Nos. 96-17131, 97-15422

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

_____

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

Plaintiffs-Appellants-
Cross-Appellees

v.

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

Defendants-Appellees-
Cross-Appellants

_____

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

_____

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

_____

C. GREGORY STEWART
General Counsel
Equal Employment
Opportunity Commission
1801 L Street, N.W.
Washington, D.C. 20507

JUDITH C. WINSTON
General Counsel
Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

ANITA S. HODGKISS
Deputy Assistant Attorney General

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

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES: **PAGE**

REGULATIONS: **PAGE**

LEGISLATIVE HISTORY:

MISCELLANEOUS:

MISCELLANEOUS (continued): **PAGE**

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

_____

Nos. 96-17131, 97-15422

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

Plaintiffs-Appellants-
Cross-Appellees

v.

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

Defendants-Appellees-
Cross-Appellants

_____

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

_____

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

_____

INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The federal government supports fully the use of standardized testing as one factor in assessing teacher quality. Indeed, the Department of Education has made substantial grants to numerous states and local school districts, including California, to improve their systems of teacher testing. Of course, such testing must be properly validated as required by federal civil rights laws, and we believe that compliance with such laws is fully consistent with the federal government's commitment to teacher quality. The United States is filing this brief to address significant jurisdictional issues, not to take a position on whether the Court should enjoin California from continuing to administer the California Basic Educational Skills

Test (CBEST). The only question we address here is whether California's system of testing is subject to judicial review under Titles VI and VII of the Civil Rights Act of 1964.[1] We submit that it is.

Pursuant to 42 U.S.C. 2000d-1, numerous federal agencies have promulgated regulations to implement Title VI, which prohibits a recipient of federal financial assistance from discriminating on the basis of race, color, or national origin in its programs or activities. 42 U.S.C. 2000d. Those regulations prohibit, among other forms of discrimination, the use of criteria that have unjustified discriminatory effects. See, e.g., 34 C.F.R. 100.3(b)(2) (Department of Education); 32 C.F.R. 195.4(b)(2) (Department of Defense). A federal agency may initiate administrative action if it finds a recipient is not in compliance with Title VI or its implementing regulations. See, e.g., 34 C.F.R. 100.6-100.10. In addition, the Department of Justice coordinates federal agencies' enforcement of Title VI, Exec. Order No. 12,250, 3 C.F.R. 298 (1980), and has authority to enforce Title VI in federal court. 42 U.S.C. 2000d-1.

Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(f), the Department of Justice has authority to initiate suits against public employers, and the Equal Employment Opportunity Commission (EEOC) has authority to initiate suits

---

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

against private employers. Title VII prohibits, among other things, employment practices that have an unjustified disparate impact. See 42 U.S.C. 2000e-2(k).

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

Teacher preparation and the enhancement of teacher quality are central purposes of many statutes administered by the Department of Education, including, for example, the Teacher Quality Enhancement Grant Program, which makes grants to States to support systemic efforts to improve teaching quality.[2] See 20

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

U.S.C. 1021 et seq. This program includes a competitive priority for States that strengthens their teacher certification requirements to ensure that new teachers have strong content knowledge and teaching skills. See 20 U.S.C. 1025(b)(2). The statute also includes accountability provisions that require annual state reports to the Secretary of Education on the quality of teacher preparation in the State, including the performance of teacher candidates on state certification examinations and annual reports to the public by teacher preparation institutions on the pass rates of their graduates on teacher certification assessments of the State in which the institution is located. 20 U.S.C. 1027.

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

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

National Comm'n on Teaching And America's Future, What Matters Most: Teaching for America's Future Summary Report at 7-8 (Sept. 1996).

Teacher quality is critical in influencing student achievement. What teachers know and do is the most important influence on what students learn. "[S]tudies show that teacher expertise is the most important factor in student achievement." Id. (Full report) at 6.[3]

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

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

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

National Research Council, Tests and Teaching Quality, Interim Report at 23-24 (2000) (hereinafter "Interim Report").

Although there has been limited research on the extent to which state tests are effective in distinguishing between candidates who are competent to teach and those who are not, see ibid., evidence from studies that have addressed the relationships between students' and teachers' scores suggests that teachers' test scores do help in predicting their students' achievement.[4] There is broad educational consensus that teacher employment or certification tests are needed to help ensure teacher competence. Forty-one States require prospective teachers to pass one or more tests, either of basic skills, subject matter knowledge, pedagogical knowledge and skills, or a combination of these measures. See Interim Report at 10. Most of these states require a test of basic reading and math. See id. at 11. Although Congress has not endorsed any particular state teacher exam, it has implicitly endorsed state practices to administer these exams by holding States and institutions of higher education accountable for, among other things, the pass rate for initial state teacher certification. See 20 U.S.C.

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

1021-1030. Of course, such tests must comply with civil rights laws.

The United States agrees that States should insist on high levels of skills from all of their elementary and secondary school teachers. The National Research Council Report cited above makes clear that testing basic skills alone is not sufficient to determine whether a teacher candidate will be successful. Therefore, the Department of Education provides millions of dollars in federal aid to assist in recruiting, preparing, and supporting high quality teachers who have not only basic skills, but also subject matter expertise and excellent teaching skills.

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

appropriate requirement for every elementary and secondary school teacher. Federal nondiscrimination laws are consistent with the establishment of high standards for all students and teachers.

STATEMENT OF THE ISSUES

The United States and the Equal Employment Opportunity Commission as amici curiae will address two jurisdictional issues:

1. Whether California's Commission on Teacher Credentialing's (CTC's) administration of the California Basic Educational Skills Test (CBEST) is subject to scrutiny under Title VI.

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

STATEMENT OF THE CASE

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

Asians, and is not job-related or consistent with business necessity.

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

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

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

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

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

3. The plaintiffs filed a Petition for Rehearing and Rehearing En Banc. Approximately two weeks later, the defendants

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

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

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

Ibid. (emphasis added).

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

4. In July 1999, approximately one month before defendants filed their Notice Of Change In Circumstances stating that CTC was, in fact, a recipient of federal funds since early 1996, the U.S. Department of Education awarded California's Title II Teacher Quality Enhancement State Grant.[5] Pursuant to this three-year grant, beginning September 1, 1999, the CTC has received federal funds to lead the State's effort to develop a standards-based Teaching Performance Assessment (TPA) and to reform the State's teacher licensure and certification requirements.[6] Funding for the first year totals $3,257,866.

SUMMARY OF ARGUMENT

Plaintiffs assert a "disparate impact" challenge to CBEST under both Titles VI and VII of the Civil Rights Act of 1964. It is generally recognized -- and the parties do not dispute -- that an employment test that has a disparate impact upon minorities is lawful under Titles VI and VII only if the defendant can demonstrate that the test is "job-related for the position in question and consistent with business necessity," and there is no equally effective alternative with less adverse impact. 42

[5/] California's Office of the Governor submitted the application, although the CTC is the recipient, fiscal agent, and payee of funds from the Department of Education. A copy of the narrative portion of the Application for Federal Financial Assistance, California's Revised Year One Project Workplan and Year One Budget Proposal, and award documents from the Department of Education are included in the Addendum at pages 1-112.

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

U.S.C. 2000e-2(k); see In re: Employment Discrimination Litig. Against Ala., 198 F.3d 1305, 1311-1314 (11th Cir. 1999); Lanning v. Southeastern Pa. Transp. Auth., 181 F.3d 478, 487 (3d Cir. 1999), cert. denied, 120 S. Ct. 970 (2000); see also Larry P. v. Riles, 793 F.2d 969, 982 n.9 (9th Cir. 1984) (Title VII disparate impact standards apply to disparate impact claims brought pursuant to Title VI regulations).

Defendants contend, however, that the CBEST is beyond the reach of both Title VI and Title VII, because CTC neither receives federal funds in connection with this test nor employs plaintiffs. In our view, both statutes apply to CTC and, thus, the test is subject to judicial scrutiny under both statutes. First, as a recipient of federal funds, the CTC is subject to the requirements of Title VI. See Department of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 605 (1986). In addition, given the Civil Rights Restoration Act of 1987, a claim asserting a disparate impact violation of Title VI need not be "program specific"; that is, the alleged discrimination need not be in a program or activity that receives federal assistance. See 42 U.S.C. 2000d-4a; S. Rep. No. 64, 100th Cong., 1st Sess. 7-10 (1987).

Second, the State and CTC need not be the plaintiffs' direct employer to be subject to Title VII. A claim alleging that the defendants' requirement of the CBEST for public school employment unlawfully interferes with a failing applicant's ability to seek such employment is cognizable under Title VII. See Gomez v.

Alexian Bros. Hosp., 698 F.2d 1019, 1021-1022 (9th Cir. 1983); Sibley Mem'l Hosp. v. Wilson, 488 F.2d 1338, 1341 (D.C. Cir. 1973). Moreover, the CBEST constitutes a condition of employment subject to Title VII -- as opposed to a licensing examination exempt from Title VII -- because the examination is limited to individuals seeking public school employment, and applicants cannot obtain such employment without passing the CBEST. See 42 U.S.C. 2000e-2(k); Cal. Educ. Code 44252(b).

ARGUMENT

I

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

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

If a recipient is a public entity, all of its programs and activities or operations are subject to Title VI, without regard to the specific purpose of federal assistance. See 42 U.S.C.

2000d-4a(1)-(2); S. Rep. No. 64, 100th Cong., 1st Sess. 4, 16 (1987). For example, all of the operations of a state agency or instrumentality are subject to Title VI even though federal funding may be limited to one specific program. See 42 U.S.C. 2000d-4a; S. Rep. No. 64, supra, at 16.[7] Moreover, if one agency receives federal funds and transfers funds to a second agency, all of the operations of both entities are subject to Title VI. See ibid.

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

---

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

Title VI after 1995, we rely upon the alternative holding that Title VI was satisfied.").[8]

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

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

---

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

part of which is extended Federal financial assistance." Pub. L. No. 100-259, § 6, 102 Stat. 31 (codified at 42 U.S.C. 2000d-4a for Title VI).

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

The legislative history confirms this interpretation. A Senate committee report found "overwhelming" evidence that for nearly two decades prior to Grove City, both Republican and Democratic administrations had interpreted Title VI, Title IX, and their implementing regulations as having "the institution wide coverage that Congress intended." S. Rep. No. 64, supra, at 10; accord id. at 3, 7-9. For example, the Report emphasized that a former cabinet secretary had testified that coverage of Title IX "was exceedingly broad and that this broad coverage was reflected in the Title IX regulations promulgated during his tenure." Id. at 9. The Report confirmed that the purpose of the

Restoration Act was "to reaffirm" these "pre-Grove City College * * * executive branch interpretations." Id. at 2. Similarly, the House Judiciary Committee recognized that "[f]rom the outset," the "Title VI enforcement regulations" provided "broad coverage" and were "intended to apply to the entity which has received federal funds, not just to previously identified particular programs for which funds are earmarked." H.R. Rep. No. 829, Pt. 1, 98th Cong., 2d Sess. 23-24 (1984).

When Congress enacted the Restoration Act it was well aware of the Title VI effects regulations, which the Supreme Court had already held valid in Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983). See, e.g., H.R. Rep. No. 829, Pt. 1, supra, at 24 (discussing Guardians). Senator Kennedy, a primary sponsor of the legislation, explained that "title VI regulations use an effect standard to determine violations and that the Federal courts have upheld the use of an effect standard." 134 Cong. Rec. 229 (1988); see also 130 Cong. Rec. 27,935 (1984) (Sen. Kennedy) (judicial decisions approving discriminatory effects regulations "will remain in effect after enactment of this bill"). A case involving the discriminatory effects of certain educational practices was included among the Senate Report's examples of pending administrative cases that were not being addressed on the merits because of Grove City, but for which the Act would restore coverage. See S. Rep. No. 64, supra, at 13.[9]

[9/] Individual members of Congress also expressed their understanding that prior administrations had interpreted the

(continued...)

Consistent with that congressional intent, federal agencies have interpreted the coverage of the Title VI regulations, including the discriminatory effects regulations, to reach those programs that fall within the broad statutory definition of "program." See 42 U.S.C. 2000d-4a. The Department of Justice, which coordinates executive branch enforcement of Title VI, has emphasized that the Restoration Act was designed to restore "the broad interpretation of coverage" reflected in the "original regulations implementing Title VI"; thus, federal agencies "should consistently apply the Act's definition to all of the activities of a recipient," and "should review their own compliance programs to ensure that decisions regarding jurisdiction currently reflect the Restoration Act's definition of program or activity." 9 Civil Rights Forum No. 1, at 3 (Spring 1995) (Excerpts in Addendum, pp. 119-120). The Department has taken the same position in policy guidance to agencies in enforcing Title VI. See, e.g., Enforcement of Title VI of the Civil Rights Act of 1964 and Related Statutes in Block Grant-Type Programs, Memorandum from Acting Assistant Attorney General, Civil Rights Division at 5 (Jan. 28, 1999) (See Addendum at 113-118).

Moreover, on May 5, 2000, the Department of Education issued a Notice of Proposed Rulemaking (NPRM) that modifies its Title VI

[9/](...continued)
regulations as having institution-wide coverage. See, e.g., 134 Cong. Rec. 247 (1988)(Senator Packwood); 130 Cong. Rec. 18,837 (1984)(Representative Panetta).

implementing regulations to incorporate the statutory definition of "program." See 65 Fed. Reg. 26464 (May 5, 2000). As set forth in the Preamble, this modification does not reflect any change in the Department of Education's institution-wide interpretation of its regulations. See 65 Fed. Reg. 26464-26465. This NPRM is merely cautionary action to correct an improper interpretation and to avoid further judicial rulings that adopt the Cureton analysis.[10]

In addition, CTC has received federal funds since September 1999 for the Title II Teacher Quality Enhancement State Grant. See infra, pp. 3, 11-12. A primary purpose of this grant is to modify the State's teacher certification and licensing program. The CBEST is a central element of the defendants' existing certification program. See Cal. Educ. Code 44252(b), 44830(b). Thus, plaintiffs' challenge to the administration of the CBEST encompasses the very "program" now funded. Accordingly, even if this Circuit adopted the Third Circuit's "program specific" requirement as set forth in Cureton, Title VI indisputably applies to the CTC's administration of the CBEST since September 1999.

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

II

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

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

1. The panel concluded that the plaintiffs, if hired, would be employed by the local districts and not by either defendant. Given the absence of an employer-employee relationship between the parties, the panel held that there was no Title VII jurisdiction. See AMAE, 195 F.3d at 482-483. In reaching this conclusion, the panel failed to follow settled Title VII law, including Ninth Circuit precedent. See Gomez v. Alexian Bros. Hosp., 698 F.2d 1019, 1021-1022 (9th Cir. 1983); Sibley Mem'l Hosp. v. Wilson, 488 F.2d 1338, 1341 (D.C. Cir. 1973).

Title VII prohibits action by an employer directed not only at its own employees and applicants, but also activity that interferes with another's employer-employee relationship on grounds prohibited by Title VII. See Sibley, 488 F.2d at 1341; 42 U.S.C. 2000e-2(a)(1). Title VII prohibits discriminatory acts against "any individual," rather than acts directed at an

employee. 42 U.S.C. 2000e-2(a)(1); see Sibley, 488 F.2d at 1341.[11] In Sibley, a male private duty nurse hired by patients in defendant's hospital alleged that the hospital interfered with his employment relationship with patients at the hospital because of his sex. See Sibley, 488 F.2d at 1339-1340. As the D.C. Circuit explained:

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

Id. at 1341. Many circuits, including this Circuit, have followed Sibley and concluded that Title VII extends beyond the direct employer-employee relationship to prohibit unlawful interference with a plaintiff's employment opportunities or relationship with another employer. See Bender v. Suburban Hosp., 159 F.3d 186, 188 (4th Cir. 1998) (without itself deciding, notes all circuits to consider question have followed Sibley).[12]

---

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

[12] See, e.g., Zaklama v. Mt. Sinai Med. Ctr., 842 F.2d 291, 293 (continued...)

In Gomez, plaintiff, a contracting company president, alleged that a hospital refused to contract for his company's services based on race. This Circuit cited Sibley, 488 F.2d at 1431, and held that plaintiff stated a valid claim since the hospital's alleged discriminatory actions interfered with the plaintiff's employment relationship with his employer, albeit his own company. See Gomez, 698 F.2d at 1021.[13] A plaintiff's opportunities for future employment in a given field need not be foreclosed completely in order to state a claim of interference under Title VII; the plaintiff need only show that conditions or opportunities for employment are different than they would be absent discrimination. See ibid.; see also Lutcher v. Musicians Union Local 47, 633 F.2d 883 n.3 (9th Cir. 1980) (recognizes Title VII applies to instances where defendant interferes with an individual's "employment opportunities with another employer" but not business opportunities for an independent contractor); cf. Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship and Training Comm., 833 F.2d 1334 (9th Cir. 1987), cert. denied, 487 U.S. 1210 (1988) (defendant cannot avoid Title VII liability

---

[12/](...continued)
(11th Cir. 1988); Spirt v. Teachers Insur. and Annuity Assoc., 691 F.2d 1054, 1063 (2d Cir. 1982), vacated on other grounds, 463 U.S. 1232 (1983).

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

by delegating administration of neutral practice with disparate impact to third party).[14]

2. It is well established that the use of selection criteria, including an examination, to assess whether an applicant satisfies the minimum qualifications for a position is subject to Title VII. See 42 U.S.C. 2000e-2(a) and (k); see also Allen v. Alabama Bd. of Educ., 164 F.3d 1347 (11th Cir. 1999) (Title VII prohibits selection processes that "result in an unjustifiable discriminatory impact" on minorities); Griggs v. Duke Power Co., 401 U.S. 424, 432-436 (1971). If the test has a disparate impact, it may only be utilized if it is shown that it is "consistent with business necessity" and is "job-related," and no less discriminatory alternative exists. 42 U.S.C. 2000e-2(k); see In re: Employment Discrimination Litig. Against Ala., 198 F.3d 1305, 1311-1314 (11th Cir. 1999); Lanning v. Southeastern Pa. Transp. Auth., 181 F.3d 478, 487 (3d Cir. 1999), cert. denied, 120 S. Ct. 970 (2000).

In California, the CBEST is administered primarily by the

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

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

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

this exam a condition of public employment? Cf. AMAE, 195 F.3d at 482-483; Fields, 906 F.2d at 1019-1020.

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

These licensing entities have been described as performing an "'in-or-out' screening function for the public -- it has the power to decide, on behalf of and for the good of the public, who is and who is not qualified to participate in a given profession." Morrison v. American Bd. of Psychiatry and Neurology, Inc., 908 F. Supp. 582, 586 (N.D. Ill. 1996) (a board that assesses a psychiatrist's qualifications for certification, yet is not determinative of the psychiatrist's practicing in the

field, is not a licensing entity exempt from Title VII). Thus, a licensing authority imposes standards on an entire profession and are given primarily to regulate private conduct. It is ordinarily unnecessary, however, for a public entity to issue a license to regulate the conduct of its own employees.

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

CONCLUSION

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

Respectfully submitted,

C. GREGORY STEWART
General Counsel
Equal Employment
Opportunity Commission
1801 L Street, N.W.
Washington, D.C. 20507

JUDITH C. WINSTON
General Counsel
Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

ANITA S. HODGKISS
Deputy Assistant Attorney
General

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

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, I certify that the attached Brief For The United States And The Equal Employment Opportunity Commission As Amici Curiae is monospaced, has 10.5 characters per inch and contains 6,805 words.

_____
Jennifer Levin
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on this 2d day of June, 2000, I served by Federal Express, next-business day delivery, two copies of the Brief For The United States And The Equal Employment Opportunity Commission As Amici Curiae on the following counsel of record:

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

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

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

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

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

_____
JENNIFER LEVIN
Attorney