ORIGINAL

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THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1798

TITLE T. H. BELL, SECRETARY OF EDUCATION, Petitioner v. KENTUCKY DEPARTMENT OF EDUCATION

PLACE Washington, D. C.

DATE January 8, 1985

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 T. H. BELL, SECRETARY OF :

4 EDUCATION, :

5 Petitioner :

6 V. : No. 83-1798

7 KENTUCKY DEPARTMENT OF :

8 EDUCATION :

9 - - - - - - - - - - - - - - - - - -x

10 Washington, D.C.

11 Tuesday, January 8, 1985

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States

14 at 11:50 o'clock a.m.

15 APPEARANCES:

16 KENNETH S. GELLER, ESQ., Deputy Solicitor General,

17 Department of Justice, Washington, D. C.; on behalf of

18 the Petitioner.

19 ROBERT L. CHENOWETH, ESQ., Assistant Deputy Attorney

20 General and Chief Counsel of Kentucky, Frankfort,

21 Kentucky; on behalf of the Respondent.

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1 C O N T E N T S

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: Mr. Geller, you may
3 proceed whenever you are ready.

4 ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.,
5 ON BEHALF OF THE PETITIONER

6 MR. GELLER: Thank you, Mr. Chief Justice, and
7 may it please the Court:
8 Two years ago in Bell v. New Jersey, this
9 Court unanimously held that the federal government may
10 recoup misspent grant funds under Title I of the
11 Elementary and Secondary Education Act of 1965. The two
12 cases that the Court will hear this afternoon involve
13 Court of Appeals decisions announcing erroneous rules of
14 construction that substantially frustrate the exercise
15 of this recoupment remedy.
16 In this case, the Kentucky case, the Sixth
17 Circuit has held that misspent grant funds may be
18 recovered only when the violation is so plain that the
19 grantee could not reasonably have believed that its
20 expenditures were lawful. In our view there is no legal
21 basis for this ruling.
22 Now, as the Court is aware, Congress passed
23 the Title I statute in 1965 for the purpose of expanding
24 and improving programs designed to meet the special
25 educational needs of educationally deprived children in

1 low income areas. Now, from the outset, the Title I
2 program has been designed to provide supplemental
3 federal educational aid to these educationally deprived
4 children over and above whatever assistance they would
5 be entitled to receive from state and local funds, and
6 in order to ensure that federal monies are used solely
7 for this purpose, the Title I program has always
8 included since 1965 the so-called supplanting
9 prohibition.

10 Now, this provision expressly states that
11 Title I funds may be used only to supplement the level
12 of funds that would in the absence of Title I be made
13 available from state and local sources for the education
14 of children participating in the Title I program. In
15 other words, Title I is designed to provide an
16 additional layer of federal benefits for certain
17 educationally deprived children rather than to take the
18 place of any money that the state or local government
19 would otherwise provide for educating these children.
20 The antisupplanting requirement has always been at the
21 heart of the Title I program, and it has always been an
22 express condition on the receipt of federal funds.

23 Now, this case involves the way in which
24 Kentucky operated its so-called readiness programs in
25 1974 under Title I. These readiness classes were for

1 children who were not prepared to enter the regular
2 first or second grade because of educational
3 difficulties. And in states other than Kentucky, Title
4 I programs provided children such as these with
5 federally funded supplemental instruction in addition to
6 whatever state-funded instruction they were entitled to
7 receive.
8 But what Kentucky did was the following: it
9 set up special self-contained full day classes for these
10 educationally deprived children wholly apart from the
11 regular instructional program, and it funded these
12 classes almost exclusively out of federal Title I
13 funds. In other words, these students received
14 virtually their entire academic instruction for the
15 first and second grade through the Title I program
16 rather than through the regular state-funded school
17 program.
18 As a result, it is quite obvious that Kentucky
19 was using federal funds to supplant state and local
20 funds that otherwise would have been available for the
21 children in these readiness classes. And the readiness
22 classes unquestionably took the place of the regular
23 first and second grade classes that these students would
24 have attended in the absence of the Title I program.
25 And in fact, nearly half of the students in these

1 readiness classes were actually promoted to the second
2 or third grade after they had completed their year of
3 readiness training.

4 So it is quite clear that at least as to those
5 students, federal funds were being used for regular
6 rather than supplemental instruction.

7 Now, when federal auditors examined the
8 Kentucky Title I program for 1974, they concluded not
9 surprisingly that a supplanting violation had occurred.
10 Kentucky challenged this finding before the Education
11 Appeal Board.

12 Now, Kentucky conceded that virtually no state
13 and local funds had been spent for the basic
14 instructional costs of the Title I children in the
15 readiness classes, but it argued that a supplanting
16 violation nonetheless had not occurred because there had
17 been no decrease in state and local funds for the
18 schools involved.

19 Now, this argument was rejected by the
20 auditors, by the Education Appeal Board, and by the
21 Secretary of Education, all of whom concluded that the
22 antisupplanting provisions of the statute and
23 regulations were crystal clear in their emphasis on
24 maintaining state and local funds for the particular
25 Title I children rather than simply for particular

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1 schools.

2 But as I mentioned a moment ago, the Sixth
3 Circuit reversed the recoupment order. The Court of
4 Appeals agreed actually with the Secretary's reading of
5 the antisupplanting provisions. The Sixth Circuit
6 specifically held that the prohibition against
7 supplanting state and local funds with federal funds
8 could be read to refer to expenditures at the level of
9 the educationally deprived child rather than at the
10 school level, and it therefore held that the Secretary's
11 reasonable interpretation of the supplanting provisions
12 would govern all future Title I grants.

13 But the Court then went on to say that
14 Kentucky's interpretation of the supplanting prohibition
15 also was reasonable, and in these circumstances the
16 Court held that the Secretary could not recoup the
17 concededly misspent funds because the statutory and
18 regulatory provisions at issue were not sufficiently
19 clear to apprise the state of its responsibilities.

20 Now --

21 QUESTION: Mr. Geller, the Congress enacted
22 amendments to Title I in 1978, and some of the
23 legislative reports in connection with that observed
24 that the supplanting regulations lacked sufficient
25 clarity.

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1 Did Congress itself think that they were
2 confusing, I gather?
3 MR. GELLER: Well, Congress did not amend in
4 any way the supplanting provisions. We don't contend, I
5 should add quickly, that every conceivable application
6 of the supplanting provisions would be crystal clear to
7 every observer. What we do contend that is that in this
8 case there really was no two, there weren't one or two
9 reasonable constructions of the statute, and that is
10 what we are concerned with here. But Congress didn't
11 amend the supplanting provisions, and in fact, they --
12 QUESTION: Well, if there were two equally
13 plausible constructions, is it appropriate in your view
14 that we might treat this much like a contractual
15 arrangement and say that we are going to apply the most
16 reasonable interpretation?
17 MR. GELLER: Well, in our view, even if there
18 were two reasonable interpretations, the question would
19 still be was the Secretary's interpretation correct? In
20 other words, what is the correct interpretation of the
21 statute if in fact under that interpretation of the
22 statute the funds were misspend?
23 QUESTION: In other words, what is the more
24 reasonable or most reasonable?
25 MR. GELLER: Yes. Well, the question, the

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1 issue in this case really only arises, Justice O'Connor,
2 when there has been a determination as there was in this
3 case that the funds were in fact misspend.
4 QUESTION: Right.
5 MR. GELLER: In that situation, our submission
6 is that the Secretary's recoupment authority is not in
7 any way limited by the fact that the state may have been
8 acting reasonably.
9 I hope to discuss a little bit later on, after
10 lunch, why -- what the state should do when it is faced
11 with an ambiguity, and it should not, as it did in this
12 case, simply adopt whatever interpretation was most
13 favorable to it, and then spend the money --
14 QUESTION: Mr. Geller, why was the amount
15 reduced in the determination of how much had been
16 misspend?
17 MR. GELLER: The amount --
18 QUESTION: From some $700,000 to $300,000.
19 MR. GELLER: It was seven hundred -- yes, it
20 was reduced by the Secretary of Education --
21 QUESTION: Why?
22 MR. GELLER: -- from $700,000 to $300,000
23 because these readiness classes had a smaller
24 student-teacher ratio than in the regular classes. I
25 think the ratio in the readiness classes was 13 students

1 to one teacher --

2 QUESTION: Are you saying in effect the

3 Secretary simply conceded he had made a mistake and

4 he --

5 MR. GELLER: No, no, not at all. What the

6 Secretary concluded is that some supplementing was going

7 on in these readiness classes. It wasn't a question of

8 total supplanting. There was some additional benefit

9 being given to the Title I students in the fact that

10 they had smaller classes, and the Secretary took account

11 of those smaller classes by reducing the recoupment to

12 the amount that constituted the supplanting.

13 QUESTION: Well there was a mistake in the

14 first place, then, in asking for so much.

15 MR. GELLER: Well, there wasn't a mistake,

16 there was a different --

17 QUESTION: Well, you did --

18 MR. GELLER: -- different calculation of

19 the --

20 QUESTION: Well, you did ask for that much,

21 $700,000.

22 MR. GELLER: Well, the --

23 CHIEF JUSTICE BURGER: We will go on at 1:00

24 o'clock.

25 Thank you, Mr. Geller.

1 (Whereupon, at 12:10 o'clock p.m., the case in
2 the above-entitled matter was recessed, to reconvene at
3 1:00 o'clock p.m. this same day.)
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1 AFTERNOON SESSION

2 (12:58 p.m.)

3 CHIEF JUSTICE BURGER: Mr. Geller, you may

4 resume the argument.

5 QUESTION: Mr. Geller, excuse me.

6 Before you start, would you mind telling me

7 something about how this grant process works? For

8 example, did Kentucky make any undertaking as to how it

9 would use the --

10 ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.,

11 ON BEHALF OF THE PETITIONER -- Resumed

12 MR. GELLER: Yes. In order to get the Title I

13 grant --

14 QUESTION: Yes.

15 MR. GELLER: -- the local school district had

16 to make certain representations to the state itself as

17 to how it would use the grant. The state -- one of

18 those representations was that it would abide by the

19 supplanting prohibitions of the statute, and the state

20 made similar representations to the federal government

21 in order to get the federal Title I grants.

22 QUESTION: And what is required appears on the

23 application form or something?

24 MR. GELLER: Yes. In fact, it is even more --

25 it is even more explicit than that, Justice Brennan.

1 The specific form that the state, the local education
2 agency filled out in this case is on page 27a of the
3 Appendix to the Petition --
4 QUESTION: Yes.
5 MR. GELLER: -- the standard grant application
6 completed in the middle of the page by each of the 50
7 LEAs, or the local school districts, for the year in
8 dispute, contain the following question, and that was
9 will you use this program to assure that children
10 participating in the component activity will receive
11 this Title I service in addition to services that they
12 are ordinarily entitled to receive from state and local
13 funds, and the district obviously answered that question
14 that it would, and as the Education Appeal Board stated
15 right after that, if they had abided by this assurance,
16 there wouldn't have been any supplanting violation
17 here.
18 QUESTION: While I have you interrupted, may I
19 ask one other question?
20 MR. GELLER: Yes.
21 QUESTION: You argued I think in your brief
22 that the Kentucky authorities could have requested
23 clarification.
24 MR. GELLER: YEs.
25 QUESTION: How would they go about that?

1 MR. GELLER: There is constant contact, as the
2 Court will imagine, between the local Title I
3 administrators and the federal Title I administrators.
4 In fact, during the year in question in this case, in
5 1974, there were program review teams right on the
6 premises in Kentucky, and they could have been asked for
7 an opinion. But beyond that, over the period that the
8 Title I statute has been in existence, there has been a
9 formal mechanism for constant communication between
10 federal and state athorities whereby state authorities
11 that have some question as to how an ambiguous provision
12 should be interpreted can get a determination from the
13 federal authorities.
14 And I would like to call the Court's
15 attention --
16 QUESTION: Well, Mr. Geller, was that
17 provision you just read ambiguous? Do you think it is
18 ambiguous?
19 MR. GELLER: We don't think it is at all
20 ambiguous, but the state thought it was ambiguous, or at
21 least they now allege that they thought it was
22 ambiguous, but rather than asking for a definitive
23 interpretation of the ambiguous provision, they adopted
24 their own interpretation and spent the money in
25 accordance with it.

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1 CHIEF JUSTICE BURGER: And you say they do
2 that at their own peril.
3 MR. GELLER: That is our -- that is our
4 position.
5 I would like to call the Court's attention in
6 this regard to the report of the National Institute of
7 Education, a copy of which has been lodged with the
8 clerk of this Court. This was a report prepared after a
9 comprehensive study of the Title I program undertaken in
10 the mid-1970s by the National Institute of Education.
11 QUESTION: Is that in the record, is that --
12 or is that something --
13 MR. GELLER: This is not in the record but it
14 is --
15 QUESTION: -- judicial notice of?
16 MR. GELLER: Yes, it is a report of the
17 National Institute of Education, which is part of the
18 Department of Health, Education and Welfare.
19 QUESTION: Did you furnish one or nine?
20 MR. GELLER: Well, this was furnished by the
21 amici, and the clerk would have the copies. I am sure
22 how many -- we would be glad to furnish extra copies to
23 the Court, but one of the -- this was, as I say --
24 QUESTION: Does that purport to be an official
25 position of the Department or not?

1 MR. GELLER: No, this is a study that was
2 undertaken at Congress' behest of the Title I statute,
3 Title I -- administration of the Title I program in the
4 mid-1970s by --
5 QUESTION: Well, is it --
6 MR. GELLER: It is not by the Department of
7 Education.
8 QUESTION: Well, who -- was it a study by a
9 high school person or by a -- or by a real expert?
10 MR. GELLER: It was a study by I think real
11 experts. This is the National Institute of Education,
12 Justice White, and one of the points that they made --
13 this is at page 18 of the report which is in the clerk's
14 possession, is that the Office of Education, as it was
15 then called, had a formal mechanism by which is gave
16 advice to grantees when they were confronted with
17 ambiguous provisions in the statute and regulations as
18 Kentucky claims it was confronted with here, and if I
19 could just read one sentence from this NIE report, the
20 report said in an effort to improve the clarify of the
21 legal framework, the Office of Education has adopted the
22 practice of providing individual interpretive responses
23 to state and local inquiries. On the basis of a review
24 of the responses issued since 1968, NIE, which was the
25 National Institute of Education, concluded that the

1 Office of Education has addressed many of the most
2 difficult and controversial issues in the legal
3 framework, and then the report goes on to discuss one
4 particular area in which a number of interpretations had
5 been given to state grantees, and that is the
6 supplanting area, the very area that we are involved
7 with in this case.

8 QUESTION: Is there a citation to the specific
9 provision for the formal mechanism for obtaining
10 clarification?

11 MR. GELLER: The citation in the NIE report?

12 QUESTION: Well, do you have it or do you know
13 where we would look to find it, Mr. Geller?

14 MR. GELLER: No, no, but -- I don't know that
15 there is a formal citation. This is something --

16 QUESTION: I thought I understood you to say
17 there was a formal mechanism, but it isn't --

18 MR. GELLER: The mechanism was --

19 QUESTION: It isn't established by regulation
20 or anything of that complexion.

21 MR. GELLER: It's not established by -- as far
22 a I know, by regulation, but every grantee obviously was
23 aware because there was this constant contact with
24 federal administrators of the opportunity to ask for a
25 clarification of an ambiguous provision rather than

1 simply to adopt one's own interpretation and to act
2 accordingly at one's peril.
3 QUESTION: Well, Mr. Geller, is it true that
4 the federal auditors long before this dispute arose had
5 reviewed Kentucky's program and approved it? Is that
6 true?
7 MR. GELLER: That's not -- they had never
8 approved.
9 QUESTION: That is not --
10 MR. GELLER: That is not true. There had been
11 program teams on the premises, but they had never
12 approved the actual funding of these programs because
13 just simply by looking at the program there would be no
14 way to know how it was funded, and the supplanting
15 violation occurred not in the way the program was
16 organized but in the way it was funded.
17 Kentucky never asked for an interpretation of
18 whether the way it was funding its program violated the
19 supplanting provisions until after the year in question
20 here, and as soon as it asked for that interpretation,
21 it was immediately told by the federal officials that
22 this was a supplanting violation because all of the
23 monies of this instructional program were federal
24 monies, and as a result, state and federal authorities
25 immediately got together and worked out a program by

1 which the readiness classes could be continued under a
2 funding arrangement that would not violate the
3 supplanting provision.
4 So if Kentucky had simply asked before 1974,
5 none of this would have occurred.
6 QUESTION: Incidentally, does the government
7 take the position that there are no limits on recoupment
8 other than such as might be prescribed by the Congress
9 or by the Secretary's regulations?
10 MR. GELLER: That is our legal position.
11 Obviously the Secretary as a matter of administrative
12 discretion does not seek recoupment in every
13 circumstance in which it could.
14 QUESTION: But basically, whatever might be
15 the terms, the Secretary sets, and that's it.
16 MR. GELLER: Basically -- that's right.
17 Well, Congress sets.
18 QUESTION: Or the Congress, yes.
19 MR. GELLER: Congress sets, and Congress has
20 set out recoupment provisions.
21 Now --
22 QUESTION: What if the federal agency were
23 aware of the state's particular utilization and funding
24 and made no objection?
25 Does that make any difference in your view?

1 MR. GELLER: I think if the state got an
2 interpretation from the Education Department that its
3 program was in compliance with the law, it would make a
4 big difference.
5 As far as we know, there has never been an
6 insteance -- the NIE report talks about 20 years worth
7 of interpretations given to the states. We don't know
8 of a single instance in which a state asks for an
9 opinion as to whether what it was proposing to do would
10 violate the statute, was told by the Department of
11 Education that it wouldn't, and thereafter there was an
12 attempt at recoupment.
13 QUESTION: I suppose, though, that we have not
14 found that estoppel runs against the federal government
15 generally, even in that situation.
16 MR. GELLER: Well, I am not sure it would be
17 an estoppel situation, Justice O'Connor, because if it
18 was an authoritative interpretation -- I mean, agencies
19 do have to follow their own regulations. The estoppel
20 cases that this Court has confronted, such as Community
21 Health Service and Schweiker v. Hansen and cases like
22 that were all cases in which the person giving the
23 advice was not authorized to give the advice to bind the
24 agency. But we are talking here about authoritative
25 interpretations from the Department of Education. And

1 there has never been a litigation over estoppel because
2 the Department of Education has never tried to repudiate
3 one of these positions.
4 QUESTION: Mr. Geller, do you think it is
5 appropriate to analogize to contract law to a degree in
6 looking at these cases of Title I grants?
7 MR. GELLER: Well --
8 QUESTION: Don't they impose contractual type
9 relationships on the --
10 MR. GELLER: Well, it is contractual type in
11 the sense that there is an agreement, but it is not a
12 contract, and I think it is important to understand that
13 the requirements that are imposed here are requirements
14 imposed by Congress pursuant to statutes and
15 regulations. They are not contractual provisions
16 whereby A and B sit down and work out the best
17 arrangement between themselves in anticipation of what
18 is likely to occur. Here we are talking --
19 QUESTION: Is it sufficiently like a contract
20 to apply against the government that old principle of
21 contract construction that ambiguities are resolved
22 against the drafter of the agreement?
23 MR. GELLER: No, we have answered that, I
24 think, in our reply brief, Justice Brennan. It is not.
25 we are construing here not contract terms but portions

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1 of a statute and regulations. I don't know of any
2 authority for the proposition that a statute should be
3 construed against the drafter, that is, the United
4 States.
5 QUESTION: Well, but don't those statutes and
6 regulations in effect become part of the contractual
7 type agreement that is entered into with the state?
8 MR. GELLER: In the sense that the grantees
9 are bound by them, but that is not the question.
10 QUESTION: I am not sure it would alter the
11 result, but I am trying to explore the framework within
12 which it would make sense to analyze it.
13 MR. GELLER: There is an agreement here, and I
14 think the framework to analyze whether the agreement has
15 been violated is to recognize that this is an appeal of
16 an administrative order finding recoupment, and there is
17 a body of law as to when a court can set aside an
18 administrative order. And that is how I think this
19 Court has to analyze the correctness of the Sixth
20 Circuit's decision in this case.
21 QUESTION: Mr. Geller, can I just ask one
22 question about the clarity of the violation of the
23 supplanting regulation?
24 The Court of Appeals indicates that the local
25 education agency in Kentucky had to certify that there

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1 would be the same number of teachers that would be paid
2 for with state and local funds as without the Title I?
3 And also I understand at least as much money went into
4 each local education agency of old funds.
5 Isn't that kind of a good prima facie
6 indication, unless you have much larger student bodies,
7 that there was no supplanting?
8 MR. GELLER: I think not, Justice Stevens.
9 There were a number of obligations imposed on LEAs, or
10 local education agencies. One was the comparability
11 requirement which required that schools get as much
12 money from the LEA each year as they got before the
13 Title I money came into effect.
14 Now, we are talking here about a totally
15 different requirement which is the supplanting
16 requirement, which on its face, if the Court will look
17 at the statute and regulations, talks about the amount
18 of local money being spent on the children involved. I
19 think there was some confusion on --
20 QUESTION: Well, but you spend money on
21 children indirectly by hiring teachers and providing
22 classrooms, and I guess they did pay for the classrooms
23 and they paid for the same number of teachers, as I
24 understand, with local funds --
25 QUESTION: The amount, the confusion, if there

1 was any confusion here, was that the amount of local
2 money given to the schools each year remained the same,
3 but the problem was that the Title I children were not
4 getting the benefit of any of that money. All of their
5 instruction was being paid for by the federal money, and
6 that is where the supplanting violation occurred as the
7 Sixth Circuit ultimately agreed, there was in fact a
8 supplanting violation.
9 QUESTION: And therefore the same amount of
10 money was being in effect used to give a better
11 education to those who were not --
12 MR. GELLER: To the non-title --
13 QUESTION: -- being the beneficiaries of Title
14 I.
15 MR. GELLER: Exactly, non-Title I children.
16 So they were getting the benefit of all of the state
17 money rather than simply their proportionate share.
18 QUESTION: And in deed, the regular first and
19 second grade students were getting the benefit of a
20 lower pupil-teacher class ratio as well --
21 MR. GELLER: These are non-Title I statutes.
22 QUESTION: -- because the Title I children
23 were pulled out of their classrooms.
24 MR. GELLER: Exactly, exactly.
25 QUESTION: And weren't holding them back.

1 MR. GELLER: That's exactly right. That's in
2 large part the supplanting violation here. The money,
3 the state and local money was being used for the benefit
4 of -- only of the non-title -- non-Title I children.
5 So we don't think -- we think the Court of
6 Appeals decision is plainly wrong for two independent
7 reasons. One is I don't think that anyone looking at
8 the statute and regulations, the clarity with which they
9 are written, could really conclude that there was an
10 ambiguity here.
11 QUESTION: But then you are arguing -- I hate
12 to, don't mean to interrupt you -- you are arguing they
13 are wrong for two reasons: one, the standard, but even
14 under their own standard they are wrong is what you are
15 saying.
16 MR. GELLER: Even under their own standard,
17 that's correct.
18 QUESTION: Because their standard is really
19 not all that -- doesn't seem all that unreasonable to
20 me, to be quite frank with you.
21 MR. GELLER: Well, I think the stand is wrong,
22 but even under their own standard, it is hard for anyone
23 I think to look at the statute and regulations here and
24 conclude that there was an ambiguity or conclude that
25 Kentucky actually had a reasonable interpretation of

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1 that statute and regulation.

2 So even by their own lights, I think the Sixth

3 Circuit was wrong. But I think that there is a problem

4 with the Sixth Circuit's test as well because even if we

5 were to assume for the moment that the supplanting

6 statute and regulations were in fact ambiguous, and even

7 if we were to assume that Kentucky adopted a reasonable

8 interpretation of those provisions, both assumptions I

9 think are quite dubious, but even if we were to make

10 them, we still think that the Court of Appeals was wrong

11 in reversing the administrative order requiring

12 recoupment of the misspent funds and that is because I

13 think it goes without saying that there has to be some

14 violation of law before a Court of Appeals can set aside

15 an administrative order.

16 Now, as I noted a moment ago, the Court of

17 Appeals here found that in this case the Secrtary's

18 interpretation of the supplanting provisions was

19 reasonable. In fact, far from finding that the

20 Secretary's interpretation was arbitrary or capricious

21 or in violation of law, the Sixth Circuit held that it

22 was reasonable and would govern all future grants, and

23 there has never been any question here that there was

24 substantial evidence.

25 QUESTION: Yes, but Mr. Geller, if you

1 takelyour standard -- and I realize we are not
2 necessarily talking about the facts here -- you are in
3 effect saying that the local agency must take the funds
4 at its peril unless it is willing to go get an advisory
5 ruling before it actually adopts a plan.
6 If it is a doubtful case and it takes the
7 money, it may end up having to spend that amount of
8 money itself. That's what you are saying.
9 MR. GELLER: If -- we don't say that they take
10 it at their peril, Justice Stevens, because there is an
11 important point, and that is they can ask for an
12 interpretation.
13 QUESTION: Yes, I understand, unless they go
14 and get advice.
15 MR. GELLER: Unless -- and I don't think that
16 is unreasonable.
17 QUESTION: And you don't have any regulatory
18 scheme regulating the way to go get advice. Understand
19 it was available and they could do it, but you didn't
20 spell it out in your regulation.
21 MR. GELLER: Well, I think that the Court has
22 to understand under the Title I program, as in many of
23 these grant programs, there is constant contact between
24 the state and the federal administrators. There is no
25 suggestion here on the part of Kentucky that they didn't

1 know they could ask for advice. In fact, they asked for
2 advice in the next year, and when they got the advice,
3 they stopped the way the readiness program was funded.
4 QUESTION: Well, I suppose under your test,
5 even if they got advice and the advice was wrong -- say
6 they asked the wrong official and he misread the
7 regulations, too, the government wouldn't be bound by
8 that advice.
9 MR. GELLER: Well, I think that relates to the
10 response I gave to Justice --
11 QUESTION: But that's part of the problem of
12 the --
13 MR. GELLER: -- Justice O'Connor. I don't
14 think there would be an estoppel problem if they got
15 advice from the official who is authorized to speak for
16 the Department on that matter.
17 I think what I am saying here is nothing more
18 than what the Court said last term in the Heckler v.
19 Community Health Services case, which was a very similar
20 case, and the Court there said explicitly that people
21 who get federal funds have to act cautiously. If there
22 is an ambiguity, they have to ask for advice, and they
23 have to ask for advice from an official that they --
24 QUESTION: Yes, but it also said you can't
25 rely on oral advice.

1 MR. GELLER: No, but -- well, first of all,
2 there is no suggestion that the advice from the
3 Department of Education here would be oral. The
4 National Institute of Education is talking about
5 written.
6 QUESTION: But the bedrock here --
7 MR. GELLER: Excuse me?
8 QUESTION: The bedrock in this case is that it
9 was not ambiguous.
10 MR. GELLER: It was not ambiguous and Kentucky
11 never asked for advice if they thought it was
12 ambiguous.
13 Now, as I was saying, here the Sixth Circuit
14 found that the Secretary's interpretation is
15 reasonable. There has never been any suggestion that
16 there wasn't substantial evidence to support the
17 Secretary's determination. So what legal basis is there
18 to set aside the administrative order?
19 Now, the Sixth Circuit clearly couldn't have
20 been relying on the Title I statute itself because I
21 think it is important for the Court to look at the
22 recoupment provisions of the Title I statute. 20 U.S.C.
23 1234(a), which is the recoupment provision, says
24 whenever the Secretary determines that an expenditure
25 not allowable under a program has been made by a state,

1 the Secretary shall give such state written notice of a
2 final audit determination and shall recoup the money.
3 And the audit statute, which is 20 U.S.C.
4 2835, says the same thing. It says the Secretary shall
5 require the repayment of the amount of funds under this
6 subchapter which have been finally determined through
7 the audit resolution process to have been misspent or
8 misapplied. There is no suggestion in the statutes that
9 Congress passed that the Secretary's recoupment
10 authority was limited to situations where the grantee
11 has acted in bad faith or is limited to situations where
12 the grantee has acted reasonably, or that in determining
13 whether a recoupment order is valid, the Court of
14 Appeals is supposed to defer to the grantee's reasonable
15 interpretation of the statute rather than the
16 Secretary's.
17 The statute itself say precisely the
18 opposite.
19 And I should add in this regard that in the
20 last few years the states have sought an amendment of
21 the Title I statute from Congress which would have done
22 precisely what they are asking this Court to do in this
23 case, which is to essentially have a qualified immunity
24 defense in these sorts of proceedings.
25 . And Congress has on several occasions refused

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1 to do that.

2 If there are no questions, I would like to

3 reserve the balance of my time.

4 QUESTION: Well, I think I would just explore

5 with you again the fact that getting a clear answer from

6 the federal agency in these cases isn't always as easy

7 as I think you may have painted it.

8 Wouldn't you agree with me. Mr. Geller?

9 MR. GELLER: Well, I can't --

10 QUESTION: I mean, it sounds nice here at this

11 level, but on the practical level, it is sometimes very

12 difficult for states or local school districts to get a

13 response to a question.

14 MR. GELLER: All I can say in response,

15 Justice O'Connor, is that the report of the NIE found

16 otherwise, that there is this regular process of giving

17 advice. I would say in this case that that is a

18 particularly hollow claim for Kentucky to make in this

19 case when they never even sought advice, and also, that

20 the year afterwards, when they did seek advice, they had

21 no trouble whatsoever in getting the correct answer.

22 QUESTION: Well, it may not provide the answer

23 in this case, but I think it is something we have to be

24 mindful of in establishing the proper mechanism for

25 reviewing these cases.

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1 MR. GELLER: Well, I don't disagree with
2 that. I just think that when the Court announces what
3 the rules will be in this case, it has to think of the
4 rule rather than the exception, and I am not prepared to
5 say that grantees as a rule have any trouble in getting
6 answers to their ambiguous questions. I think that the
7 experience of the last 20 years and the experience in
8 this very case suggests otherwise.
9 Thank you.
10 CHIEF JUSTICE BURGER: Mr. Chenoweth?
11 ORAL ARGUMENT OF ROBERT L. CHENOWETH, ESQ.
12 ON BEHALF OF RESPONDENT
13 MR. CHENOWETH: Mr. Chief Justice, may it
14 please the Court:
15 In this federal-state grant program case
16 involving Title I funds, the Secretary of Education
17 wants retroactive application of his interpretation of
18 the law on supplanting. To agree with the Secretary's
19 position would be to allow him to use his interpretation
20 of the law retroactively to achieve a recoupment of
21 Title I funds that have already been expended in the
22 Commonwealth of Kentucky. Such a penalty should not be
23 imposed where Kentucky acted in good faith, on a
24 reasonable interpretation of the provisions of the Title
25 I law, and when there had not been adequate notice of

1 the obligations under the Title I provision to the
2 Commonwealth.
3 QUESTION: Do you say that these provisions
4 were ambiguous, Mr. Chenoweth?
5 MR. CHENOWETH: Your Honor, yes we are saying
6 that they are and that they were ambiguous.
7 QUESTION: Why not get a clarification then?
8 MR. CHENOWETH: I think that is a very, very
9 fair question, but the important point concerning that
10 is that you truly have to believe that there is
11 something wrong with your program, something wrong with
12 the way that you are using the law and getting the
13 funds. You don't --
14 QUESTION: Well, maybe it would be a splendid
15 program, a beautiful program, but not authorized by the
16 statute. The merits of the program in the abstract are
17 not the issue here. The issue is whether the money weas
18 spent within the framework of the particular purpose for
19 which it was given.
20 MR. CHENOWETH: Yes, Your Honor, we very much
21 agree with that, but the point, while not being in the
22 abstract, is also that we are simply not only looking at
23 what we believe to be facial ambiguity of this law, but
24 really perhaps more importantly than the facial
25 ambiguity, what is meant by supplant, what is meant by

1 supplementing as seen in that law. We are not looking
2 at just the facial ambiguity, but we are also looking at
3 the ambiguity as applied, as those words were applied,
4 and as seen by the Secretary of Education.
5 We believe that it is a both level of
6 ambiguity that was evident in this case.
7 QUESTION: Tell me, Mr. Chenoweth, were the
8 details of the readiness program given in the initial
9 application for the grant by the state?
10 MR. CHENOWETH: The details of the program as
11 such were not set out in that application.
12 it is very important to understand, Justice
13 Brennan, that when Congress enacted this law in 1965,
14 specifically in the law there is the intention of
15 Congress of having the programs that were going to
16 benefit these educationally deprived children developed
17 by the states. They were intended to be innovative.
18 The design was going to be left for the states to come
19 up with on the belief that the way Kentucky dealt with
20 this problem would be different than the way it would be
21 dealt with in another state.
22 So there was no a requirement or an
23 expectation that in the receiving of those Title I funds
24 t at you were going to establish at that very point
25 exactly the nature of the program.

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1 Now, the Sixth Circuit Court of Appeals in
2 looking at this case very much relied upon the Bell v.
3 New Jersey decision and the 1981 decision in Pennhurst
4 of this Court. The Pennhurst decision is applicable in
5 this case because Title I is a grant in aid program, and
6 it is based upon the concept of cooperative federalism.
7 QUESTION: Well, Mr. Chenoweth, I think there
8 is a significant difference between this case and
9 Pennhurst in that the argument, as I recall, was -- that
10 Pennhurst was all about was had the Congress made a
11 particular thing, a condition of the grant of these
12 funds, and the Court ended up saying no, Congress has to
13 speak unambiguously if it is going to make something a
14 condition.
15 Here there is no question but what compliance
16 with these regulations was a condition of the grant.
17 MR. CHENOWETH: Your Honor, I understand what
18 you are saying, but while the words "supplant" are in
19 the law, and Kentucky knew that that was in the law, it
20 is not just simply that that condition was in the law,
21 it is how that condition was applied, and therein is the
22 similarity between this case and Pennhurst because we
23 had not in the Commonwealth been given adequate
24 notification as to what that --
25 QUESTION: Well, but I think there is a

1 significant difference between saying Congress has to
2 speak unambiguously when it makes a particular
3 requirement a condition of a grant. That's what
4 Pennhurst said. And to go further and say Congress must
5 speak unambiguously when it is laying down requirements
6 for something that is concededly a condition, I think
7 there you have got a weaker case.
8 MR. CHENOWETH: Well, Your Honor, we do
9 believe, and it is clear in the Sixth Circuit Court of
10 Appeals that the Court was believing that Kentucky had
11 not had adequate notice of its obligations in the same
12 sense as this Court addressed that in Pennhurst.
13 Again --
14 QUESTION: That's why I don't think I agree
15 with the Sixth Circuit on that point.
16 MR. CHENOWETH: Your Honor, we do --
17 QUESTION: Mr. Chenoweth --
18 MR. CHENOWETH: Yes, ma'am.
19 QUESTION: -- on the same point, it is a
20 little difficult for me to understand why you contend
21 that the statute and regulations are ambiguous or
22 confusing in any way. When the regulation says federal
23 funds made available will be used to supplement the
24 level of state and local funds that would be used in the
25 absence of the federal funds for the education of the

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1 pupils participating in the project.

2 Now, how is that ambiguous?

3 MR. CHENOWETH: Justice O'Connor, we believe

4 that in that provision of the law that you are reading,

5 not only does it talk about children, which is a

6 collective reference, first of all --

7 QUESTION: Well, it talks in the regulation

8 about the pupils participating in the project.

9 Whad could be clearer than that?

10 MR. CHENOWETH: The provision of the law

11 while, and the regulation while talking about pupils, it

12 also is talking about project area.

13 We go back and we look at what was meant by

14 supplanting, what has been looked at as supplanting from

15 the very beginning, and we understand from virtually the

16 beginning of the Title I law that the expenditure of the

17 federal dollars for programs that had previously been

18 paid for by state money, the type of situation with the

19 enrichment types of programs that we had as a part of

20 our readiness program that was paid for with state

21 money, previously early practice, pre-1970 practice

22 would have been that those kinds of services would have

23 been paid for by federal funds.

24 Kentucky understood that those kinds of

25 services could not be paid for with the federal funds.

1 QUESTION: Well, can you point to anything in
2 the language of that regulation whch I read from that is
3 ambiguous?
4 MR. CHENOWETH: Your Honor, simply pointing to
5 that, I cannot point to the provision. The point though
6 is, one, it is not just facial ambiguity that I think
7 that we have to consider. We need to look at the
8 context in which this program was being operated. We
9 need to look at the manner of application.
10 Part of the divergent interpretations involved
11 in this case came from the perspective of whether you
12 accept that the supplanting issues are to be monitored
13 at the level of the child or whether you are going to
14 monitor the expenditure of money at the school district
15 or at the classroom level.
16 QUESTION: WEll, the regulation refers to the
17 child.
18 MR. CHENOWETH: Your Honor, we believe that it
19 also is talking about the project area, and that you
20 look at those together.
21 I think, though, importantly, that we -- what
22 we need to zero in on is not really the interpretations
23 that are involved in this case, because it is not a
24 matter of choosing between those interpretations. The
25 question here is what Kentucky understood the

1 commitments under that Title I contract to be.

2 QUESTION: Is that an estoppel argument of

3 some kind?

4 MR. CHENOWETH: Your Honor, we do not believe

5 that it is an estoppel matter any more than the

6 Solicitor General's office has indicated it to be. We

7 think that there are significant differences between

8 this case and the Crawford Community Services case, the

9 Heckler case. One, that was not a spending power case,

10 it was a private party that was receiving these funds,

11 and there was certainly a very questionable

12 interpretation upon the law that was involved in that

13 case.

14 So we don't see that what we are having to

15 focus in on in this Title I case as being an estoppel

16 case or a Heckler case at all.

17 Again, we believe that the pertinent question

18 that has to be addressed is what were the understandings

19 of the commitments under that Title I contract, the

20 contract that is in place because Title I is a spending

21 power clause provision of the federal constitution, and

22 it is very much in the nature of a contract. There has

23 to be a meeting of the minds of we are going to have a

24 good contract. And we believe that it is clear that

25 there was not a meeting of the minds here as to what

1 Kentucky's obligations were going to be under that Title
2 I provision.
3 QUESTION: How soon did Kentucky find that
4 out?
5 MR. CHENOWETH: I'm sorry, Your Honor, I
6 QUESTION: How soon did Kentucky find out that
7 there was not a meeting of the minds?
8 MR. CHENOWETH: Your Honor, we found that out
9 really as the audit was being completed in 1974. The
10 audit period was 1967 to 1974.
11 QUESTION: The basis of that, but to ask when
12 did you try to get an understanding about it?
13 MR. CHENOWETH: Your Honor --
14 QUESTION: When it became ambiguous to you was
15 in '74?
16 MR. CHENOWETH: It was not a matter that at
17 that time --
18 QUESTION: Was that when it was ambiguous?
19 MR. CHENOWETH: It was not ambiguous.
20 QUESTION: Was it beginning to be ambiguous?
21 MR. CHENOWETH: Your Honor, the ambiguity --
22 QUESTION: My question is, when did you first
23 let anybody know that you considered it to be
24 ambiguous?
25 MR. CHENOWETH: Your Honor, the answer to

1 that, and the only answer that I can give to you is that
2 it was not at a particular point in time. We did not
3 believe --
4 QUESTION: About when?
5 MR. CHENOWETH: There's -- there's no way
6 really to answer that, Your Honor.
7 QUESTION: Well, it was a little before today
8 wasn't it?
9 MR. CHENOWETH: Certainly that's true.
10 The point that we have to consider is that we
11 had these programs developed before the 1970 supplanting
12 provision. We continued on with those programs for six
13 years. We had encouraged other school districts to
14 develop those programs. We thought that they were a
15 showcase program, that they were a good example of a
16 design by a state to serve the intent and purposes of
17 Congress.
18 You don't ask what is wrong with the law
19 unless you believe that there is something wrong with
20 what you are doing under the law.
21 QUESTION: Well, then, I misunderstood your
22 original answer, was that in '74 you realized that they
23 were ambiguous.
24 MR. CHENOWETH: Your Honor, we found out that
25 was so in the sense we were told after the audit that

1 what our program had been doing and the manner in which
2 that program had been developed, that there was a
3 problem with the law as seen by the auditors.
4 So at that point in time certainly we did
5 become aware that our education staff had not looked at
6 this law at the same level of monitoring as had the
7 state or the federal education officials.
8 So yes, it was brought to our mind then. But
9 we did not have, and our education people did not have a
10 question from the very beginning that this was a
11 problem. Again, there would have been no incentive --
12 if we thought that there was a problem and we were
13 unsure of that, there was no incentive to continue on
14 with this program.
15 QUESTION: Well, I thought you said there was
16 a problem in '74.
17 MR. CHENOWETH: But this is -- that was after
18 the fact, Your Honor. That was after the audit
19 exception --
20 QUESTION: '74 is not after the fact of what
21 you are arguing now.
22 MR. CHENOWETH: Your Honor, the important
23 point that we are trying to make here is that we believe
24 we had a program that was consistent with the law, and
25 that we do believe that there is considerable moment in

1 the fact that there were operational review teams that
2 did come in on a yearly basis to Kentucky. Those
3 operational people from the Federal Office of Education
4 went out to the school districts. They saw these
5 programs in effect. And the record is clear that the
6 directors of the Title I wanted to show off this
7 program.

8 Now, the comment and the response on this as
9 to, well, we didn't look at the funding. We suggest to
10 the Court that that really cannot be the answer. That
11 was exactly what the operational team had to look at was
12 whether or not these programs were complying with the
13 law on the expenditure of that money. That was their
14 only purpose for looking at the program.

15 QUESTION: Aren't you now arguing estoppel?

16 MR. CHENOWETH: Your Honor, we are not arguing
17 estoppel. We are not arguing that at all, but we do
18 believe that the Sixth Circuit did look at a coalition
19 of factors in looking at this request to apply the
20 Secretary's interpretation of what was prohibited by
21 supplanting, and one of those factors is Kentucky's good
22 faith, and that is very much shown in the record, that
23 Kentucky did attempt to follow this law in good faith.
24 We --

25 QUESTION: Well, Mr. Chenoweth, I suppose that

1 the program itself, operationally, in the sense of
2 providing smaller classroom settings for children within
3 an appropriate project area, children who qualified for
4 the aid, is something that the federal government would
5 want to examine in any event, and did, and the question
6 of whether the state had reduced its level of support
7 for those children is a different question, is it not?
8 MR. CHENOWETH: Yes, we believe that is a
9 different question, but also is a part of the
10 consideration of the design of that program.
11 Kentucky as well as other states were
12 attempting to create innovative ways to meet the needs
13 of these educationally deprived children.
14 QUESTION: Well, certainly the federal
15 government could have picked up its alleged problem
16 earlier than it did, but do you think that that alone
17 means that no recovery can be had?
18 MR. CHENOWETH: Not alone, Your Honor, but we
19 do believe importantly in looking at the way the Sixth
20 Circuit in reviewing this issue which we believe is the
21 pertinent issue, and that is what the understanding of
22 the commitments were by Kentucky in the receipt of those
23 Title I funds, that that was a factor, that Kentucky had
24 had the operational people in looking at the design, and
25 they had not been told that there was anything wrong

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1 with those programs, and we believe that was a part of
2 the good faith of the Commonwealth concerning these
3 self-contained readiness programs.
4 QUESTION: Well, good faith is not normally a
5 defense either to the application of an appropriate
6 federal statute or regulation of this type or, if you
7 treated it as a contract, to a defense under a contract
8 theory, is it?
9 MR. CHENOWETH: As a pure contract theory, no,
10 we would agree with that, Justice O'Connor. But again,
11 we are looking at a contract here in the nature of a
12 grant in aid program, in the nature of the cooperative
13 federalism where the state is giving up something,
14 giving up rights that it has in order to enter into that
15 cooperation with the federal government. We believe
16 that in order to do that -- and we did think consistent
17 with Pennhurst, and that Pennhurst is very much
18 applicable in this case, as the Sixth Circuit Court of
19 Appeals believed, that if there is going to be that
20 giving up, then there is going to have to be a clear
21 understanding of what it is that the state is giving
22 up.
23 To that extent, we do believe that the Court's
24 consideration that there had not been any finding of bad
25 faith is very much a part of the standard of review that

1 the Courts of Appeals are to exercise pursuant to this
2 Court's decision in Bell v. New Jersey when you are
3 looking at a recoupment of Title I funds.
4 Again, you don' go into a program, and if you
5 have reservations of that program, start encouraging
6 other school districts within the state to develop those
7 programs. We had in 1974, when again that audit
8 signalled to us that there were problems, by that time
9 we had 69 school districts that had readiness programs.
10 That's a third of the Kentucky school districts.
11 Importantly also, we believe, is the fact that
12 there were not any incentives any the state or the local
13 districts to keep doing this. We were not saving any
14 money. There were the same amount of money, as
15 indicated by Justice Stevens, we had the same amount of
16 money going to those school districts, we had the same
17 number of teachers.
18 So that the only incentive that possibly could
19 have been available to the state, to the local
20 districts, had to be a belief that those programs were
21 serving the intent and purpose of having Title I
22 programs and the receipt of that federal money.
23 QUESTION: You are not now arguing that the
24 mere fact that th state continued to supply the same
25 amount of money would demonstrate that there was no

1 supplanting, are you?

2 MR. CHENOWETH: Your Honor, we are not saying

3 that any of these matters as a sole factor show the

4 point.

5 QUESTION: For example, if they shifted all

6 the money they -- all their first and second grade

7 teachers into the higher grades and reduced the ratios

8 in the higher grades and then financed first and second

9 grade entirely with federal money, you would say that

10 would be a clear violation?

11 MR. CHENOWETH: Your Honor, I think that that

12 is obviously a different situation, and yes, that would

13 be supplanting

14 But here we were not doing that. The benefit

15 that was derived from having these self-contained

16 readiness programs was a matter that was agreed and

17 conceded in the administrative proceedings. It was a

18 matter that was made reference to by the Sixth Circuit

19 Court of Appeals, to the fact that when the auditors

20 made the exception, they made the exception only for the

21 children that were going to be promoted and not for

22 those children that were going to be held back.

23 We believe that that tends to indicate that

24 there were differing levels of understanding even by the

25 auditors and the education appeals board as to what was

1 meant by supplanting, and that it was not just our
2 perhaps reading of the law, but it was also the reading
3 of the law by others.
4 That ambiguity that we do believe existed both
5 facially and application, can be seen in the fact that,
6 one, it is in the NIE report that there was a lack of
7 clarity in the issue of supplanting. This ambiguity,
8 the unclearness of the understanding as to what was
9 supplanting, existed even after 1977, or 1974. It went
10 on even through 1977, and that again is in the NIE
11 report that that had been very much an issue in the
12 Office of Education between various members of that
13 office.
14 So we have a continuation even past the period
15 of our audit when there was still some problems as to
16 what was meant by supplanting.
17 The supplanting statute certainly stated a
18 goal, but we argue that it did not explain how that goal
19 was going to be achieved and was going to be gained, and
20 we do believe that when you look at the language and
21 look at the manner in which that is applied, look at the
22 different kind of indicators that are going to have an
23 important play upon what is meant by supplanting, again,
24 whether you look at that as the Secretary would like, at
25 the pupil, whether you look at that in the pupil and

1 also the classroom, the school district, those
2 indicators, are you going to look at it simply money, or
3 are you going to look at it benefit?
4 The Secretary must have looked at it not only
5 in terms of money; he had to have looked at it in the
6 sense of benefit, a benefit supplement because he
7 reduced it merely on the fact that we had the lower
8 student-teacher ratio. That didn't change the dollars
9 approach to it at all, but still gave us a modification
10 of the amount of money on the basis of the benefit.
11 So two levels are existent, even through the
12 proceedings of this case over six or seven years.
13 The third factor that the Sixth Circuit Court
14 of Appeals looked at in applying the proper legal
15 standards, again as it was supposed to do, and looking
16 at this case in the sense of Pennhurst, and looking at
17 it in the sense of the significant issue that was
18 identified in Justice White's concurring opinion in Bell
19 v. New Jersey, and that is whether the state should be
20 held liable in a recoupment action, in a postaudit
21 recoupment action if there was merely a technical
22 violation or if there was a different construction of
23 the statute after the state had had their plan submitted
24 and approved --
25 QUESTION: You mean a changed construction.

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1 MR. CHENOWETH: I'm sorry, Your Honor.

2 QUESTION: A change in the construction.

3 MR. CHENOWETH: A change in the construction.

4 QUESTION: Was there any change here?

5 MR. CHENOWETH: We believe that there was a

6 change in the construction --

7 QUESTION: Well, not by the secretary.

8 MR. CHENOWETH: Well, there was not an

9 explanation of what the construction of the supplanting

10 law was --

11 QUESTION: Well, this may -- this -- at most

12 here, this was the first time that the construction was

13 ever spelled out. I mean, the state says that you

14 finally learned what the Secretary really thought it

15 meant.

16 MR. CHENOWETH: Yes, Your Honor, and we

17 believe that --

18 QUESTION: That's not a change.

19 MR. CHENOWETH: Well, it certainly is a change

20 from what Kentucky --

21 QUESTION: It's from a change, it is a change

22 with respect to what you thought it meant.

23 MR. CHENOWETH: Yes, and we think that that's

24 very important. Again, not the least by which we had

25 these people in looking at the way that we were doing

1 things and then later told that the way we were doing
2 things was not in compliance with the law. We think
3 that change in construction or the notification of the
4 construction of the law on supplanting is a factor and
5 is a part of what the Sixth Circuit was obliged to do in
6 the reviewing of this recoupment consideration in Title
7 I.

8 Certainly the retroactive, postaudit
9 recoupment of Title I funds as desired by the Secretary
10 would be inconsistent with the consensual nature of a
11 grant program, like Title I is, where a state ought
12 to -- it really has to be able to weigh what the
13 benefits and the burdens are.

14 The Secretary's desire to have his
15 interpretations applied retroactively is not in keeping,
16 we believe, not only with the Pennhurst decision, but is
17 not in keeping with the Rosato v. Wyman approach.

18 QUESTION: Well, now, without looking at a
19 retroactive change at all, just looking at the statute
20 and the regulations as they existed, can't they be
21 enforced in the way in which they were written at the
22 time the grant was made?

23 MR. CHENOWETH: We do not believe that the
24 interpretation that has been placed upon them by the
25 Secretary in this decision --

1 QUESTION: Well, as an abstract matter, would
2 you agree they can be applied as they were written when
3 the grant was made, in the abstract? Is that a valid
4 approach?
5 MR. CHENOWETH: In the abstract, Justice
6 O'Connor, the pertinent question still has to be what
7 did Kentucky understand its commitments to be under this
8 contract?
9 While we are fully willing to allow the case
10 to follow this case, the New Jersey case, be argued by
11 the able counsel for those parties, I can't help but
12 inject that in that case, the Secretary, where the
13 Secretary does not want a retroactivity of the education
14 law, the contention is that the point of reference must
15 be whether the state complied with its Title I
16 commitments as they were understood at the time. That
17 is a contemporaneous understanding perspective, and that
18 is wht we are contending is and should be applicable in
19 this case.
20 We believe that to apply the Secretary's
21 interpretation retroactively would create a manifest
22 injustice. We believe that if you look at the matters
23 looked at by the Sixth Circuit Court of Appeals, that
24 there should not be a retroactive, postaudit recoupment
25 of Title I funds.

1 The standard of review the Sixth Circuit set
2 out is simply one that protects a state in a grant
3 program from retroactive liability where the state has
4 applied in good faith --
5 QUESTION: You know, I just really am troubled
6 by your insistence on the repetition of the word
7 "retroactive." The question, of course, is whether it
8 is, and I don't think that has been conceded at all.
9 MR. CHENOWETH: Your Honor, we believe that
10 the Secretary is applying a construction of the statute
11 and his interpretation of the statute and the level by
12 which that was going to be considered, he is applying
13 that retroactively, and only by doing that could there
14 be a recoupment of the expended Title I funds.
15 So we are arguing, we believe that the facts
16 show that it is a retroactive application of that.
17 QUESTION: Well, the agreement itself, of
18 course, if you wanted to treat it as a contract,
19 provides that if the regulatory requirements aren't met,
20 that the federal government may require reimbursement.
21 MR. CHENOWETH: Yes, Your Honor, but a part of
22 that is going to be that Kentucky had a notice of what
23 those obligations were going to be, and it is our
24 contention that Kentucky did not have adequate notice of
25 those obligations in keeping with Pennhurst, and that

1 therefore it would not be reasonable to have this
2 recoupment of already-expended Title I dollars that
3 would have to be paid for out of Kentucky general tax
4 dollars. We believe that is the -- that in order to
5 apply the proper legal standards which we think the
6 Sixth Circuit did, and the considerations in the
7 application of Pennhurst, that the -- there cannot be
8 that recoupment of monies.
9 We submit to Your Honors, that the Sixth
10 Circuit Court of Appeals decision should be affirmed.
11 CHIEF JUSTICE BURGER: Do you have anything
12 further, Mr. Geller?
13 MR. GELLER: Unless the Court has any
14 questions, I don't have anything.
15 ORAL ARGUMENT BY KENNETH S. GELLER, ESQ.
16 ON BEHALF OF PETITIONER -- Rebuttal
17 QUESTION: Let me just ask you one -- it is in
18 the brief, I know, but would you state again for me the
19 standard for which you contend?
20 MR. GELLER: Is the legal standard that the
21 Court --
22 QUESTION: Yes.
23 MR. GELLER: This is a review of an
24 administrative order.
25 QUESTION: So it is an arbitrary and

1 capricious?

2 MR. GELLER: It is more contrary -- well, it

3 is the Administrative Procedure Act. There has to be a

4 finding of lack of substantial evidence, which there

5 hasn't been here, or there has to be a finding that the

6 Secretary committed some legal error in seeking

7 recoupment.

8 But it has been conceded, I think, that there

9 was a misspending here. So unless something in the

10 Title I statute prevents the Secretary from recouping

11 money that has been misspent, we don't think that there

12 can be any overturning of that recoupment decision.

13 And as I read earlier, the Title I recoupment

14 provisions contain nothing suggesting that there is a

15 requirement of showing bad faith or showing that the

16 grantee did not act reasonably or any of the other

17 things that Kentucky is arguing for today.

18 QUESTION: So you would say the normal rule

19 should be followed that if the Secretary's

20 interpretation of the statute is a reasonable one, we

21 should accept it.

22 MR. GELLER: That is correct.

23 QUESTION: Even in a grant program.

24 MR. GELLER: Even in a grant program.

25 This Court, let me just add by saying --

1 QUESTION: Well, and even if you didn't, you

2 still would reach the result for which you are --

3 MR. GELLER: Well, because I think, as you

4 correctly stated, there is really no ambiguity here.

5 Thank you.

6 CHIEF JUSTICE BURGER: Thank you, gentlemen.

7 The case is submitted.

8 We hear arguments next in Bell v. New Jersey.

9 (Whereupon, at 1:46 o'clock p.m., the case in

10 the above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#83-1798 - T. H. BELL, SECRETARY OF EDUCATION, Petitioner v. KENTUCKY DEPARTMENT OF EDUCATION

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)

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