Title I teachers is required. There is no suggestion in the record that the system New York City has in place to monitor Title I employees is insufficient to prevent or to detect inculcation. Moreover, the Court has failed to find excessive entanglement in cases

involving far more onerous burdens on religious institutions. See Bowen v. Kendrick, 487 U.S. 589, 615-617. Pp. 26-29.

(f) Thus, New York City's Title I program does not run afoul of any of three primary criteria the Court currently uses to evaluate whether government aid has the effect of advancing religion: It does not result in governmental indoctrination, define its recipients by reference to religion, or create an excessive entanglement. [*10] Nor can this carefully constrained program reasonably be viewed as an endorsement of religion. Pp. 28-29.

(g) The stare decisis doctrine does not preclude this Court from recognizing the change in its law and overruling Aguilar and those portions of Ball that are inconsistent with its more recent decisions. E.g., United States v. Gaudin, 515 U.S. 506, . Moreover, in light of the Court's conclusion that Aguilar would be decided differently under current Establishment Clause law, adherence to that decision would undoubtedly work a "manifest injustice," such that the law of the case doctrine does not apply. Accord, Davis v. United States, 417 U.S. 333, 342. Pp. 29-31.

2. The significant change in this Court's post-Aguilar Establishment Clause law entitles petitioners to relief under Rule 60(b)(5). The Court's general practice is to apply the rule of law it is announcing to the parties before it, Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 485, even when it is overruling a case, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, . The Court neither acknowledges nor holds that other courts [*11] should ever conclude that its more recent cases have, by implication, overruled an earlier precedent. Rather, lower courts should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions. Rodriguez de Quijas, supra, at 484. Respondents' various arguments as to why relief should not be granted in this case--that a different analysis is required because the Court is here reviewing for abuse of discretion the District Court's denial of relief; that petitioners' unprecedented use of Rule 60(b)(5) as a vehicle for effecting changes in the law, rather than as a means of recognizing them, will encourage litigants to burden the federal courts with a deluge of Rule 60(b)(5) motions; that petitioners' use of Rule 60(b) in this context will erode the Court's institutional integrity; and that the Court should wait for a "better vehicle" in which to evaluate Aguilar's continuing vitality--are not persuasive. Pp. 31-34.

101 F. 3d 1394, reversed and remanded.

JUDGES: O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. SOUTER, J., filed a dissenting opinion, [*12] in which STEVENS and GINSBURG, JJ., joined, and in which BREYER, J., joined as to Part II. GINSBURG, J., filed a dissenting opinion, in which STEVENS, SOUTER, and BREYER, JJ., joined.

OPINIONBY: O'CONNOR

OPINION: JUSTICE O'CONNOR delivered the opinion of the Court.

In Aguilar v. Felton, 473 U.S. 402 (1985), this Court held that the Establishment Clause of the First Amendment barred the city of New York from sending public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to a congressionally mandated

program. On remand, the District Court for the Eastern District of New York entered a permanent injunction reflecting our ruling. Twelve years later, petitioners--the parties bound by that injunction--seek relief from its operation. Petitioners maintain that Aguilar cannot be squared with our intervening Establishment Clause jurisprudence and ask that we explicitly recognize what our more recent cases already dictate: Aguilar is no longer good law. We agree with petitioners that Aguilar is not consistent with our subsequent Establishment Clause decisions and further conclude that, on the facts presented here, petitioners [*13] are entitled under Federal Rule of Civil Procedure 60(b)(5) to relief from the operation of the District Court's prospective injunction.

I

In 1965, Congress enacted Title I of the Elementary and Secondary Education Act of 1965, 79 Stat. 27, as modified, 20 U.S.C. @ 6301 et seq., to "provide full educational opportunity to every child regardless of economic background." S. Rep. No. 146, 89th Cong., 1st Sess. 5 (1965) (hereinafter Title I). Toward that end, Title I channels federal funds, through the States, to "local educational agencies" (LEA's). 20 U.S.C. @@ 6311, 6312. * The LEA's spend these funds to provide remedial education, guidance, and job counseling to eligible students. @@ 6315(c)(1)(A) (LEA's must use funds to "help participating children meet . . . State student performance standards"), 6315(c)(1)(E) (LEA's may use funds to provide "counseling, mentoring, and other pupil services"); see also @@ 6314(b)(1)(B)(i), (iv). An eligible student is one (i) who resides within the attendance boundaries of a public school located in a low-income area, @ 6313(a)(2)(B); and (ii) who is failing, or is at risk of failing, the State's student performance standards, @ 6315(b)(1)(B). [*14] Title I funds must be made available to all eligible children, regardless of whether they attend public schools, @ 6312(c)(1)(F), and the services provided to children attending private schools must be "equitable in comparison to services and other benefits for public school children." @ 6321(a)(3); see @ 6321(a)(1); 34 CFR @@ 200.10(a), 200.11(b) (1996).

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* Title I has been reenacted, in varying forms, over the years, most recently in the Improving America's Schools Act of 1994, 108 Stat. 3518. We will refer to the current Title I provisions, which do not differ meaningfully for our purposes from the Title I program referred to in our previous decision in this litigation.

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An LEA providing services to children enrolled in private schools is subject to a number of constraints that are not imposed when it provides aid to public schools. Title I services may be provided only to those private school students eligible for aid, and cannot be used to provide services on a "school-wide" basis. Compare 34 CFR @ [*15] 200.12(b) with 20 U.S.C. @ 6314 (allowing "school-wide" programs at public schools). In addition, the LEA must retain complete control over Title I funds; retain title to all materials used to provide Title I services; and provide those services through public employees or other persons independent of the private school and any religious institution. @@ 6321(c)(1), (2). The Title I services themselves must be "secular, neutral, and nonideological." @ 6321(a)(2), and must "supplement, and in no case

supplant, the level of services" already provided by the private school, 34 CFR @ 200.12(a) (1996).

Petitioner Board of Education of the City of New York (Board), an LEA, first applied for Title I funds in 1966 and has grappled ever since with how to provide Title I services to the private school students within its jurisdiction. Approximately 10% of the total number of students eligible for Title I services are private school students. See App. 38, 620. Recognizing that more than 90% of the private schools within the Board's jurisdiction are sectarian, Felton v. Secretary, United States Dept. of Ed., 739 F. 2d 48, 51 (CA2 1984), the Board initially arranged to transport children [*16] to public schools for after-school Title I instruction. But this enterprise was largely unsuccessful. Attendance was poor, teachers and children were tired, and parents were concerned for the safety of their children. Ibid. The Board then moved the after-school instruction onto private school campuses, as Congress had contemplated when it enacted Title I. See Wheeler v. Barrera, 417 U.S. 402, 422 (1974). After this program also yielded mixed results, the Board implemented the plan we evaluated in Aguilar v. Felton, 473 U.S. 402 (1985).

That plan called for the provision of Title I services on private school premises during school hours. Under the plan, only public employees could serve as Title I instructors and counselors. Id., at 406. Assignments to private schools were made on a voluntary basis and without regard to the religious affiliation of the employee or the wishes of the private school. Ibid.; 739 F. 2d, at 53. As the Court of Appeals in Aguilar observed, a large majority of Title I teachers worked in nonpublic schools with religious affiliations different from their own. 473 U. S., at 406. The vast majority of Title I teachers also moved [*17] among the private schools, spending fewer than five days a week at the same school. Ibid.

Before any public employee could provide Title I instruction at a private school, she would be given a detailed set of written and oral instructions emphasizing the secular purpose of Title I and setting out the rules to be followed to ensure that this purpose was not compromised. Specifically, employees would be told that (i) they were employees of the Board and accountable only to their public school supervisors; (ii) they had exclusive responsibility for selecting students for the Title I program and could teach only those children who met the eligibility criteria for Title I; (iii) their materials and equipment would be used only in the Title I program; (iv) they could not engage in team-teaching or other cooperative instructional activities with private school teachers; and (v) they could not introduce any religious matter into their teaching or become involved in any way with the religious activities of the private schools. Ibid. All religious symbols were to be removed from classrooms used for Title I services. 473 U. S., at 407. The rules acknowledged that it might be necessary [*18] for Title I teachers to consult with a student's regular classroom teacher to assess the student's particular needs and progress, but admonished instructors to limit those consultations to mutual professional concerns regarding the student's education. 739 F. 2d, at 53. To ensure compliance with these rules, a publicly employed field supervisor was to attempt to make at least one unannounced visit to each teacher's classroom every month. 473 U. S., at 407.

In 1978, six federal taxpayers--respondents here--sued the Board in the District Court for the Eastern District of New York. Respondents sought declaratory and injunctive relief, claiming that the Board's Title I program

violated the Establishment Clause. The District Court permitted the parents of a number of parochial school students who were receiving Title I services to intervene as codefendants. The District Court granted summary judgment for the Board, but the Court of Appeals for the Second Circuit reversed. While noting that the Board's Title I program had "done so much good and little, if any, detectable harm," 739 F. 2d, at 72, the Court of Appeals nevertheless held that Meek v. Pittenger, 421 U.S. 349 (1975), [*19] and Wolman v. Walter, 433 U.S. 229 (1977), compelled it to declare the program unconstitutional. In a 5-4 decision, this Court affirmed on the ground that the Board's Title I program necessitated an "excessive entanglement of church and state in the administration of [Title I] benefits." 473 U. S., at 414. On remand, the District Court permanently enjoined the Board

"from using public funds for any plan or program under [Title I] to the extent that it requires, authorizes or permits public school teachers and guidance counselors to provide teaching and counseling services on the premises of sectarian schools within New York City." App. to Pet. for Cert. in No. 96-553, pp. A25-A26.

The Board, like other LEA's across the United States, modified its Title I program so it could continue serving those students who attended private religious schools. Rather than offer Title I instruction to parochial school students at their schools, the Board reverted to its prior practice of providing instruction at public school sites, at leased sites, and in mobile instructional units (essentially vans converted into classrooms) parked near the sectarian school. The Board also offered [*20] computer-aided instruction, which could be provided "on premises" because it did not require public employees to be physically present on the premises of a religious school. App. 315.

It is not disputed that the additional costs of complying with Aguilar's mandate are significant. Since the 1986-1987 school year, the Board has spent over $ 100 million providing computer-aided instruction, leasing sites and mobile instructional units, and transporting students to those sites. App. 333 ($ 93.2 million spent between 1986-1987 and 1993-1994 school years); id., at 336 (annual additional costs average around $ 15 million). Under the Secretary of Education's regulations, those costs "incurred as a result of implementing alternative delivery systems to comply with the requirements of Aguilar v. Felton" and not paid for with other state or federal funds are to be deducted from the federal grant before the Title I funds are distributed to any student. 34 CFR @ 200.27(c) (1996). These "Aguilar costs" thus reduce the amount of Title I money an LEA has available for remedial education, and LEA's have had to cut back on the number of students who receive Title I benefits. [*21] From Title I funds available for New York City children between the 1986-1987 and the 1993-1994 school years, the Board had to deduct $ 7.9 million "off-the-top" for compliance with Aguilar. App. 333. When Aguilar was handed down, it was estimated that some 20,000 economically disadvantaged children in the city of New York, see 473 U. S., at 431 (O'CONNOR, J., dissenting), and some 183,000 children nationwide, see L. Levy, The Establishment Clause 176 (1986), would experience a decline in Title I services. See also S. Rep. No. 100-222, p. 14 (1987) (estimating that Aguilar costs have "resulted in a decline of about 35 percent in the number of private school children who are served").

In October and December of 1995, petitioners--the Board and a new group of parents of parochial school students entitled to Title I services--filed motions in the District Court seeking relief under Federal Rule of Civil Procedure

60(b) from the permanent injunction entered by the District Court on remand from our decision in Aguilar. Petitioners argued that relief was proper under Rule 60(b)(5) and our decision in Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 388 (1992), [*22] because the "decisional law [had] changed to make legal what the [injunction] was designed to prevent." Specifically, petitioners pointed to the statements of five Justices in Board of Ed. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687 (1994), calling for the overruling of Aguilar. The District Court denied the motion. The District Court recognized that petitioners, "at bottom," sought "a procedurally sound vehicle to get the [propriety of the injunction] back before the Supreme Court," App. to Pet. for Cert. in No. 96-553, p. A12, and concluded that the "the Board had properly proceeded under Rule 60(b) to seek relief from the injunction." Id., at A19. Despite its observations that "the landscape of Establishment Clause decisions has changed," id., at A10, and that "there may be good reason to conclude that Aguilar's demise is imminent," id., at A20, the District Court denied the Rule 60(b) motion on the merits because Aguilar's demise had "not yet occurred." The Court of Appeals for the Second Circuit "affirmed substantially for the reasons stated in" the District Court's opinion. Id., at 5a. We granted certiorari, 519 U.S. [*23] (1997), and now reverse.

II

The question we must answer is a simple one: Are petitioners entitled to relief from the District Court's permanent injunction under Rule 60(b)? Rule 60(b)(5), the subsection under which petitioners proceeded below, states:

"On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment [or] order . . . [when] it is no longer equitable that the judgment should have prospective application."

In Rufo v. Inmates of Suffolk County Jail, supra, at 384, we held that it is appropriate to grant a Rule 60(b)(5) motion when the party seeking relief from an injunction or consent decree can show "a significant change either in factual conditions or in law." A court may recognize subsequent changes in either statutory or decisional law. See Railway Employees v. Wright, 364 U.S. 642, 652-653 (1961) (consent decree should be vacated under Rule 60(b) in light of amendments to the Railway Labor Act); Rufo, supra, at 393 (vacating denial of Rule 60(b)(5) motion and remanding so District Court could consider whether consent decree should be modified in light of Bell v. Wolfish, 441 [*24] U. S. 520 (1979)); Pasadena City Bd. of Ed. v. Spangler, 427 U.S. 424, 437-438 (1976) (injunction should have been vacated in light of Swann v. Charlotte-Mecklenberg Bd. of Ed., 402 U.S. 1 (1971)). A court errs when it refuses to modify an injunction or consent decree in light of such changes. See Wright, supra, at 647 ("The court cannot be required to disregard significant changes in law or facts if it is satisfied that what it has been doing has been turned through changed circumstances into an instrument of wrong") (internal quotation marks omitted).

Petitioners point to three changes in the factual and legal landscape that they believe justify their claim for relief under Rule 60(b)(5). They first contend that the exorbitant costs of complying with the District Court's injunction constitute a significant factual development warranting modification of the injunction. See Brief for Petitioner Agostini et al. 38-40. Petitioners also argue that there have been two significant legal developments since Aguilar was decided: a majority of Justices have expressed their views that Aguilar

should be reconsidered or overruled, see supra, at 7; and [*25] Aguilar has in any event been undermined by subsequent Establishment Clause decisions, including Witters v. Washington Dept. of Servs. for Blind, 474 U.S. 481 (1986), Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993), and Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. (1995).

Respondents counter that, because the costs of providing Title I services off-site were known at the time Aguilar was decided, and because the relevant case law has not changed, the District Court did not err in denying petitioners' motions. Obviously, if neither the law supporting our original decision in this litigation nor the facts have changed, there would be no need to decide the propriety of a Rule 60(b)(5) motion. Accordingly, we turn to the threshold issue whether the factual or legal landscape has changed since we decided Aguilar.

We agree with respondents that petitioners have failed to establish the significant change in factual conditions required by Rufo. Both petitioners and this Court were, at the time Aguilar was decided, aware that additional costs would be incurred if Title I services could not be provided in parochial [*26] school classrooms. See App. 66-68 (Defendants' Joint Statement of Material Facts Not In Dispute, filed in 1982, detailing costs of providing off-premises services); Aguilar, 473 U. S., at 430-431 (O'CONNOR, J., dissenting) (observing that costs of complying with Aguilar decision would likely cause a decline in Title I services for 20,000 New York City students). That these predictions of additional costs turned out to be accurate does not constitute a change in factual conditions warranting relief under Rule 60(b)(5). Accord, Rufo, 502 U. S., at 385 ("Ordinarily . . . modification should not be granted where a party relies upon events that actually were anticipated at the time [the order was entered]").

We also agree with respondents that the statements made by five Justices in Kiryas Joel do not, in themselves, furnish a basis for concluding that our Establishment Clause jurisprudence has changed. In Kiryas Joel, we considered the constitutionality of a New York law that carved out a public school district to coincide with the boundaries of the village of Kiryas Joel, which was an enclave of the Satmar Hasidic sect. Before the new district was created, Satmar [*27] children wishing to receive special educational services under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. @ 1400 et seq., could receive those services at public schools located outside the village. Because Satmar parents rarely permitted their children to attend those schools, New York created a new public school district within the boundaries of the village so that Satmar children could stay within the village but receive IDEA services on public school premises from publicly employed instructors. In the course of our opinion, we observed that New York had created the special school district in response to our decision in Aguilar, which had required New York to cease providing IDEA services to Satmar children on the premises of their private religious schools. 512 U. S., at 692. Five Justices joined opinions calling for reconsideration of Aguilar. See 512 U. S., at 718 (O'CONNOR, J., concurring in part and concurring in judgment); id., at 731 (KENNEDY, J., concurring in judgment); id., at 750 (SCALIA, J., dissenting, joined by REHNQUIST, C. J. and THOMAS, J.). But the question of Aguilar's propriety was not before us. The views of five [*28] Justices that the case should be reconsidered or overruled cannot be said to have effected a change in Establishment Clause law.

In light of these conclusions, petitioners' ability to satisfy the prerequisites of Rule 60(b)(5) hinges on whether our later Establishment Clause *cases* have so undermined Aguilar that it is no longer good law. We now turn to that inquiry.

III

A

In order to evaluate whether Aguilar has been eroded by our subsequent Establishment Clause cases, it is necessary to understand the rationale upon which Aguilar, as well as its companion case, School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985), rested.

In Ball, the Court evaluated two programs implemented by the School District of Grand Rapids, Michigan. The district's Shared Time program, the one most analogous to Title I, provided remedial and "enrichment" classes, at public expense, to students attending nonpublic schools. The classes were taught during regular school hours by publicly employed teachers, using materials purchased with public funds, on the premises of nonpublic schools. The Shared Time courses were in subjects designed to supplement the "core curriculum" of [*29] the nonpublic schools. Id., at 375-376. Of the 41 nonpublic schools eligible for the program, 40 were "'pervasively sectarian'" in character--that is, "the purpose of [those] schools [was] to advance their particular religions." Id., at 379.

The Court conducted its analysis by applying the three-part test set forth in Lemon v. Kurtzman, 403 U.S. 602 (1971):

"First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." 473 U.S. 382-383 (quoting Lemon, supra, at 612-613) (citations and internal quotation marks omitted).

The Court acknowledged that the Shared Time program served a purely secular purpose, thereby satisfying the first part of the so-called Lemon test. 473 U. S., at 383. Nevertheless, it ultimately concluded that the program had the impermissible effect of advancing religion. Id., at 385.

The Court found that the program violated the Establishment Clause's prohibition against "government-financed or government-sponsored indoctrination into the [*30] beliefs of a particular religious faith" in at least three ways. Ibid. First, drawing upon the analysis in Meek v. Pittenger, 421 U.S. 349 (1975), the Court observed that "the teachers participating in the programs may become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs." 473 U. S., at 385. Meek invalidated a Pennsylvania program in which full-time public employees provided supplemental "auxiliary services"--remedial and accelerated instruction, guidance counseling and testing, and speech and hearing services--to nonpublic school children at their schools. 473 U. S., at 367-373. Although the auxiliary services themselves were secular, they were mostly dispensed on the premises of parochial schools, where "an atmosphere dedicated to the advancement of religious belief [was] constantly maintained." Meek, 421 U. S., at 371. Instruction in that atmosphere was sufficient to create "the potential for impermissible fostering of religion." Id., at 372. Cf. Wolman v. Walter, 433 U. S., at 248 (upholding programs

employing public employees to provide remedial instruction and guidance counseling to nonpublic school [*31] children at sites away from the nonpublic school).

The Court concluded that Grand Rapids' program shared these defects. 473 U. S., at 386. As in Meek, classes were conducted on the premises of religious schools. Accordingly, a majority found a "'substantial risk'" that teachers--even those who were not employed by the private schools--might "subtly (or overtly) conform their instruction to the [pervasively sectarian] environment in which they [taught]." 473 U. S., at 388. The danger of "state-sponsored indoctrination" was only exacerbated by the school district's failure to monitor the courses for religious content. Id., at 387. Notably, the Court disregarded the lack of evidence of any specific incidents of religious indoctrination as largely irrelevant, reasoning that potential witnesses to any indoctrination--the parochial school students, their parents, or parochial school officials--might be unable to detect or have little incentive to report the incidents. Id., at 388-389.

The presence of public teachers on parochial school grounds had a second, related impermissible effect: It created a "graphic symbol of the 'concert or union or dependency' of church and [*32] state," id., at 391 (quoting Zorach v. Clauson, 343 U.S. 306, 312 (1952)), especially when perceived by "children in their formative years," 473 U. S., at 390. The Court feared that this perception of a symbolic union between church and state would "convey a message of government endorsement . . . of religion" and thereby violate a "core purpose" of the Establishment Clause. Id., at 389.

Third, the Court found that the Shared Time program impermissibly financed religious indoctrination by subsidizing "the primary religious mission of the institutions affected." Id., at 385. The Court separated its prior decisions evaluating programs that aided the secular activities of religious institutions into two categories: those in which it concluded that the aid resulted in an effect that was "indirect, remote, or incidental" (and upheld the aid); and those in which it concluded that the aid resulted in "a direct and substantial advancement of the sectarian enterprise" (and invalidated the aid). Id., at 393 (internal quotation marks omitted). In light of Meek and Wolman, Grand Rapids' program fell into the latter category. In those cases, the Court ruled that [*33] a state loan of instructional equipment and materials to parochial schools was an impermissible form of "direct aid" because it "advanced the primary, religion-oriented educational function of the sectarian school," id., at 395 (citations and quotation marks omitted), by providing "in-kind" aid (e.g., instructional materials) that could be used to teach religion and by freeing up money for religious indoctrination that the school would otherwise have devoted to secular education. Given the holdings in Meek and Wolman, the Shared Time program--which provided teachers as well as instructional equipment and materials--was surely invalid. Id., at 395. The Ball Court likewise placed no weight on the fact that the program was provided to the student rather than to the school. Nor was the impermissible effect mitigated by the fact that the program only supplemented the courses offered by the parochial schools. Id., at 395-397.

The New York City Title I program challenged in Aguilar closely resembled the Shared Time program struck down in Ball, but the Court found fault with an aspect of the Title I program not present in Ball: The Board had "adopted [*34] a system for monitoring the religious content of publicly funded Title

I classes in the religious schools." 473 U. S., at 409. Even though this monitoring system might prevent the Title I program from being used to inculcate religion, the Court concluded, as it had in Lemon and Meek, that the level of monitoring necessary to be "certain" that the program had an exclusively secular effect would "inevitably result in the excessive entanglement of church and state," thereby running afoul of Lemon's third prong. 473 U. S., at 409; see Lemon, 403 U. S., at 619 (invalidating Rhode Island program on entanglement grounds because "[a] comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that the restrictions [against indoctrination] are obeyed"); Meek, 421 U. S., at 370 (invalidating Pennsylvania program on entanglement grounds because excessive monitoring would be required for the State to be certain that public school officials do not inculcate religion). In the majority's view, New York City's Title I program suffered from the "same critical elements of entanglement" present in Lemon and Meek: the aid was provided [*35] "in a pervasively sectarian environment . . . in the form of teachers," requiring "ongoing inspection . . . to ensure the absence of a religious message." 473 U. S., at 412. Such "pervasive monitoring by public authorities in the sectarian schools infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement." Id., at 413. The Court noted two further forms of entanglement inherent in New York City's Title I program: the "administrative cooperation" required to implement Title I services and the "dangers of political divisiveness" that might grow out of the day-to-day decisions public officials would have to make in order to provide Title I services. Id., at 413-414.

Distilled to essentials, the Court's conclusion that the Shared Time program in Ball had the impermissible effect of advancing religion rested on three assumptions: (i) any public employee who works on the premises of a religious school is presumed to inculcate religion in her work; (ii) the presence of public employees on private school premises creates a symbolic union between church and state; and (iii) any and all public aid that directly aids the educational [*36] function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking. Additionally, in Aguilar there was a fourth assumption: that New York City's Title I program necessitated an excessive government entanglement with religion because public employees who teach on the premises of religious schools must be closely monitored to ensure that they do not inculcate religion.

B

Our more recent cases have undermined the assumptions upon which Ball and Aguilar relied. To be sure, the general principles we use to evaluate whether government aid violates the Establishment Clause have not changed since Aguilar was decided. For example, we continue to ask whether the government acted with the purpose of advancing or inhibiting religion, and the nature of that inquiry has remained largely unchanged. See Witters, 474 U. S., at 485-486; Bowen v. Kendrick, 487 U.S. 589, 602-604 (1988) (concluding that Adolescent Family Life Act had a secular purpose); Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens, 496 U.S. 226, 248-249 (1990) (concluding that Equal Access [*37] Act has a secular purpose); cf. Edwards v. Aguillard, 482 U.S. 578 (1987) (striking down Louisiana law that required creationism to be discussed with evolution in public schools because the law lacked a legitimate secular purpose). Likewise, we continue to explore whether the aid has the "effect" of advancing or inhibiting religion. What has changed since we decided Ball and

Aguilar is our understanding of the criteria used to assess whether aid to religion has an impermissible effect.

1

As we have repeatedly recognized, government inculcation of religious beliefs has the impermissible effect of advancing religion. Our cases subsequent to Aguilar have, however, modified in two significant respects the approach we use to assess indoctrination. First, we have abandoned the presumption erected in Meek and Ball that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion. In Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993), we examined whether the IDEA, 20 U.S.C. @ 1400 et seq. [*38] , was constitutional as applied to a deaf student who sought to bring his state-employed sign-language interpreter with him to his Roman Catholic high school. We held that this was permissible, expressly disavowing the notion that "the Establishment Clause [laid] down [an] absolute bar to the placing of a public employee in a sectarian school." 509 U. S., at 13. "Such a flat rule, smacking of antiquated notions of 'taint,' would indeed exalt form over substance." Ibid. We refused to presume that a publicly employed interpreter would be pressured by the pervasively sectarian surroundings to inculcate religion by "adding to [or] subtracting from" the lectures translated. Ibid. In the absence of evidence to the contrary, we assumed instead that the interpreter would dutifully discharge her responsibilities as a full-time public employee and comply with the ethical guidelines of her profession by accurately translating what was said. Id., at 12. Because the only government aid in Zobrest was the interpreter, who was herself not inculcating any religious messages, no government indoctrination took place and we were able to conclude that "the provision of such [*39] assistance [was] not barred by the Establishment Clause." Ibid. Zobrest therefore expressly rejected the notion--relied on in Ball and Aguilar--that, solely because of her presence on private school property, a public employee will be presumed to inculcate religion in the students. Zobrest also implicitly repudiated another assumption on which Ball and Aguilar turned: that the presence of a public employee on private school property creates an impermissible "symbolic link" between government and religion.

JUSTICE SOUTER contends that Zobrest did not undermine the "presumption of inculcation" erected in Ball and Aguilar, and that our conclusion to the contrary rests on a "mistaken reading" of Zobrest. Post, at 9. In his view, Zobrest held that the Establishment Clause tolerates the presence of public employees in sectarian schools "only in . . . limited circumstances"--i.e., when the employee "simply translates for one student the material presented to the class for the benefit of all students." Post, at 10. The sign-language interpreter in Zobrest is unlike the remedial instructors in Ball and Aguilar because signing, [*40] JUSTICE SOUTER explains, "[cannot] be understood as an opportunity to inject religious content in what [is] supposed to be secular instruction." Ibid. He is thus able to conclude that Zobrest is distinguishable from--and therefore perfectly consistent with--Ball and Aguilar.

In Zobrest, however, we did not expressly or implicitly rely upon the basis JUSTICE SOUTER now advances for distinguishing Ball and Aguilar. If we had thought that signers had no "opportunity to inject religious content" into their translations, we would have had no reason to consult the record for evidence of inaccurate translations. 509 U. S., at 13. The signer in Zobrest had the same

opportunity to inculcate religion in the performance of her duties as do Title I employees, and there is no genuine basis upon which to confine Zobrest's underlying rationale--that public employees will not be presumed to inculcate religion--to sign-language interpreters. Indeed, even the Zobrest dissenters acknowledged the shift Zobrest effected in our Establishment Clause law when they criticized the majority for "straying . . . from the course set by nearly five decades of Establishment [*41] Clause jurisprudence." 509 U. S., at 24 (Blackmun, J., dissenting). Thus, it was Zobrest--and not this case--that created "fresh law." Post, at 11. Our refusal to limit Zobrest to its facts despite its rationale does not, in our view, amount to a "misreading" of precedent.

Second, we have departed from the rule relied on in Ball that all government aid that directly aids the educational function of religious schools is invalid. In Witters v. Washington Dept. of Servs. for Blind, 474 U.S. 481 (1986), we held that the Establishment Clause did not bar a State from issuing a vocational tuition grant to a blind person who wished to use the grant to attend a Christian college and become a pastor, missionary, or youth director. Even though the grant recipient clearly would use the money to obtain religious education, we observed that the tuition grants were "'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.'" Id., at 487 (quoting Committee for Public Ed. & Religious Liberty v. Nyquist, 413 U.S. 756, 782-783, n. 38 (1973)). The grants were disbursed directly to students, who [*42] then used the money to pay for tuition at the educational institution of their choice. In our view, this transaction was no different from a State's issuing a paycheck to one of its employees, knowing that the employee would donate part or all of the check to a religious institution. In both situations, any money that ultimately went to religious institutions did so "only as a result of the genuinely independent and private choices of" individuals. Ibid. The same logic applied in Zobrest, where we allowed the State to provide an interpreter, even though she would be a mouthpiece for religious instruction, because the IDEA's neutral eligibility criteria ensured that the interpreter's presence in a sectarian school was a "result of the private decision of individual parents" and "[could] not be attributed to state decisionmaking." 509 U. S., at 10 (emphasis added). Because the private school would not have provided an interpreter on its own, we also concluded that the aid in Zobrest did not indirectly finance religious education by "relieving the sectarian school of costs [it] otherwise would have borne in educating [its] students." Id., at 12.

Zobrest [*43] and Witters make clear that, under current law, the Shared Time program in Ball and New York City's Title I program in Aguilar will not, as a matter of law, be deemed to have the effect of advancing religion through indoctrination. Indeed, each of the premises upon which we relied in Ball to reach a contrary conclusion is no longer valid. First, there is no reason to presume that, simply because she enters a parochial school classroom, a full-time public employee such as a Title I teacher will depart from her assigned duties and instructions and embark on religious indoctrination, any more than there was a reason in Zobrest to think an interpreter would inculcate religion by altering her translation of classroom lectures. Certainly, no evidence has ever shown that any New York City Title I instructor teaching on parochial school premises attempted to inculcate religion in students. National Coalition for Public Ed. & Religious Liberty v. Harris, 489 F. Supp. 1248, 1262, 1267 (SDNY 1980); Felton v. Secretary, United States Dept. of Ed., 739 F. 2d, at 53, aff'd sub nom. Aguilar v. Felton, 473 U.S. 402 (1985). Thus, both our

precedent and our [*44] experience require us to reject respondents' remarkable argument that we must presume Title I instructors to be "uncontrollable and sometimes very unprofessional." Tr. of Oral Arg. 39.

As discussed above, Zobrest also repudiates Ball's assumption that the presence of Title I teachers in parochial school classrooms will, without more, create the impression of a "symbolic union" between church and state. JUSTICE SOUTER maintains that Zobrest is not dispositive on this point because Aguilar's implicit conclusion that New York City's Title I program created a "symbolic union" rested on more than the presence of Title I employees on parochial school grounds. Post, at 11. To him, Title I continues to foster a "symbolic union" between the Board and sectarian schools because it mandates "the involvement of public teachers in the instruction provided within sectarian schools," ibid., and "fuses public and private faculties," post, at 15. JUSTICE SOUTER does not disavow the notion, uniformly adopted by lower courts, that Title I services may be provided to sectarian school students in off-campus locations, post, at 8-9, even though that notion necessarily presupposes [*45] that the danger of "symbolic union" evaporates once the services are provided off-campus. Taking this view, the only difference between a constitutional program and an unconstitutional one is the location of the classroom, since the degree of cooperation between Title I instructors and parochial school faculty is the same no matter where the services are provided. We do not see any perceptible (let alone dispositive) difference in the degree of symbolic union between a student receiving remedial instruction in a classroom on his sectarian school's campus and one receiving instruction in a van parked just at the school's curbside. To draw this line based solely on the location of the public employee is neither "sensible" nor "sound," post, at 9, and the Court in Zobrest rejected it.

Nor under current law can we conclude that a program placing full-time public employees on parochial campuses to provide Title I instruction would impermissibly finance religious indoctrination. In all relevant respects, the provision of instructional services under Title I is indistinguishable from the provision of sign-language interpreters under the IDEA. Both programs make aid available only [*46] to eligible recipients. That aid is provided to students at whatever school they choose to attend. Although Title I instruction is provided to several students at once, whereas an interpreter provides translation to a single student, this distinction is not constitutionally significant. Moreover, as in Zobrest, Title I services are by law supplemental to the regular curricula. 34 CFR @ 200.12(a) (1996). These services do not, therefore, "relieve sectarian schools of costs they otherwise would have borne in educating their students." Zobrest, 509 U. S., at 12.

JUSTICE SOUTER finds our conclusion that the IDEA and Title I programs are similar to be "puzzling," and points to three differences he perceives between the programs: (i) Title I services are distributed by LEA's "directly to the religious schools" instead of to individual students pursuant to a formal application process; (ii) Title I services "necessarily relieve a religious school of 'an expense that it otherwise would have assumed'"; and (iii) Title I provides services to more students than did the programs in Witters and Zobrest. Post, at 13-14. None of these distinctions is meaningful. While it is [*47] true that individual students may not directly apply for Title I services, it does not follow from this premise that those services are distributed "directly to the religious schools," post, at 14. In fact, they are not. No Title I funds ever reach the coffers of religious schools, compare Committee for Public Ed. & Religious Liberty v. Regan, 444 U.S. 646, 657-659 (1979) (involving a program

giving "direct cash reimbursement" to religious schools for performing certain state-mandated tasks), and Title I services may not be provided to religious schools on a school-wide basis, 34 CFR @ 200.12(b) (1996). Title I funds are instead distributed to a public agency (an LEA) that dispenses services directly to the eligible students within its boundaries, no matter where they choose to attend school. 20 U.S.C. @@ 6311, 6312. Moreover, we fail to see how providing Title I services directly to eligible students results in a greater financing of religious indoctrination simply because those students are not first required to submit a formal application.

We are also not persuaded that Title I services supplant the remedial instruction and guidance counseling already provided [*48] in New York City's sectarian schools. Although JUSTICE SOUTER maintains that the sectarian schools provide such services and that those schools reduce those services once their students begin to receive Title I instruction, see post, at 6, 7, 13, 15-16, his claims rest on speculation about the impossibility of drawing any line between supplemental and general education, see post, at 7, and not on any evidence in the record that the Board is in fact violating Title I regulations by providing services that supplant those offered in the sectarian schools. See 34 CFR @ 200.12(a) (1996). We are unwilling to speculate that all sectarian schools provide remedial instruction and guidance counseling to their students, and are unwilling to presume that the Board would violate Title I regulations by continuing to provide Title I services to students who attend a sectarian school that has curtailed its remedial instruction program in response to Title I. Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid. Zobrest did not turn on the fact that James Zobrest had, [*49] at the time of litigation, been the only child using a publicly funded sign-language interpreter to attend a parochial school. Accord, Mueller v. Allen, 463 U.S. 388, 401 (1983) ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law").

What is most fatal to the argument that New York City's Title I program directly subsidizes religion is that it applies with equal force when those services are provided off-campus, and Aguilar implied that providing the services off-campus is entirely consistent with the Establishment Clause. JUSTICE SOUTER resists the impulse to upset this implication, contending that it can be justified on the ground that Title I services are "less likely to supplant some of what would otherwise go on inside [the sectarian schools] and to subsidize what remains" when those services are offered off-campus. Post, at 8. But JUSTICE SOUTER does not explain why a sectarian school would not have the same incentive to "make patently significant cut-backs" in its curriculum no matter where Title I services [*50] are offered, since the school would ostensibly be excused from having to provide the Title I-type services itself. Because the incentive is the same either way, we find no logical basis upon which to conclude that Title I services are an impermissible subsidy of religion when offered on-campus, but not when offered off-campus. Accordingly, contrary to our conclusion in Aguilar, placing full-time employees on parochial school campuses does not as a matter of law have the impermissible effect of advancing religion through indoctrination.

Although we examined in Witters and Zobrest the criteria by which an aid program identifies its beneficiaries, we did so solely to assess whether any use of that aid to indoctrinate religion could be attributed to the State. A number of our Establishment Clause cases have found that the criteria used for identifying beneficiaries are relevant in a second respect, apart from enabling a court to evaluate whether the program subsidizes religion. Specifically, the criteria might themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination. Cf. Witters, supra, at 488 (upholding [*51] neutrally available program because it did not "create a financial incentive for students to undertake sectarian education"); Zobrest, supra, at 10 (upholding neutrally available IDEA aid because it "creates no financial incentive for parents to choose a sectarian school"); accord, post, at 15 (SOUTER, J., dissenting) ("Evenhandedness is a necessary but not a sufficient condition for an aid program to satisfy constitutional scrutiny"). This incentive is not present, however, where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis. Under such circumstances, the aid is less likely to have the effect of advancing religion. See Widmar v. Vincent, 454 U.S. 263, 274 (1981) ("The provision of benefits to so broad a spectrum of groups is an important index of secular effect").

In Ball and Aguilar, the Court gave this consideration no weight. Before and since those decisions, we have sustained programs that provided aid to all eligible children regardless of where they attended school. See, e.g., Everson v. [*52] Board of Ed. of Ewing, 330 U.S. 1, 16-18 (1947) (sustaining local ordinance authorizing all parents to deduct from their state tax returns the costs of transporting their children to school on public buses); Board of Ed. of Central School Dist. No. 1 v. Allen, 392 U.S. 236, 243-244 (1968) (sustaining New York law loaning secular textbooks to all children); Mueller v. Allen, 463 U.S. 388, 398-399 (1983) (sustaining Minnesota statute allowing all parents to deduct actual costs of tuition, textbooks, and transportation from state tax returns); Witters, 474 U. S., at 487-488 (sustaining Washington law granting all eligible blind persons vocational assistance); Zobrest, 509 U. S., at 10 (sustaining section of IDEA providing all "disabled" children with necessary aid).

Applying this reasoning to New York City's Title I program, it is clear that Title I services are allocated on the basis of criteria that neither favor nor disfavor religion. 34 CFR @ 200.10(b) (1996); see supra, at 2. The services are available to all children who meet the Act's eligibility requirements, no matter what their religious beliefs or where they go to school. 20 U.S.C. @ [*53] 6312(c)(1)(F). The Board's program does not, therefore, give aid recipients any incentive to modify their religious beliefs or practices in order to obtain those services.

3

We turn now to Aguilar's conclusion that New York City's Title I program resulted in an excessive entanglement between church and state. Whether a government aid program results in such an entanglement has consistently been an aspect of our Establishment Clause analysis. We have considered entanglement both in the course of assessing whether an aid program has an impermissible effect of advancing religion, Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 674 (1970), and as a factor separate and apart from "effect," Lemon v.

Kurtzman, 403 U. S., at 612-613. Regardless of how we have characterized the issue, however, the factors we use to assess whether an entanglement is "excessive" are similar to the factors we use to examine "effect." That is, to assess entanglement, we have looked to "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." [*54] Id., at 615. Similarly, we have assessed a law's "effect" by examining the character of the institutions benefited (e.g., whether the religious institutions were "predominantly religious"), see Meek, 421 U. S., at 363-364; cf. Hunt v. McNair, 413 U.S. 734, 743-744 (1973), and the nature of the aid that the State provided (e.g., whether it was neutral and nonideological), see Everson, 330 U. S., at 18; Wolman, 433 U. S., at 244. Indeed, in Lemon itself, the entanglement that the Court found "independently" to necessitate the program's invalidation also was found to have the effect of inhibiting religion. See, e.g., 403 U. S., at 620 ("We cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion . . ."). Thus, it is simplest to recognize why entanglement is significant and treat it--as we did in Walz--as an aspect of the inquiry into a statute's effect.

Not all entanglements, of course, have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable, see id., at 614, and we have always tolerated some level of involvement between the two. Entanglement [*55] must be "excessive" before it runs afoul of the Establishment Clause. See, e.g., Bowen v. Kendrick, 487 U. S., at 615-617 (no excessive entanglement where government reviews the adolescent counseling program set up by the religious institutions that are grantees, reviews the materials used by such grantees, and monitors the program by periodic visits); Roemer v. Board of Public Works of Md., 426 U.S. 736, 764-765 (1976) (no excessive entanglement where state conducts annual audits to ensure that categorical state grants to religious colleges are not used to teach religion).

The pre-Aguilar Title I program does not result in an "excessive" entanglement that advances or inhibits religion. As discussed previously, the Court's finding of "excessive" entanglement in Aguilar rested on three grounds: (i) the program would require "pervasive monitoring by public authorities" to ensure that Title I employees did not inculcate religion; (ii) the program required "administrative cooperation" between the Board and parochial schools; and (iii) the program might increase the dangers of "political divisiveness." 473 U. S., at 413-414. Under our current understanding [*56] of the Establishment Clause, the last two considerations are insufficient by themselves to create an "excessive" entanglement. They are present no matter where Title I services are offered, and no court has held that Title I services cannot be offered off-campus. Aguilar, supra (limiting holding to on-premises services); Walker v. San Francisco Unified School Dist., 46 F. 3d 1449 (CA9 1995) (same); Pulido v. Cavazos, 934 F. 2d 912, 919-920 (CA8 1991); Committee for Public Ed. & Religious Liberty v. Secretary, United States Dept. of Ed., 942 F. Supp. 842 (EDNY 1996) (same). Further, the assumption underlying the first consideration has been undermined. In Aguilar, the Court presumed that full-time public employees on parochial school grounds would be tempted to inculcate religion, despite the ethical standards they were required to uphold. Because of this risk pervasive monitoring would be required. But after Zobrest we no longer presume that public employees will inculcate religion simply because they happen to be in a sectarian environment. Since we have abandoned the assumption that properly instructed public employees will fail to discharge [*57] their duties faithfully, we must also discard the assumption that pervasive monitoring of

Title I teachers is required. There is no suggestion in the record before us that unannounced monthly visits of public supervisors are insufficient to prevent or to detect inculcation of religion by public employees. Moreover, we have not found excessive entanglement in cases in which States imposed far more onerous burdens on religious institutions than the monitoring system at issue here. See Bowen, supra, at 615-617.

To summarize, New York City's Title I program does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: it does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement. We therefore hold that a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here. [*58] The same considerations that justify this holding require us to conclude that this carefully constrained program also cannot reasonably be viewed as an endorsement of religion. Accord, Witters, 474 U. S., at 488-489 ("The mere circumstance that [an aid recipient] has chosen to use neutrally available state aid to help pay for [a] religious education [does not] confer any message of state endorsement of religion"); Bowen, supra, at 613-614 (finding no "'symbolic link'" when Congress made federal funds neutrally available for adolescent counseling). Accordingly, we must acknowledge that Aguilar, as well as the portion of Ball addressing Grand Rapids' Shared Time program, are no longer good law.

C

The doctrine of stare decisis does not preclude us from recognizing the change in our law and overruling Aguilar and those portions of Ball inconsistent with our more recent decisions. As we have often noted, "stare decisis is not an inexorable command," Payne v. Tennessee, 501 U.S. 808, 828 (1991), but instead reflects a policy judgment that "in most matters it is more important that the applicable rule of law be settled than that it be settled [*59] right," Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). That policy is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions. Seminole Tribe of Fla. v. Florida, 517 U.S. , (1996) (slip op., at 20-21); Payne, supra, at 828; St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 94 (1936) (Stone and Cardozo, JJ., concurring in result) ("The doctrine of stare decisis . . . has only a limited application in the field of constitutional law"). Thus, we have held in several cases that stare decisis does not prevent us from overruling a previous decision where there has been a significant change in or subsequent development of our constitutional law. United States v. Gaudin, 515 U.S. 506, (1995) (slip op., at 15) (stare decisis may yield where a prior decision's "underpinnings [have been] eroded, by subsequent decisions of this Court"); Alabama v. Smith, 490 U.S. 794, 803 (1989) (noting that a "later development of . . . constitutional law" is a basis for overruling [*60] a decision); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 857 (1992) (observing that a decision is properly overruled where "development of constitutional law since the case was decided has implicitly or explicitly left [it] behind as a mere survivor of obsolete constitutional thinking"). As discussed above, our Establishment Clause jurisprudence has changed significantly since we decided Ball and Aguilar, so

our decision to overturn those cases rests on far more than "a present doctrinal disposition to come out differently from the Court of [1985]." Casey, supra, at 864. We therefore overrule Ball and Aguilar to the extent those decisions are inconsistent with our current understanding of the Establishment Clause.

Nor does the "law of the case" doctrine place any additional constraints on our ability to overturn Aguilar. Under this doctrine, a court should not reopen issues decided in earlier stages of the same litigation. Messenger v. Anderson, 225 U.S. 436, 444 (1912). The doctrine does not apply if the court is "convinced that [its prior decision] is clearly erroneous and would work a manifest injustice." [*61] Arizona v. California, 460 U.S. 605, 618, n. 8 (1983). In light of our conclusion that Aguilar would be decided differently under our current Establishment Clause law, we think adherence to that decision would undoubtedly work a "manifest injustice," such that the law of the case doctrine does not apply. Accord, Davis v. United States, 417 U.S. 333, 342 (1974) (Court of Appeals erred in adhering to law of the case doctrine despite intervening Supreme Court precedent).

IV

We therefore conclude that our Establishment Clause law has "significantly changed" since we decided Aguilar. See Rufo, 502 U. S., at 384. We are only left to decide whether this change in law entitles petitioners to relief under Rule 60(b)(5). We conclude that it does. Our general practice is to apply the rule of law we announce in a case to the parties before us. Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 485 (1989) ("The general rule of long standing is that the law announced in the Court's decision controls the case at bar"). We adhere to this practice even when we overrule a case. In Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), [*62] for example, the District Court and Court of Appeals rejected the argument that racial classifications in federal programs should be evaluated under strict scrutiny, relying upon our decision in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990). When we granted certiorari and overruled Metro Broadcasting, we did not hesitate to vacate the judgments of the lower courts. In doing so, we necessarily concluded that those courts relied on a legal principle that had not withstood the test of time. 515 U. S., at 237-238. See also Hubbard v. United States, 514 U.S. 695, 715 (1995) (overruling decision relied upon by Court of Appeals and reversing the lower court's judgment that relied upon the overruled case).

We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." Rodriguez de [*63] Quijas, 490 U. S., at 484. Adherence to this teaching by the District Court and Court of Appeals in this case does not insulate a legal principle on which they relied from our review to determine its continued vitality. The trial court acted within its discretion in entertaining the motion with supporting allegations, but it was also correct to recognize that the motion had to be denied unless and until this Court reinterpreted the binding precedent.

Respondents and JUSTICE GINSBURG urge us to adopt a different analysis because we are reviewing the District Court's denial of petitioners' Rule

60(b)(5) motion for an abuse of discretion. See Browder v. Director, Dept. of Corrections of Ill., 434 U.S. 257, 263, n. 7 (1978). It is true that the trial court has discretion, but the exercise of discretion cannot be permitted to stand if we find it rests upon a legal principle that can no longer be sustained. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 385, 405 (1990). The standard of review we employ in this litigation does not therefore require us to depart from our general practice. See Adarand, supra; Hubbard, supra.

Respondents nevertheless contend that [*64] we should not grant Rule 60(b)(5) relief here, in spite of its propriety in other contexts. They contend that petitioners have used Rule 60(b)(5) in an unprecedented way--not as a means of recognizing changes in the law, but as a vehicle for effecting them. If we were to sanction this use of Rule 60(b)(5), respondents argue, we would encourage litigants to burden the federal courts with a deluge of Rule 60(b)(5) motions premised on nothing more than the claim that various judges or Justices have stated that the law has changed. See also post, at 7 (GINSBURG, J., dissenting) (contending that granting Rule 60(b)(5) relief in this case will encourage "invitations to reconsider old cases based on 'speculations on chances from changes in [the Court's membership]"). We think their fears are overstated. As we noted above, a judge's stated belief that a case should be overruled does not make it so. See supra, at 10-11.

Most importantly, our decision today is intimately tied to the context in which it arose. This litigation involves a party's request under Rule 60(b)(5) to vacate a continuing injunction entered some years ago in light of a bona fide, significant change [*65] in subsequent law. The clause of Rule 60(b)(5) that petitioners invoke applies by its terms only to "judgments having prospective application." Intervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6), the only remaining avenue for relief on this basis from judgments lacking any prospective component. See J. Moore, 12 Moore's Federal Practice, @ 60.48[5][b], P60-181 (3d ed. 1997) (collecting cases). Our decision will have no effect outside the context of ordinary civil litigation where the propriety of continuing prospective relief is at issue. Compare Teague v. Lane, 489 U.S. 288 (1989) (applying a more stringent standard for recognizing changes in the law and "new rules" in light of the "interests of comity" present in federal habeas corpus proceedings). Given that Rule 60(b)(5) specifically contemplates the grant of relief in the circumstances presented here, it can hardly be said that we have somehow warped the Rule into a means of "allowing an 'anytime' rehearing." See post, at 5 (GINSBURG, J., dissenting).

Respondents further contend that "petitioners' proposed use of Rule 60(b) [*66] will erode the institutional integrity of the Court." Brief for Respondents 26. Respondents do not explain how a proper application of Rule 60(b)(5) undermines our legitimacy. Instead, respondents focus on the harm occasioned if we were to overrule Aguilar. But as discussed above, we do no violence to the doctrine of stare decisis when we recognize bona fide changes in our decisional law. And in those circumstances, we do no violence to the legitimacy we derive from reliance on that doctrine. Casey, 505 U. S., at 865-866.

As a final matter, we see no reason to wait for a "better vehicle" in which to evaluate the impact of subsequent cases on Aguilar's continued vitality. To evaluate the Rule 60(b)(5) motion properly before us today in no way undermines "integrity in the interpretation of procedural rules" or signals any departure

from "the responsive, non-agenda-setting character of this Court." Post, at 6-7 (GINSBURG, J., dissenting). Indeed, under these circumstances, it would be particularly inequitable for us to bide our time waiting for another case to arise while the city of New York labors under a continuing injunction forcing it to spend millions of [*67] dollars on mobile instructional units and leased sites when it could instead be spending that money to give economically disadvantaged children a better chance at success in life by means of a program that is perfectly consistent with the Establishment Clause.

For these reasons, we reverse the judgment of the Court of Appeals and remand to the District Court with instructions to vacate its September 26, 1985, order.

It is so ordered.

DISSENTBY: SOUTER; GINSBURG

DISSENT: JUSTICE SOUTER, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, and with whom JUSTICE BREYER joins as to Part II, dissenting.

In this novel proceeding, petitioners seek relief from an injunction the District Court entered 12 years ago to implement our decision in Aguilar v. Felton, 473 U.S. 402 (1985). For the reasons given by JUSTICE GINSBURG, see post, the Court's holding that petitioners are entitled to relief under Rule 60(b) is seriously mistaken. The Court's misapplication of the rule is tied to its equally erroneous reading of our more recent Establishment Clause cases, which the Court describes as having rejected the underpinnings of Aguilar and portions of Aguilar's companion case, [*68] School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985). The result is to repudiate the very reasonable line drawn in Aguilar and Ball, and to authorize direct state aid to religious institutions on an unparalleled scale, in violation of the Establishment Clause's central prohibition against religious subsidies by the government.

I respectfully dissent.

I

In both Aguilar and Ball, we held that supplemental instruction by public school teachers on the premises of religious schools during regular school hours violated the Establishment Clause. Aguilar, of course, concerned the very school system before us here and the same Title I program at issue now, see ante, at 2-3, under which local educational agencies receive public funds to provide remedial education, guidance and job counseling to eligible students including those attending religious schools. Immediately before Aguilar, New York City used Title I funds to provide guidance services and classes in remedial reading, remedial mathematics, and English as a second language to students at religious schools, as it did by sending employees of the public school system, including teachers, guidance [*69] counselors, psychologists, and social workers into the religious schools. See Aguilar, supra, at 406. Ball involved a program similar in many respects to Title I called Shared Time, n1 under which the local school district provided religious school students with "supplementary" classes in their religious schools, taught by teachers who were full-time employees of the public schools, in subjects including remedial math and reading, art, music, and physical education. See Ball, 473 U. S., at 375.

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n1 School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985), also invalidated a separate program called Community Education that is distinct from the Title I program at issue today. I do not understand the Court's discussion to implicate Ball's evaluation of the Community Education program.

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We held that both schemes ran afoul of the Establishment Clause. The Shared Time program had the impermissible effect of promoting religion in three ways: first, state-paid teachers conducting classes in [*70] a sectarian environment might inadvertently (or intentionally) manifest sympathy with the sectarian aims to the point of using public funds for religious educational purposes, id., at 388; second, the government's provision of secular instruction in religious schools produced a symbolic union of church and state that tended to convey a message to students and to the public that the State supported religion, id., at 390-392; and, finally, the Shared Time program subsidized the religious functions of the religious schools by assuming responsibility for teaching secular subjects the schools would otherwise be required to provide, id., at 395-396. Our decision in Aguilar noted the similarity between the Title I and Shared Time programs, and held that the system New York City had adopted to monitor the religious content of Title I classes held in religious schools would necessarily result in excessive entanglement of church and state, and violate the Establishment Clause for that reason. See Aguilar, supra, at 412-414.

As I will indicate as I go along, I believe Aguilar was a correct and sensible decision, and my only reservation about its opinion is that the [*71] emphasis on the excessive entanglement produced by monitoring religious instructional content obscured those facts that independently called for the application of two central tenets of Establishment Clause jurisprudence. The State is forbidden to subsidize religion directly and is just as surely forbidden to act in any way that could reasonably be viewed as religious endorsement. See, e.g., Ball, 473 U. S., at 385 ("Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith"); id., at 389 ("Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any--or all--religious denominations as when it attempts to inculcate specific religious doctrines.") (citing Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'CONNOR, J., concurring)).

As is explained elsewhere, the flat ban on subsidization antedates the Bill of Rights and has been an unwavering rule in Establishment Clause cases, qualified only by the conclusion two Terms ago that state [*72] exactions from college students are not the sort of public revenues subject to the ban. See Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. , (1995) (slip op., at 4-14) (SOUTER, J., dissenting); see also id., at (slip op., at 5) (O'CONNOR, J., concurring). The rule expresses the hard lesson learned over and over again in the American past and in the experiences of the countries from which we have come, that religions supported by governments are compromised just as surely as the religious freedom of dissenters is burdened when the government supports religion. "When the government favors a particular religion or sect, the disadvantage to all others is obvious, but even the favored religion may

fear being 'tainted . . . with corrosive secularism.' The favored religion may be compromised as political figures reshape the religion's beliefs for their own purposes; it may be reformed as government largesse brings government regulation." Lee v. Weisman, 505 U.S. 577, 608 (1992) (Blackmun, J., concurring) (quoting Ball, supra, at 385); see also Memorial and Remonstrance against Religious Assessments 1785, in The Complete Madison 299, 309 [*73] (S. Padover ed. 1953) ("Religion flourishes in greater purity, without than with the aid of Government"); M. Howe, The Garden and the Wilderness 6 (1965) (noting Roger Williams's view that "worldly corruptions . . . might consume the churches if sturdy fences against the wilderness were not maintained"). The ban against state endorsement of religion addresses the same historical lessons. Governmental approval of religion tends to reinforce the religious message (at least in the short run) and, by the same token, to carry a message of exclusion to those of less favored views. See, e.g., Ball, supra, at 390 ("An important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices"); Lee, supra, at 606-607 (Blackmun, J., concurring) ("When the government puts its imprimatur on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs. A government cannot be premised [*74] on the belief that all persons are created equal when it asserts that God prefers some"); Engel v. Vitale, 370 U.S. 421, 429 (1962) ("Anguish, hardship and bitter strife" result "when zealous religious groups struggle with one another to obtain the Government's stamp of approval"). The human tendency, of course, is to forget the hard lessons, and to overlook the history of governmental partnership with religion when a cause is worthy, and bureaucrats have programs. That tendency to forget is the reason for having the Establishment Clause (along with the Constitution's other structural and libertarian guarantees), in the hope of stopping the corrosion before it starts.

These principles were violated by the programs at issue in Aguilar and Ball, as a consequence of several significant features common to both Title I, as implemented in New York City before Aguilar, and the Grand Rapids Shared Time program: each provided classes on the premises of the religious schools, covering a wide range of subjects including some at the core of primary and secondary education, like reading and mathematics; while their services were termed "supplemental," the programs and their [*75] instructors necessarily assumed responsibility for teaching subjects that the religious schools would otherwise have been obligated to provide, cf. Wolman v. Walter, 433 U.S. 229, 243 (1977) (provision of diagnostic tests to religious schools provides only an incidental benefit); the public employees carrying out the programs had broad responsibilities involving the exercise of considerable discretion, cf. Zobrest v. Catalina Foothills School Dist., 509 U.S. 1, 13 (1993) (sign-language interpreter must transmit exactly what is said); Lemon v. Kurtzman, 403 U.S. 602, 616-617 (1971) (distinguishing, for Establishment Clause purposes, books provided by the State to students from teachers paid by the State); while the programs offered aid to nonpublic school students generally (and Title I went to public school students as well), participation by religious school students in each program was extensive, cf. Witters v. Washington Dept. of Servs. for Blind, 474 U.S. 481, 488 (1986) (only one student sought state tuition assistance for religious education); and, finally, aid under Title I and Shared Time flowed directly to the schools in the form of classes [*76] and programs, as distinct from indirect aid that reaches schools only as a result of independent private choice, cf. Zobrest, supra, at 12 ("Any attenuated financial benefit

that parochial schools do ultimately receive . . . is attributable to 'the private choices of individual parents'") (quoting Mueller v. Allen, 463 U.S. 388, 400 (1983)); Witters, supra, at 487 (aid issued to students reached religious institution "only as a result of the genuinely independent and private choices of aid recipients"); Mueller, supra, at 399-400 (same).

What, therefore, was significant in Aguilar and Ball about the placement of state-paid teachers into the physical and social settings of the religious schools was not only the consequent temptation of some of those teachers to reflect the schools' religious missions in the rhetoric of their instruction, with a resulting need for monitoring and the certainty of entanglement. See Aguilar, 473 U. S., at 412-414 (monitoring); Ball, 473 U. S., at 388 (risk of indoctrination). What was so remarkable was that the schemes in issue assumed a teaching responsibility indistinguishable from the responsibility of [*77] the schools themselves. The obligation of primary and secondary schools to teach reading necessarily extends to teaching those who are having a hard time at it, and the same is true of math. Calling some classes remedial does not distinguish their subjects from the schools' basic subjects, however inadequately the schools may have been addressing them.

What was true of the Title I scheme as struck down in Aguilar will be just as true when New York reverts to the old practices with the Court's approval after today. There is simply no line that can be drawn between the instruction paid for at taxpayers' expense and the instruction in any subject that is not identified as formally religious. While it would be an obvious sham, say, to channel cash to religious schools to be credited only against the expense of "secular" instruction, the line between "supplemental" and general education is likewise impossible to draw. If a State may constitutionally enter the schools to teach in the manner in question, it must in constitutional principle be free to assume, or assume payment for, the entire cost of instruction provided in any ostensibly secular subject in any religious school. This [*78] Court explicitly recognized this in Ball, supra, at 394, 396, and although in Aguilar the Court concentrated on entanglement it noted the similarity to Ball, see Aguilar, supra, at 409, and Judge Friendly's opinion for the Second Circuit made it expressly clear that there was no stopping place in principle once the public teacher entered the religious schools to teach their secular subjects. See Felton v. Secretary, U.S. Dept. of Education, 739 F. 2d 48, 66-67 (CA2 1984), aff'd sub. nom. Aguilar v. Felton, 473 U.S. 402 (1985).

It may be objected that there is some subsidy in remedial education even when it takes place off the religious premises, some subsidy, that is, even in the way New York City has administered the Title I program after Aguilar. In these circumstances, too, what the State does, the religious school need not do; the schools save money and the program makes it easier for them to survive and concentrate their resources on their religious objectives. This argument may, of course, prove too much, but if it is not thought strong enough to bar even off-premises aid in teaching the basics to religious school pupils (an issue [*79] not before the Court in Aguilar or today), it does nothing to undermine the sense of drawing a line between remedial teaching on and off-premises. The off-premises teaching is arguably less likely to open the door to relieving religious schools of their responsibilities for secular subjects simply because these schools are less likely (and presumably legally unable) to dispense with those subjects from their curriculums or to make patently significant cut-backs in basic teaching within the schools to offset the outside instruction; if the aid is delivered outside of the schools, it is less likely to supplant some of

what would otherwise go on inside them and to subsidize what remains. On top of that, the difference in the degree of reasonably perceptible endorsement is substantial. Sharing the teaching responsibilities within a school having religious objectives is far more likely to telegraph approval of the school's mission than keeping the State's distance would do. This is clear at every level. As the Court observed in Ball, "the symbolism of a union between church and state [effected by placing the public school teachers into the religious schools] is most likely to [*80] influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice." Ball, supra, at 390. When, moreover, the aid goes overwhelmingly to one religious denomination, minimal contact between state and church is the less likely to feed the resentment of other religions that would like access to public money for their own worthy projects.

In sum, if a line is to be drawn short of barring all state aid to religious schools for teaching standard subjects, the Aguilar-Ball line was a sensible one capable of principled adherence. It is no less sound, and no less necessary, today.

II

The Court today ignores this doctrine and claims that recent cases rejected the elemental assumptions underlying Aguilar and much of Ball. But the Court errs. Its holding that Aguilar and the portion of Ball addressing the Shared Time program are "no longer good law," ante, at 29, rests on mistaken reading.

A

Zobrest v. Catalina Foothills School Dist., 509 U. S., at 13-14, held that the Establishment Clause does not prevent a school district from providing a sign-language [*81] interpreter to a deaf student enrolled in a sectarian school. The Court today relies solely on Zobrest to support its contention that we have "abandoned the presumption erected in Meek [v. Pittenger, 421 U.S. 349 (1975)] and Ball that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion." Ante, at 17. Zobrest, however, is no such sanction for overruling Aguilar or any portion of Ball.

In Zobrest the Court did indeed recognize that the Establishment Clause lays down no absolute bar to placing public employees in a sectarian school, Zobrest, 509 U. S., at 13, and n. 10, but the rejection of such a per se rule was hinged expressly on the nature of the employee's job, sign-language interpretation (or signing) and the circumscribed role of the signer. On this point (and without reference to the facts that the benefited student had received the same aid before enrolling in the religious school and the employee was to be assigned to the student not to the school) the Court explained itself [*82] this way: "The task of a sign-language interpreter seems to us quite different from that of a teacher or guidance counselor. . . . Nothing in this record suggests that a sign-language interpreter would do more than accurately interpret whatever material is presented to the class as a whole. In fact, ethical guidelines require interpreters to 'transmit everything that is said in exactly the same way it was intended.'" Id., at 13. The signer could thus be seen as more like a hearing aid than a teacher, and the signing could not be understood as an

opportunity to inject religious content in what was supposed to be secular instruction. Zobrest accordingly holds only that in these limited circumstances where a public employee simply translates for one student the material presented to the class for the benefit of all students, the employee's presence in the sectarian school does not violate the Establishment Clause. Id., at 13-14. Cf. Lemon v. Kurtzman, 403 U.S. 602, 617 (1971) ("Teachers have a substantially different ideological character from books [and] in terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content [*83] is ascertainable, but a teacher's handling of a subject is not").

The Court, however, ignores the careful distinction drawn in Zobrest and insists that a full-time public employee such as a Title I teacher is just like the signer, asserting that "there is no reason to presume that, simply because she enters a parochial school classroom, . . . [this] teacher will depart from her assigned duties and instructions and embark on religious indoctrination . . . ." Ante, at 20. Whatever may be the merits of this position (and I find it short on merit), it does not enjoy the authority of Zobrest. The Court may disagree with Ball's assertion that a publicly employed teacher working in a sectarian school is apt to reinforce the pervasive inculcation of religious beliefs, but its disagreement is fresh law.

The Court tries to press Zobrest into performing another service beyond its reach. The Court says that Ball and Aguilar assumed "that the presence of a public employee on private school property creates an impermissible 'symbolic link' between government and religion," ante, at 18, and that Zobrest repudiated this assumption. Ante, at 17-18. First, [*84] Ball and Aguilar said nothing about the "mere presence" of public employees at religious schools. It was Ball that specifically addressed the point and held only that when teachers employed by public schools are placed in religious schools to provide instruction to students during the schoolday a symbolic union of church and state is created and will reasonably be seen by the students as endorsement, see Ball, 473 U. S., at 390-392; Aguilar adopted the same conclusion by reference, see Aguilar, 473 U. S., at 409. Zobrest did not, implicitly or otherwise, repudiate the view that the involvement of public teachers in the instruction provided within sectarian schools looks like a partnership or union and implies approval of the sectarian aim. On the subject of symbolic unions and the strength of their implications, the lesson of Zobrest is merely that less is less.

B

The Court next claims that Ball rested on the assumption that "any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decision-making." [*85] Ante, at 15-16. After Ball, the opinion continues, the Court departed from the rule that "all government aid that directly aids the educational function of religious schools is invalid." Ante, at 19. But this mischaracterizes Ball's discussion on the point, and misreads Witters and Zobrest as repudiating the more modest proposition on which Ball in fact rested.

Ball did not establish that "any and all" such aid to religious schools necessarily violates the Establishment Clause. It held that the Shared Time program subsidized the religious functions of the parochial schools by taking over a significant portion of their responsibility for teaching secular

subjects. See Ball, supra, at 396-397. The Court noted that it had "never accepted the mere possibility of subsidization . . . as sufficient to invalidate an aid program," and instead enquired whether the effect of the proffered aid was "direct and substantial" (and, so, unconstitutional) or merely "indirect and incidental," (and, so, permissible) emphasizing that the question "is one of degree." Ball, supra, at 394 (quoting Committee for Public Ed. & Religious Liberty v. Nyquist, [*86] 413 U.S. 756, 784-785, n. 39 (1973), and Zorach v. Clauson, 343 U.S. 306, 314 (1952)). Witters and Zobrest did nothing to repudiate the principle, emphasizing rather the limited nature of the aid at issue in each case as well as the fact that religious institutions did not receive it directly from the State. In Witters, the Court noted that the State would issue the disputed vocational aid directly to one student who would then transmit it to the school of his choice, and that there was no record evidence that "any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education." Witters, 474 U. S., at 488. Zobrest also presented an instance of a single beneficiary, see Zobrest, 509 U. S., at 4, and emphasized that the student (who had previously received the interpretive services in a public school) determined where the aid would be used, that the aid at issue was limited, and that the religious school was "not relieved of an expense that it otherwise would have assumed in educating its students." See id., at 12.

It is accordingly puzzling to find the Court insisting that the aid scheme [*87] administered under Title I and considered in Aguilar was comparable to the programs in Witters and Zobrest. Instead of aiding isolated individuals within a school system, New York City's Title I program before Aguilar served about 22,000 private school students, all but 52 of whom attended religious schools. See App. 313-314. n2 Instead of serving individual blind or deaf students, as such, Title I as administered in New York City before Aguilar (and as now to be revived) funded instruction in core subjects (remedial reading, reading skills, remedial mathematics, English as a second language) and provided guidance services. See Aguilar, 473 U. S., at 406. Instead of providing a service the school would not otherwise furnish, the Title I services necessarily relieved a religious school of "an expense that it otherwise would have assumed," Zobrest, supra, at 12, and freed its funds for other, and sectarian uses.

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n2 The Court's refusal to recognize the extent of student participation as relevant to the constitutionality of an aid program, see ante, at 23, ignores the contrary conclusion in Witters v. Washington Dept. of Servs. for Blind, 474 U.S. 481 (1986), on this very point. See id., at 488 (noting, among relevant factors, that "no evidence had been presented indicating that any other person had ever sought to finance religious education or activity pursuant to the State's program").

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[*88]

Finally, instead of aid that comes to the religious school indirectly in the sense that its distribution results from private decisionmaking, a public educational agency distributes Title I aid in the form of programs and services directly to the religious schools. In Zobrest and Witters, it was fair to say that individual students were themselves applicants for individual benefits on

a scale that could not amount to a systemic supplement. But under Title I, a local educational agency (which in New York City is the Board of Education) may receive federal funding by proposing programs approved to serve individual students who meet the criteria of need, which it then uses to provide such programs at the religious schools, see App. 28-29, 38, 60, 242-243; students eligible for such programs may not apply directly for Title I funds. n3 The aid, accordingly, is not even formally aid to the individual students (and even formally individual aid must be seen as aid to a school system when so many individuals receive it that it becomes a significant feature of the system, see Wolman v. Walter, 433 U. S., at 264 (opinion of Powell, J.)).

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n3 For this reason, the Court's attempted analogy between Title I and IDEA fails, see ante, at 22; James Zobrest, unlike students receiving Title I services, applied individually for the interpretative services at issue in Zobrest v. Catalina Foothills School Dist., 509 U.S. 1, 4 (1993).

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[*89]

In sum, nothing since Ball and Aguilar and before this case has eroded the distinction between "direct and substantial" and "indirect and incidental." That principled line is being breached only here and now.

C

The Court notes that aid programs providing benefits solely to religious groups may be constitutionally suspect, while aid allocated under neutral, secular criteria is less likely to have the effect of advancing religion. Ante, at 25. The opinion then says that Ball and Aguilar "gave this consideration no weight," ibid., and accordingly conflict with a number of decisions. But what exactly the Court thinks Ball and Aguilar inadequately considered is not clear, given that evenhandedness is a necessary but not a sufficient condition for an aid program to satisfy constitutional scrutiny. Title I services are available to all eligible children regardless whether they go to religious or public schools, but, as I have explained elsewhere and am not alone in recognizing, see, e.g., Rosenberger, 515 U. S., at - (slip op., at 1-2) (O'CONNOR, J., concurring); id., at - (slip op., at 18-24) (SOUTER, J., dissenting); see also Bowen [*90] v. Kendrick, 487 U.S. 589, 614, 621 (1988), that fact does not define the reach of the Establishment Clause. If a scheme of government aid results in support for religion in some substantial degree, or in endorsement of its value, the formal neutrality of the scheme does not render the Establishment Clause helpless or the holdings in Aguilar and Ball inapposite.

III

Finally, there is the issue of precedent. Stare decisis is no barrier in the Court's eyes because it reads Aguilar and Ball for exaggerated propositions that Witters and Zobrest are supposed to have limited to the point of abandoned doctrine. Cf. Patterson v. McLean Credit Union, 491 U.S. 164, 173-174 (1989). The Court's dispensation from stare decisis is, accordingly, no more convincing than its reading of those cases. Since Aguilar came down, no case has held that there need be no concern about a risk that publicly paid school teachers may further religious doctrine; no case has repudiated the distinction between

direct and substantial aid and aid that is indirect and incidental; no case has held that fusing public and private faculties in one religious school does not [*91] create an impermissible union or carry an impermissible endorsement; and no case has held that direct subsidization of religious education is constitutional or that the assumption of a portion of a religious school's teaching responsibility is not direct subsidization.

The continuity of the law, indeed, is matched by the persistence of the facts. When Aguilar was decided everyone knew that providing Title I services off the premises of the religious schools would come at substantial cost in efficiency, convenience, and money. Title I had begun off the premises in New York, after all, and dissatisfaction with the arrangement was what led the City to put the public school teachers into the religious schools in the first place. See Felton v. Secretary, U.S. Dept. of Education, 739 F. 2d, at 51. When Aguilar required the end of that arrangement, conditions reverted to those of the past and they have remained unchanged: teaching conditions are often poor, it is difficult to move children around, and it costs a lot of money. That is, the facts became once again what they were once before, as everyone including the Members of this Court knew they would be. No predictions [*92] have gone so awry as to excuse the case from the claim of precedent, see Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting), let alone excuse the Court from adhering to its own prior decision in this very case.

That is not to deny that the facts just recited are regrettable: the object of Title I is worthy without doubt, and the cost of compliance is high. In the short run there is much that is genuinely unfortunate about the administration of the scheme under Aguilar's rule. But constitutional lines have to be drawn, and on one side of every one of them is an otherwise sympathetic case that provokes impatience with the Constitution and with the line. But constitutional lines are the price of constitutional government.

JUSTICE GINSBURG, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE BREYER join, dissenting.

The Court today finds a way to rehear a legal question decided in respondents' favor in this very case some 12 years ago. See Aguilar v. Felton, 473 U.S. 402 (1985). Subsequent decisions, the majority says, have undermined Aguilar and justify our immediate reconsideration. This Court's Rules do not countenance [*93] the rehearing here granted. For good reason, a proper application of those rules and the Federal Rules of Civil Procedure would lead us to defer reconsideration of Aguilar until we are presented with the issue in another case.

We have a rule on rehearing, Rule 44, but it provides only for petitions filed within 25 days of the entry of the judgment in question. See this Court's Rule 44.1. Although the Court or a Justice may "shorten or extend" this period, I am aware of no case in which we have extended the time for rehearing years beyond publication of our adjudication on the merits. Cf. Reid v. Covert, 354 U.S. 1 (1957) (original decision issued June 11, 1956; rehearing granted Nov. 5, 1956); Jones v. Opelika, 319 U.S. 103 (1943) (per curiam) (original decision issued October Term 1941; rehearing granted October Term 1942). Moreover, nothing in our procedures allows us to grant rehearing, timely or not, "except . . . at the instance of a Justice who concurred in the judgment or decision." This Court's Rule 44.1. Petitioners have not been so bold (or so candid) as to style their plea as one for rehearing in this Court, and the Court has not

taken up the petition [*94] at the instance of JUSTICE STEVENS, the only still-sitting member of the Aguilar majority.

Lacking any rule or practice allowing us to reconsider the Aguilar judgment directly, the majority accepts as a substitute a rule governing relief from judgments or orders of the federal trial courts. See Fed. Rule Civ. Proc. 60(b)(5). The service to which Rule 60(b) has been impressed is unprecedented, and neither the Court nor those urging reconsideration of Aguilar contend otherwise. See, e.g., ante, at 32-33; Tr. of Oral Arg. 11 (acknowledgment by counsel for the United States that "we do not know of another instance in which Rule 60(b) has been used in this way"). The Court makes clear, fortunately, that any future efforts to expand today's ruling will not be favored. See ante, at 33. I therefore anticipate that the extraordinary action taken in this case will remain aberrational.

Rule 60(b) provides, in relevant part:

"On motion and upon such terms as are just, the [district] court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) . . . it is no longer equitable that the [*95] judgment should have prospective application."

Under that rule, a district court may, in its discretion, grant relief from a final judgment with prospective effect if the party seeking modification can show "a significant change either in factual conditions or in law" that renders continued operation of the judgment inequitable. Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384 (1992) (addressing modification of consent decree in institutional-reform setting); see 12 J. Moore, Moore's Federal Practice @ 60.47[2][c], pp. 60-163 to 60-166 (3d ed. 1997); 11 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure @ 2863, pp. 336-347 (2d ed. 1995) (hereinafter Wright, Miller, & Kane).

Appellate courts review denials of Rule 60(b) motions for abuse of discretion. See Browder v. Director, Dept. of Corrections of Ill., 434 U.S. 257, 263, n. 7 (1978); Railway Employes v. Wright, 364 U.S. 642, 648-650 (1961). As we recognized in our unanimous opinion in Browder, "an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review." 434 U. S., at 263, n. 7. For in this context,

"we are not framing a decree. [*96] We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting." United States v. Swift & Co., 286 U.S. 106, 119 (1932).

Cf. Illinois v. Illinois Central R. Co., 184 U.S. 77, 91-92 (1902) (cautioning against entertaining successive appeals of legal questions open to dispute in an initial appeal, and observing that tolerance of such appeals would allow parties, inter alia, to "'speculate on chances from changes in [a court's] members'") (quoting Roberts v. Cooper, 20 How. 467, 481 (1858)).

In short, relitigation of the legal or factual claims underlying the original judgment is not permitted in a Rule 60(b) motion or an appeal therefrom. See 11 Wright, Miller, & Kane, @ 2863, p. 340 (Rule 60(b) "does not allow

relitigation of issues that have been resolved by the judgment."); see also Fortin v. Commissioner, Mass. Dept. of Public Welfare, 692 F. 2d 790, 799 (CA1 1982) (warning against transformation of Rule [*97] 60(b) "modification procedure into an impermissible avenue of collateral attack"). Thus, under settled practice, the sole question legitimately presented on appeal of the District Court's decision denying petitioners' Rule 60(b)(5) motion to modify the Aguilar injunction would be: Did the District Court abuse its discretion when it concluded that neither the facts nor the law had so changed as to warrant alteration of the injunction?

The majority acknowledges that there has been no significant change in factual conditions. See ante, at 9-10. The majority also recognizes that Aguilar had not been overruled, but remained the governing Establishment Clause law, until this very day. See ante, at 10-11, 30. Because Aguilar had not been overruled at the time the District Court acted, the law the District Court was bound to respect had not changed. The District Court therefore did not abuse its discretion in denying petitioners' Rule 60(b) motion.

We have declared that lower courts lack authority to determine whether adherence to a judgment of this Court is inequitable. Those courts must "follow the [Supreme Court] case which directly controls, leaving to this Court [*98] the prerogative of overruling its own decisions." Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989); see also ante, at 31-32. The District Court would have disobeyed the plain command of Shearson/American Express had it granted petitioners' Rule 60(b) motion based upon a view that our more recent Establishment Clause decisions are in tension with Aguilar.

Without the teaching of Shearson/American Express, Rule 60(b) might have been employed in a case of this kind. Before that firm instruction, lower courts sometimes inquired whether an earlier ruling of this Court had been eroded to the point that it was no longer good law. See, e.g., Rowe v. Peyton, 383 F. 2d 709, 714 (CA4 1967), aff'd, 391 U.S. 54 (1968); Perkins v. Endicott Johnson Corp., 128 F. 2d 208, 217-218 (CA2 1942), aff'd, 317 U.S. 501 (1943); Healy v. Edwards, 363 F. Supp. 1110, 1117 (ED La. 1973), vacated and remanded for consideration of mootness, 421 U.S. 772 (1975) (per curiam); Browder v. Gayle, 142 F. Supp. 707, 716-717 (MD Ala.), summarily aff'd, 352 U.S. 903 (1956). Shearson/American Express now controls, however, [*99] so the District Court and Court of Appeals in this case had no choice but to follow Aguilar. Of course, "[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law," Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990) (cited ante, at 32), but the District Court made no legal error in determining that Aguilar had not been overruled. And our appellate role here is limited to reviewing that determination.

The Court says that the District Court was right to "entertain" the Rule 60(b) motion and also right to reject it, leaving to this Court the option of overruling our previously binding decision. See ante, at 32. The Court thus acknowledges that Rule 60(b)(5) had no office to perform in the District Court, given the no-competence instruction of Shearson/American Express. All the lower courts could do was pass the case up to us. The Court thus bends Rule 60(b) to a purpose--allowing an "anytime" rehearing in this case--unrelated to the governance of district court proceedings to which the rule, as part of the Federal Rules of Civil Procedure, is directed. See Fed. Rule Civ. Proc. 1.

In an effort [*100] to make today's use of Rule 60(b) appear palatable, the Court describes its decision not as a determination of whether Aguilar should be overruled, but as an exploration whether Aguilar already has been "so undermined . . . that it is no longer good law." Ante, at 11; see also ante, at 16-29. But nothing can disguise the reality that, until today, Aguilar had not been overruled. Good or bad, it was in fact the law.

Despite the problematic use of Rule 60(b), the Court "sees no reason to wait for a 'better vehicle.'" Ante, at 34. There are such vehicles in motion, and the Court does not say otherwise. See, e.g., Committee for Public Ed. and Religious Liberty v. Secretary, U.S. Dept. of Ed., 942 F. Supp. 842 (EDNY 1996) (PEARL II); Helms v. Cody, 856 F. Supp. 1102 (ED La. 1994); cf. Brief for U.S. Secretary of Education 45 (noting that a school district other than New York City could bring an action against the Secretary to challenge an Aguilar-based Title I funding decision). The Helms case, which has been appealed to the Fifth Circuit, involves an Establishment Clause challenge to Louisiana's special education program. In [*101] PEARL II, the District Court upheld aspects of New York City's current Title I program that were challenged under the Establishment Clause. The plaintiffs filed a notice of appeal in that case, but the parties later stipulated to withdraw the appeal, without prejudice to reinstatement, pending our decision in this case. See Stipulation of Withdrawal of Appeal in Committee for Public Ed. and Religious Liberty v. Secretary, U.S. Dept. of Ed., No. 96-6329 (CA2) (filed Mar. 20, 1997).

Unlike the majority, I find just cause to await the arrival of Helms, PEARL II, or perhaps another case in which our review appropriately may be sought, before deciding whether Aguilar should remain the law of the land. That cause lies in the maintenance of integrity in the interpretation of procedural rules, preservation of the responsive, non-agenda-setting character of this Court, and avoidance of invitations to reconsider old cases based on "speculations on chances from changes in [the Court's membership]." Illinois Central R. Co., 184 U. S., at 92.

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LEVEL 1 - 16 OF 25 BRIEFS

RACHEL AGOSTINI, ET AL., PETITIONERS v. BETTY-LOUISE FELTON, ET AL.; CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, ET AL., PETITIONERS v. BETTY-LOUISE FELTON, ET AL.

Nos. 96-552 and 96-553

October Term, 1996

February 28, 1997

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECRETARY OF EDUCATION

WALTER DELLINGER, Acting Solicitor General

FRANK W. HUNGER, Assistant Attorney General

SETH P. WAXMAN, Deputy Solicitor General

David H. Souter and Stephen Breyer, argued the court should avoid reconsidering old cases brought back to them ``based on speculations on chances from changes in the court's membership."

Most private schools are eligible to receive the Title 1 help if they have needy students, but only Catholic schools have responded to the invitation from the school districts in South Florida, said Deputy Superintendent John Johnson II, who oversees federal programs in Dade.

Students are deemed eligible for the program if they qualify for free or reduced-price lunches. For a child in a family of four, the family income would have to be about $28,860 or less.

It may be weeks before Dade and Broward school administrators can meet with church officials to decide what to do about Title 1 classes in Catholic schools this fall. Most Archdiocese school authorities are on summer vacation.

``The law requires us to consult with them to see how they want us to deliver services," said Pearlie Crawford, director of Title 1, migrant and special programs for Broward public schools.

The parochial schools in Dade slated to receive the extra lessons in the 1997-98 school year are:

The Corpus Christi School in Allapattah; Miami Union Academy in Hialeah Gardens; Our Lady of Divine Providence in Sweetwater; Sacred Heart in Homestead; St. Francis Xavier School in Overtown; St. James Catholic School in North Miami; St. John the Apostle School in Hialeah; St. Mary's Cathedral near Little Haiti; St. Michael the Archangel near Little Havana; St. Monica School in Opa-locka; Sts. Peter & Paul School in The Roads section of Miami.

In Broward, the schools are:

The Annunciation School in unincorporated South Broward; Little Flower School and Nativity School in Hollywood; Our Lady Queen of Martyrs, and St. Jerome in Fort Lauderdale; St. Helen in Lauderdale Lakes, St. Clement in Wilton Manors, St. Ambrose in Deerfield Beach; St. Elizabeth in unincorporated North Broward; St. Stephen in Miramar.■

4. The Christian Science Monitor

June 24, 1997

Court Lowers Wall Dividing Church, State...

Robert Marquand
Staff writer of The Christian Science Monitor

WASHINGTON — For 25 years the United States Supreme Court has relied on a fairly strict interpretation of the separation of church and state - not allowing, for example, public school teachers to enter parochial schools to teach remedial courses in math and reading.

Yet in what amounts to a significant change in First Amendment law, a divided high court yesterday modified its previous stand on "separation" - allowing a more relaxed standard to prevail.

The bottom line of the ruling is this: By a narrow 5-to-4 vote, the court decided that allowing public teachers to walk onto the grounds of religious schools and teach remedial math, or English, or science to disadvantaged students does not threaten the nation's cherished wall between church and state.

The opinion is immediately controversial because it not only appears to lower further the dividing wall between church and state, but also overturns a major church-state ruling of the late 1980s. Yesterday's reversal bothers some constitutional scholars, as well as the four dissenting justices, who feel the integrity of the court's decisions are compromised.

The majority opinion, written by Justice Sandra Day O'Connor, suggests that public school teachers in New York City are part of a carefully constrained program that does not "excessively entangle" them in religious doctrine or promotion. Harm done to children in religious schools who do not receive the remedial aid, she writes, is "a manifest injustice" that allows the court to rule.

"This continues a recent trend in the court to be more sympathetic to government support of education in religious schools," says Mark Tushnet, a First Amendment scholar at the Georgetown University Law School here.

Wider implications

The ruling, some legal analysts say, could give new ammunition to parents who send their children to parochial schools - and who want to be included in public education funding such as tax breaks and vouchers.

In New York City and elsewhere across the country, school administrators expect yesterday's decision will save millions of dollars a year in federal program costs for remedial education students.

Justice O'Connor's opinion appears to further enshrine her "endorsement test" as the new high-court standard, replacing a historic three-part test that had governed federal and state courts in matters of religion in public life since 1972. That standard, derived from the case of Lemon v. Kurtzman, said a state could not advance, entangle, or substitute religion in the public sphere.

O'Connor's decision says New York City's Title I remedial-education program does not violate any of the three primary criteria the court uses to evaluate whether government has advanced religion. She said the program does not result in governmental indoctrination, define its recipients by reference to religion, or create an excessive entanglement.

Further, O'Connor's opinion emphasized that government could provide aid so long as the program was scrupulously careful to avoid any religious content. The standard is a significant departure from the Lemon test.

"This seems like O'Connor's effort to establish what she sees as a neutral position," says Christine Compston of Western Washington University in Seattle, an expert on aid to sectarian schools. "But I'm not sure how successful this interpretation will be. People view neutrality in a variety of ways."

Teaching in a van

Under the previous standard, public school teachers were not banned from helping parochial students, but they were barred from teaching at any religiously

affiliated school. That would excessively entangle government and religion, the court said back then.

As a result, remedial help has been offered in mobile vans parked just off parochial-school property, in public-school classrooms, or by computer. In New York alone, the extra cost has topped $100 million since 1985. US Department of Education officials say the annual cost nationwide could be $15 million.

Chief Justice William Rehnquist and Justices O'Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas form the majority.

The four dissenters accused the court of abandoning the "responsive, non-agenda-setting character of this court." They leveled that criticism because the majority chose to consider the constitutional issues of the dispute only after deciding that a procedural hurdle was surmountable.■

5. The New York Times

06/24/97; Edition: Late Edition - Final; Section: Section A; Metropolitan Desk; Page 1, Column 6

THE SUPREME COURT: EDUCATION

COURT EASES CURB ON PROVIDING AID IN CHURCH SCHOOLS

By LINDA GREENHOUSE

WASHINGTON, June 23 — In a dramatic and potentially far-reaching ruling, the Supreme Court overturned one of its own precedents today to declare that the Constitution permits public school systems to send teachers into parochial schools to teach remedial and supplemental classes to needy children.

The 5-to-4 decision ends a 12-year period during which public schools, obliged by Federal law to provide the special services to all students who qualified but barred by the Court from delivering them on parochial school premises, had to use expensive and unwieldy alternatives.

New York City, where both the original ruling and the current challenge to it originated, spent $100 million in Federal education aid during those years, most of it to lease vans that, parked on public streets just outside religious school grounds, served as mobile classrooms for more than 20,000 parochial school students a year.

Writing for the majority today, Justice Sandra Day O'Connor said the Court no longer accepted the premise of its 1985 decision, Aguilar v. Felton, that brought about that result. "We no longer presume that public employees will inculcate religion simply because they happen to be in a sectarian environment," Justice O'Connor said.

In a dissenting opinion, Justice David H. Souter said the effect of today's ruling would be to "authorize direct state aid to religious institutions on an unparalleled scale." He said such aid would violate the "central prohibition against religious subsidies by the Government" encompassed by the First Amendment's prohibition against the "establishment" of religion.

Indeed, as significant as the decision's immediate impact is for New York and other urban school districts, its implications for future church-state cases drew most of the attention here and ran through both the majority and dissenting opinions in a kind of unacknowledged subtext.

Supporters and opponents of increased public aid to parochial schools combed the ruling for ammunition in their ongoing debate, particularly over the constitutionality of vouchers, which would permit parents to pay religious school tuition with public money. Cases testing the constitutionality of vouchers and similar programs are working their way through courts in several states.

While there was general acknowledgment that the Court today had created a more receptive climate for the pro-voucher arguments, the narrowness of the vote as well as some qualifying language in Justice O'Connor's opinion stopped well short of a guarantee that those arguments would succeed.

The majority opinion was joined by Chief Justice William H. Rehnquist and by Justices Antonin Scalia, Anthony M. Kennedy and Clarence Thomas. It was Justice O'Connor and these four Justices who set in motion the events that led to today's ruling, indicating in separate opinions in a church-state case from New York three years ago, Kiryas Joel Board of Education v. Grumet, that they disliked the 1985 precedent and would welcome a vehicle with which to reconsider it.

In addition to Justice Souter, the dissenting Justices were John Paul Stevens and Ruth Bader Ginsburg, who signed all of Justice Souter's opinion, and Stephen G. Breyer, who signed most of it. Justice Ginsburg also wrote her own dissenting opinion, which the others signed, arguing that for the sake of the "preservation of the responsive, non-agenda-setting character of this Court," the Court should not have heard this case.

The decision, Agostini v. Felton, No. 96-552, was a victory for New York City and for the Clinton Administration, which supported the city's effort to use an unusual procedure to persuade the Court to revisit its precedent. Richard W. Riley, the Secretary of Education, called the ruling today "a positive step forward for American education." Mayor Rudolph W. Giuliani called the decision "very wise" and said the precedent it overturned was "irrational."

Through three Administrations, the United States Department of Education had objected to the obstacle that the 1985 decision placed in the path of delivering services to eligible students under the Elementary and Secondary Education Act of 1965. Under this law, Federal money flowing through public school systems is supposed to provide remedial reading and math instruction as well as guidance services to low-achieving children from poor families, no matter where they attend school.

For the first 20 years, the classes were typically taught in parochial school classrooms by public school teachers, who took the assignment voluntarily. But a lawsuit by a group of New York City taxpayers led to the 1985 decision in which the Court, in a 5-to-4 ruling, said that the degree of monitoring necessary to make sure that the secular and

religious activities within the parochial school building were kept separate resulted in an unconstitutional entanglement of church and state. The decision represented a kind of high watermark in the Court's view of strict church-state separation, one from which, according to the majority opinion today, the Court began an almost immediate retreat.

The case today got to the Court in a highly unusual manner. Because there is no procedure for a party to an earlier decision to simply ask for a new hearing, New York City filed a motion in Federal District Court in Brooklyn in 1995 invoking Rule 60(b) of the Federal Rules of Civil Procedure, which is typically used when changed circumstances make it inequitable for a court order to remain in effect. The changed circumstance, the city said, was the indication that five Justices would like to overrule Aguilar v. Felton.

The District Court, in a decision affirmed by the United States Court of Appeals for the Second Circuit, said it could not grant the motion because only the Supreme Court itself could declare the overruling of a Supreme Court precedent. Supported by the Clinton Administration, New York appealed to the Supreme Court.

The city's appeal presented the Court with a dilemma: much as a majority did want to overturn Aguilar v. Felton, if the Court reopened the case on that basis, it would be inviting the use of Rule 60(b) any time that comments from Justices cast a shadow over a precedent.

Consequently, Justice O'Connor took another approach in her majority opinion, saying that Aguilar v. Felton had already been overruled as a practical matter by the Court's reasoning in two decisions, one in 1986 and the other four years ago.

The Clinton Administration had not even mentioned the first of the two cases in its brief, no doubt because there had been no indication that a majority of the Court had viewed it as undermining a decision that had been handed down just the year before. The 1986 case, Witters v. Washington, an essentially unanimous decision by Justice Thurgood Marshall, held that it did not violate the Establishment Clause for the state of Washington to permit a blind student to use a state vocational rehabilitation grant to pay his tuition at a Christian Bible college. The 1993 case, Zobrest v. Catalina Foothills School District, held that a state-employed sign-language interpreter could accompany a deaf student to a Roman Catholic high school.

Justice O'Connor said today that these decisions showed the Court had abandoned its view that "the placement of public employees on parochial school grounds inevitably results" in a violation of church-state separation. That view, she said, was essential to the decision both in Aguilar v. Felton and in a second decision, Grand Rapids v. Ball, that the Court also overruled in part today.

In his dissenting opinion, Justice Souter said that the 1986 and 1993 cases, far from overruling Aguilar v. Felton, were limited rulings that dealt only with "aiding isolated individuals within a school system." He said they provided no authority for eroding the distinction between indirect and direct aid to parochial schools.

"That principled line is being breached only here and now," Justice Souter said.

The decision today gave the Clinton Administration somewhat more than it had asked the Court for. In his brief and argument Solicitor General Walter Dellinger had asked for a ruling that would treat the 1985 ruling as something of an anomaly and overrule it on a limited basis. How much further the Court went today is now a subject of debate.

"The tea leaves look spectacular for vouchers," Kevin J. Hasson, president of the Becket Fund for Religious Liberty, a group advocating vouchers, said in an interview, calling the important point the majority's conclusion that "aid given on a neutral basis is constitutional."

However, J. Brent Walker, general counsel of the Baptist Joint Committee on Public Affairs, which opposes government aid to religious schools, pointed to Justice O'Connor's observation that no public funds "ever reach the coffers of religious schools" under the program at issue today as evidence that the Court was not making a major departure into the realm of parochial school aid. ■

6. The New York Times

06/24/97; Edition: Late Edition - Final; Section: Section B; Metropolitan Desk; Page 9, Column 3

THE SUPREME COURT: THE REACTION

After Years of Classes in Vans, It's Back to School

By JACQUES STEINBERG

It was on the afternoon of July 1, 1985, that Edward I. Koch, then the Mayor of New York City, telephoned Msgr. Vincent D. Breen, the Vicar for Education of the Archdiocese of Brooklyn, with an urgent question.

The United States Supreme Court had just ruled that New York City could no longer send public school teachers inside religious schools to provide federally mandated remedial education in reading and mathematics. How, Mr. Koch wondered, could the city meet the Federal mandate without breaking the law.

TD "It's unconstitutional to have the teachers on the site of the nonpublic school," Monsignor Breen recalled saying. "But the Court did not say it was unconstitutional to have them off the site." Finally, the Monsignor recalled, Mr. Koch said, "How about a van?"

So it was that a quick telephone conversation, which Mr. Koch himself said he barely remembered yesterday, led to a policy that grew to include more than 100 vans and drivers costing $15 million a year in Federal aid.

The policy — which enabled public school teachers to attend to the needs of parochial-school students under the Federal antipoverty program known as Title 1 — remained in effect until yesterday, when the Court overturned the 12-year-old ruling requiring such a solution.

The most immediate effect of the Court's ruling will be the return of public school teachers to the parochial classrooms next fall. They are responsible for more than 22,000 students who received remedial instruction for part of the day in 114 mobile classrooms outside 250 religious

and private schools in the New York area. Because most of the city's religious schools are under capacity, officials do not expect crowding to be a problem.

But advocates for school choice said they hoped that the ruling would have a wider effect in the near future and could serve as a precedent for the issuing of state and Federal vouchers to parents to spend on public or private schools, regardless of religious affiliation.

Although civil libertarians had supported the mobile classrooms as maintaining the separation between church and state, principals and teachers had long complained that the arrangement was an inconvenience.

"We finally got some common sense," said Ted Staniecki, principal of the School of the Incarnation on 175th Street in Washington Heights, in reaction to the ruling.

Mr. Staniecki said that in any week, 200 of the school's 520 students in grades kindergarten through 8 were taught remedial English or reading in three trailers that parked each day off Catholic Church property. Students would traipse out; the driver would stay with the van, idling it for power and lights.

Christian DeCena, age 11, who, until school ended last Friday received two periods of math instruction a week in a trailer, said he would miss "the fun" of the vans. In warm months, he said, there was air-conditioning, which the school does not have. And in winter, he added, "you get to play in the snow on the way to class."

The Government had provided the Board of Education with more than $100 million over the last decade to lease vans and pay drivers. In the previous school year alone, the Board spent $9 million in Federal grants specifically for the leasing and took $6.6 million for the leases from the city's $403 million allocation under the Title 1 program, to which all poor children, regardless of the schools they attend, are entitled.

Federal education officials said the board would likely lose much of the $9 million allocation next year but not the $6.6 million.

Schools Chancellor Rudy Crew, who had supported overturning the 1985 decision, praised yesterday's ruling as educationally sound. Whether the ruling would have broader ramifications for the growing school choice movement was unclear. Advocates for vouchers said they were hopeful that the Court would someday approve the spending of public dollars other than those of Title 1 in religious schools.

But David Bloomfield, a professor of education law at Teachers College at Columbia University, said such predictions were premature. "Clearly, the Court is not permitting public funding of religious instruction in this decision," he said. "That is a wholly separate rationale." ■

7. The New York Times

06/24/97; Edition: Late Edition - Final; Section: Section B; Metropolitan Desk; Page 9, Column 1

THE SUPREME COURT

Excerpts From Ruling Allowing Aid to Church Schools for Remedial Classes

By The New York Times

WASHINGTON, June 23 — Following are excerpts from the Supreme Court's decision today that overturned a precedent to declare that the Constitution permits public schools to send teachers into parochial schools to teach remedial classes. Justice Sandra Day O'Connor wrote the majority opinion, Justice David H. Souter the dissent. FROM THE DECISION By Justice O'Connor

In order to evaluate whether Aguilar has been eroded by our subsequent Establishment Clause cases, it is necessary to understand the rationale upon which Aguilar, as well as its companion case, School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985), rested.

TD In Ball, the Court evaluated two programs implemented by the School District of Grand Rapids, Michigan. The district's Shared Time program, the one most analogous to Title I, provided remedial and "enrichment" classes, at public expense, to students attending nonpublic schools. The classes were taught during regular school hours by publicly employed teachers, using materials purchased with public funds, on the premises of nonpublic schools. The Shared Time courses were in subjects designed to supplement the "core curriculum" of the nonpublic schools. Id., at 375-376. Of the 41 nonpublic schools eligible for the program, 40 were "'pervasively sectarian'" in character, that is, "the purpos(e) of (those) schools (was) to advance their particular religions." Id., at 379.

The Court conducted its analysis by applying the three-part test set forth in Lemon v. Kurtzman, 403 U.S. 602 (1 9 7 1) :

"First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." 473 U.S. 382-383 (quoting Lemon, supra, at 612-613).

The Court acknowledged that the Shared Time program served a purely secular purpose, thereby satisfying the first part of the so-called Lemon test. 473 U.S., at 383. Nevertheless, it ultimately concluded that the program had the impermissible effect of advancing religion. Id., at 385. . . .

Distilled to essentials, the Court's conclusion that the Shared Time program in Ball had the impermissible effect of advancing religion rested on three assumptions: (i) any public employee who works on the premises of a religious school is presumed to inculcate religion in her work; (ii) the presence of public employees on private school premises creates a symbolic union between church and state; and (iii) any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking. Additionally, in Aguilar there was a fourth assumption: that New York City's Title I program necessitated an excessive government entanglement with religion

because public employees who teach on the premises of religious schools must be closely monitored to insure that they do not inculcate religion. . . .

As we have repeatedly recognized, government inculcation of religious beliefs has the impermissible effect of advancing religion. Our cases subsequent to Aguilar have, however, modified in two significant respects the approach we use to assess indoctrination. First, we have abandoned the presumption erected in Meek and Ball that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion. In Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993), we examined whether the IDEA, 20 U.S.C. s1400 et seq., was constitutional as applied to a deaf student who sought to bring his state-employed sign language interpreter with him to his Roman Catholic high school. We held that this was permissible . . .

We refused to presume that a publicly employed interpreter would be pressured by the pervasively sectarian surroundings to inculcate religion by "add(ing) to (or) subtract(ing) from" the lectures translated. Ibid. In the absence of evidence to the contrary, we assumed instead that the interpreter would dutifully discharge her responsibilities as a full-time public employee and comply with the ethical guidelines of her profession by accurately translating what was said. Id., at 12. Because the only government aid in Zobrest was the interpreter, who was herself not inculcating any religious messages, no government indoctrination took place and we were able to conclude that "the provision of such assistance (was) not barred by the Establishment Clause." Ibid. Zobrest therefore expressly rejected the notion relied on in Ball and Aguilar that, solely because of her presence on private school property, a public employee will be presumed to inculcate religion in the students. Zobrest also implicitly repudiated another assumption on which Ball and Aguilar turned: that the presence of a public employee on private school property creates an impermissible "symbolic link" between government and religion. . . .

Second, we have departed from the rule relied on in Ball that all government aid that directly aids the educational function of religious schools is invalid. In Witters v. Washington Dept. of Servs. for Blind, 474 U.S. 481 (1986), we held that the Establishment Clause did not bar a State from issuing a vocational tuition grant to a blind person who wished to use the grant to attend a Christian college and become a pastor, missionary or youth director. Even though the grant recipient clearly would use the money to obtain religious education, we observed that the tuition grants were "made available generally without regard to the sectarian-nonsectarian or public-nonpublic nature of the institution benefited." Id., at 487 (quoting Committee for Public Ed. and Religious Liberty v. Nyquist, 413 U.S. 756, 782-783, n. 38 (1973).

The grants were disbursed directly to students, who then used the money to pay for tuition at the educational institution of their choice. In our view, this transaction was no different from a State's issuing a paycheck to one of its employees, knowing that the employee would donate part or all of the check to a religious institution. In both situations, any money that ultimately went to religious institutions did so "only as a result of the genuinely independent and private choices of" individuals. Ibid. . . .

Zobrest and Witters make clear that, under current law, the Shared Time program in Ball and New York City's Title I program in Aguilar will not, as a matter of law, be deemed to have the effect of advancing religion through indoctrination. Indeed, each of the premises upon which we relied in Ball to reach a contrary conclusion is no longer valid. First, there is no reason to presume that, simply because she enters a parochial school classroom, a full-time public employee such as a Title I teacher will depart from her assigned duties and instructions and embark on religious indoctrination, any more than there was a reason in Zobrest to think an interpreter would inculcate religion by altering her translation of classroom lectures. Certainly, no evidence has ever shown that any New York City Title I instructor teaching on parochial school premises attempted to inculcate religion in students. FROM THE DISSENT By Justice Souter

For the reasons given by JUSTICE GINSBURG, see post, the Court's holding that petitioners are entitled to relief under Rule 60(b) is seriously mistaken. The Court's misapplication of the rule is tied to its equally erroneous reading of our more recent Establishment Clause cases, which the Court describes as having rejected the underpinnings of Aguilar and portions of Aguilar's companion case, School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985). The result is to repudiate the very reasonable line drawn in Aguilar and Ball, and to authorize direct state aid to religious institutions on an unparalleled scale, in violation of the Establishment Clause's central prohibition against religious subsidies by the government.

I respectfully dissent. . . .

The human tendency, of course, is to forget the hard lessons, and to overlook the history of governmental partnership with religion when a cause is worthy, and bureaucrats have programs. That tendency to forget is the reason for having the Establishment Clause (along with the Constitution's other structural and libertarian guarantees), in the hope of stopping the corrosion before it starts.

These principles were violated by the programs at issue in Aguilar and Ball, as a consequence of several significant features common to both Title I, as implemented in New York City before Aguilar, and the Grand Rapids Shared Time program: each provided classes on the premises of the religious schools, covering a wide range of subjects including some at the core of primary and secondary education, like reading and mathematics; while their services were termed "supplemental," the programs and their instructors necessarily assumed responsibility for teaching subjects that the religious schools would otherwise have been obligated to provide. . . .

What, therefore, was significant in Aguilar and Ball about the placement of state-paid teachers into the physical and social settings of the religious schools was not only the consequent temptation of some of those teachers to reflect the schools' religious missions in the rhetoric of their instruction, with a resulting need for monitoring and the certainty of entanglement. See Aguilar, 473 U.S., at 412-414 (monitoring); Ball, 473 U.S., at 388 (risk of indoctrination). What was so remarkable was that the schemes in issue assumed a teaching responsibility indistinguishable from the responsibility of the schools themselves. The obligation of primary and secondary schools to teach reading necessarily extends to teaching those who are having a hard time at it, and the same is true of math. Calling some classes remedial does not

distinguish their subjects from the schools' basic subjects, however inadequately the schools may have been addressing them.

What was true of the Title I scheme as struck down in Aguilar will be just as true when New York reverts to the old practices with the Court's approval after today. There is simply no line that can be drawn between the instruction paid for at taxpayers' expense and the instruction in any subject that is not identified as formally religious. ■

8. Washington Post

June 24, 1997

Church-State Divide Narrowed

Taxpayer-Funded Teachers Allowed to Tutor in Parochial Schools

By Joan Biskupic and Laurie Goodstein
Washington Post Staff Writers
Tuesday, June 24, 1997; Page A01 The Washington Post

In keeping with its recent trend of lowering the wall between church and state, a narrowly divided Supreme Court ruled yesterday that public school teachers may provide remedial education to students in parochial institutions.

The court reversed a 12-year-old decision forbidding taxpayer-funded teachers to tutor children in religious schools, provoking dissenting justices to declare that important constitutional lines between church and state had been breached and that the majority was too hasty in reversing its own precedent.

The decision comes as much of the public and many lawmakers around the country are questioning whether the government would be wise to subsidize religious institutions to address a range of social problems — from housing the homeless and teaching inner-city youth to treating alcoholics and drug addicts.

Many states and municipalities are already challenging constitutional assumptions by channeling taxpayers' money to churches, synagogues and parochial schools to attack some of those issues. But the question is: To what extent are partnerships between government and religion permissible under the Constitution?

In the area of education, a narrow, more conservative majority of the Supreme Court in recent years has been enhancing the ability of government — nationally and locally — to provide funds to religious schools and academic programs. The current view is a marked departure from the stricter separationist stance of the court in the 1980s.

"Interaction between church and state is inevitable," Justice Sandra Day O'Connor wrote for the 5 to 4 majority yesterday, "and we have always tolerated some level of involvement between the two." O'Connor said that what had changed over the years was the court's view of whether particular public aid to religion had "an impermissible effect," for example, requiring a government to get excessively involved in the workings of a church institution.

But while O'Connor emphasized the narrow scope of the court's decision, focused on a federal program that provides funds for remedial education nationwide, some religious leaders immediately declared that it could help their effort to get government to pay for vouchers that could be used by parents to send their children to religious schools.

"This decision confirms that vouchers can be constitutional," said Mark Chopko, general counsel to the United States Catholic Conference, so long as those programs are carefully designed, religiously neutral and beneficial to all parents. Other religious groups felt the conclusions that would be drawn from the ruling were more limited.

At issue in yesterday's case is a 1965 federal funding program known as Title I intended to educate all school children who need remedial help, including those in parochial schools.

The New York City school district's practice was to send public school teachers into parochial schools to offer remedial services during the regular school day. But after six taxpayers challenged the program, the Supreme Court ruled in 1985 that furnishing publicly financed services in religious schools was a violation of the First Amendment's separation of church and state.

After that 5 to 4 decision, school districts in New York and across the country began fulfilling the requirements of Title I by sending public school teachers to instruct parochial students at alternative sites, usually a van parked outside the religious schools. Federal education officials said that not only was a poor environment for students who needed help but wasted millions of dollars that otherwise could have been spent on more direct academic aid. More than 190,000 parochial school children nationwide receive publicly funded remedial instruction, at a cost of about $40 million a year, much of it spent on the cost of teaching children at an alternative site.

With the support of the Clinton administration, New York City schools asked the court to free it from the requirements of the court's original 1985 ruling. It noted that a majority of the current justices had in subsequent rulings complained about the 1985 ruling.

Yesterday, O'Connor said in Agostini v. Felton that it was not enough that the 1985 mandate was costly or that it was criticized by individual justices. What mattered, she said, was that the court had expressly disavowed the notion that the First Amendment absolutely bars the placing of a public employee in a sectarian school. She noted that in a 1993 ruling, the court had allowed a public school teacher to enter a Roman Catholic school as a sign-language interpreter for a deaf student.

O'Connor said New York City's implementation of Title I "does not result in any governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement" between church and state. Joining her were Chief Justice William H. Rehnquist and Justices Antonin Scalia, Anthony M. Kennedy and Clarence Thomas.

In dissent were Justices John Paul Stevens, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer. Souter,

joined by Stevens and Ginsburg, said in a statement, "[C]onstitutional lines have to be drawn, and on one side of every one of them is an otherwise sympathetic case that provokes impatience with the Constitution and with the line. But constitutional lines are the price of constitutional government."

Staff writer Rene Sanchez contributed to this report.

CHURCH, STATE AND SCHOOL

Yesterday's ruling marks another move away from two key 1985 decisions that laid out boundaries between church and state in secondary education.

1985

Grand Rapids School District v. Ball

The court ruled, 7 to 2 and 5 to 4, that school officials improperly "established" religion by providing remedial and enrichment classes at parochial schools, both during the school day (by public school teachers) and after school (by parochial teachers paid from public funds).

Aguilar v. Felton

The court ruled, 5 to 4, that a New York program also advanced religion in violation of the First Amendment by using public funds for remedial and counseling services in parochial schools.

1986

Witters v. Washington Department of Services for the Blind

The court unanimously rejected Washington state's argument that allowing a ministerial student to receive aid under a program that assists the handicapped would violate consitu-tional separation between church and state.

1993

Zobrest v. Catalina Foothills School District

The court ruled, 5 to 4, that the government can provide a sign-language interpreter for a deaf parochial school student, under the Individuals with Disabilities Education Act.

1997

Agostini v. Felton

The court ruled, 5 to 4, that public school teachers can provide remedial help to students at parochial schools. Justices Sandra Day O'Connor, Antonin Scalia, Anthony M. Kennedy, Clarence Thomas and Chief Justice William H. Rehnquist formed the majority; Justices Ruth Bader Ginsburg, David H. Souter, John Paul Stevens and Stephen G. Breyer dissented.■

9. Associated Press

06-24 8:34a

Court allows public teachers through parochial doors

By ROBERT GREENE
AP Education Writer

WASHINGTON (AP) - Thousands of poor children at Catholic schools may get taxpayer-funded help in reading and math without sitting in motor homes converted into classrooms, marching out to a "neutral" building or staring into a not-too-personal computer.

The Supreme Court said Monday that public school teachers may enter private school buildings to carry out a federal aid program known as Title I and not worry about breaching the wall between church and state. A 1985 ruling by the same court had said otherwise, literally forcing some New York children to be taught in converted vans outside Catholic schools.

The administration praised the ruling and said it will free millions of dollars being spent on such things as transportation, converted motor homes, rental of classroom space and other assurances that learning takes place on nonsectarian turf.

"We can now work to direct this money to the classroom and help many more needy public, private and parochial school children," Education Secretary Richard Riley said.

The dollars may well be needed. Federal officials say that by making it easier for parochial and private school students to receive Title I aid, more schools and children are likely to sign on.

A number of private, mostly Catholic, schools had rejected the aid because of the paperwork or inconvenience of having the daily classroom routine interrupted by the special arrangements.

Sister Dale McDonald, director of public policy at the National Catholic Educational Association, said Monday that nearly 5,600 Catholic schools have students eligible for Title I help, but only 4,600 take part.

Of the 6.7 million children getting help through the program in 1994-1995, about 173,000 attended private and parochial schools.

With more minority students being served by Catholic schools, the number of Catholic school students possibly needing help is higher, McDonald said.

"For kids with learning difficulties and disadvantaged backgrounds, nothing can replace the steady presence of a teacher," she said. "We're happy about that."

Mary Jean LeTendre, director of the program at the Education Department, said she will be meeting with state officials next month and will put out the word that private schools should be encouraged to participate.

"We expect public school districts could, should, must reach out to that community and ask again, 'Are you interested?'" she said. The money will be taken from a limited pool of funds.

Congress made $7.2 billion this year for states to carry out Title I. The money is allocated based on poverty counts, regardless of where the poor children attend school.

If the private schools lay claim to dollars, less will be available to the public schools. On the other hand, the program will cost less to run, LeTendre said. A separate budget of $25 million to $40 million yearly provided money to comply with the old ruling, but districts had to dip into their regular Title I money as well, she said.

The two teachers' unions - the National Education Association and the American Federation of Teachers - said they are satisfied with the ruling, which keeps a separate role and identity for the visiting teachers. There can be no religious symbols in the Title I classrooms, the materials can be used only by those teachers, and the public school teachers cannot work in teams with the private school teachers.

Bob Chanin, attorney for the NEA, said the narrow ruling gave no ammunition for groups seeking taxpayer support of private education through vouchers - adamantly opposed by the unions and the administration.■

PHOTOCOPY
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10. Baltimore Sun
June 24, 1997

PHOTOCOPY
PRESERVATION

Ruling boosts religious schools

Supreme Court allows public teachers into parochial classes

By Lyle Denniston
SUN NATIONAL STAFF

WASHINGTON — The Supreme Court, angrily divided over how it should use its power, reached out yesterday to overrule two long-settled decisions and gave the government sweeping authority to subsidize education in parochial schools.

Splitting 5-4, the court ruled that, contrary to what it decided 12 years ago, the Constitution allows public school teachers to be paid with public funds to enter parochial schools and offer remedial studies, guidance counseling and enrichment classes.

The Constitution's clauses separating church and government, the court majority said, do not bar publicly paid teachers from the classrooms of parochial schools, so long as they teach subjects other than religion.

Teachers, the court said, can be depended upon not to shape their teaching to advance the schools' religious mission.

"We have abandoned the presumption that the placement of public employees on pa-

rochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination," Justice Sandra Day O'Connor wrote for the majority.

She said that having publicly paid teachers in those schools does not create "a symbolic union between government and religion."

Interaction between church and government, O'Connor said, "is inevitable and we have always tolerated some level of involvement between the two."

The decision, however, tolerated a deeper level of involvement than the court had allowed before. The justices overturned all of one 1985 ruling and part of another that year — two decisions that had come to mean that virtually all direct government subsidizing of religious school education was unconstitutional.

The court, O'Connor said, "has departed from" that view, thus implying that states and Congress were now freer to experiment with direct financing of education in parochial schools in ways that may parallel aid to public schools.

The decision was unprecedented in one respect. Although it is not uncommon for the court to overrule a prior decision, never before had it allowed the losers in a case to return to court years later and argue that they should now be declared the winners.

Dissenting Justice David H. Souter said the ruling would "authorize direct state aid to religious institutions on an unparalleled scale."

Barry W. Lynn, executive director of Americans United for Separation of Church and State, expressed dismay. He said he expected the decision to embolden state legislatures to provide additional forms of public funding to religious schools, including, perhaps, paying public school teachers to offer core courses, not just remedial or enrichment classes.

Lynn said the ruling "was as significant as you can find on public service aid to parochial schools." He doubted, however, that the ruling went far enough to give the court's blessing to state-funded scholarships that could be used at parochial schools.

Proponents of such scholarships, however, disagreed. Clint Bolick, litigation director of the Institute for Justice, said the decision "bolsters school-choice advocates' argument that states may give parents educational scholarships to spend at the public or private school of their choice."

The U.S. Catholic Conference praised the ruling, saying it "strengthened the nature of relationships between religion and government."

As a result of yesterday's decision, about 255,000 students attending Roman Catholic schools, and many others at other parochial schools, will be allowed to take remedial studies and enrichment courses from public school teachers inside their own schools.

Congress decided 32 years ago, in setting up a program of remedial education for poor children in reading, math and English, that the teaching help should go to children wherever they were in school: parochial, other private or public. Many of the poor children in the program go to Catholic schools, and those schools welcomed the federal subsidy.

After the 1985 rulings barred such aid, New York City's schools and others began providing the classes at sites away from the parochial schools, often in buses parked outside.

Until yesterday, the court had been unwilling to reconsider those rulings, although five of the present justices had criticized those decisions and suggested they should be reconsidered.

That day came yesterday, when the justices endorsed a maneuver by lawyers for New York schools and for parochial school pupils' parents to use an obscure federal court rule to reopen the very case they lost in 1985.

Joining O'Connor in the majority were Chief Justice William H. Rehnquist and Justices Anthony M. Kennedy, Antonin Scalia and Clarence Thomas.

Dissenting with Souter were Justices Stephen G. Breyer, Ruth Bader Ginsburg and John Paul Stevens.■

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White House Press Release

Statement By The President

Message Creation Date was at 23-Jun-1997 13:45:00

The White House

Office of the Press Secretary
(San Francisco, Ca)

For Immediate Release June 23, 1997

Statement By The President

I am pleased with the **Supreme Court's** decision today which will raise educational standards for children across America. For the last ten years, school districts have been barred from providing Title I supplemental remedial educational programs to parochial school students in their classrooms. These special programs, which supplement the school's base curriculum, provide remedial education to students who need more than the standard school day provides.

My Administration sought to overturn this unfair restriction. The **Court's** decision explicitly accepts the position put forth by Solicitor General Walter Dellinger, representing Secretary of Education Richard Riley, that federally funded supplemental educational programs may be provided to students of both public and parochial schools without running afoul of the principle of separation of church and state. No longer will children have to leave their school buildings in order to get the assistance they need.

Because of today's ruling, all school children, whether in public or private schools, can benefit equally from the important supplemental remedial programs of Title I.

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