OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-237, 84-238, 84-239

TITLE YOLANDA AGUILAR, ET AL., Appellants v. BETTY-LOUISE FELTON, ET AL.; SECRETARY, U.S. DEPARTMENT OF EDUCATION, Appellants v. BETTY-LOUISE FELTON, ET AL.; and CHANCELLOR, BOARD OF EDUCATION, CITY OF NEW YORK, Appellant v. BETTY-LOUISE FELTON, ET AL.

PLACE Washington, D. C.

DATE December 5, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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YOLANDA AGUILAR, ET AL., :

Appellants, :

V. : No. 84-237

BETTY-LOUISE FELTON, ET AL.; :

SECRETARY, U.S. DEPARTMENT OF :

EDUCATION, :

Appellants, :

V. : No. 84-238

BETTY-LOUISE FELTON, ET AL.; :

and :

CHANCELLOR, BOARD OF EDUCATION, :

CITY OF NEW YORK, :

Appellant, :

V. : No. 84-239

BETTY-LOUISE FELTON, ET AL. :

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Washington, D.C.

Wednesday, December 5, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 o'clock a.m.

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APPEARANCES:

REX E. LEE, ESQ., Solicitor General of the United States, Department of Justice, Washington, D.C.; on behalf of the Appellants.

STANLEY GELLER, ESQ., New York, New York; on behalf of the Appellees.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Aguilar against Felton and consolidated cases.

I think you may proceed whenever you are ready, Mr. Solicitor General.

ORAL ARGUMENT OF REX E. LEE, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. LEE: Mr. Chief Justice, and may it please the Court, at issue in this case is the constitutionality of a key feature of Title 1 of the Elementary and Secondary Education Act of 1965. Over the 19 years of its existence, Title 1 has been universally recognized and hailed as the largest and most successful federal educational effort.

The Congressional objective was to break the poverty cycle at its most vulnerable point by providing supplemental remedial educational services, such as remedial reading and remedial math, to children who meet two qualifications.

The first is educational deprivation, which means performance at a level below normal for their age, and the second is residence in an area that has a high concentration of families with incomes below the poverty level.

Pursuant to Department of Education

regulations, Title 1 programs are administered by local public school boards denominated by the regulations as local education agencies. One thing that is not at issue in this case is that Title 1 is a program that works. Everyone agrees that children at all levels have experienced significant measurable advances thanks to the benefits of this program.

The Court of Appeals which held it unconstitutional described it as a program that apparently has done so much good and little, if any, detectable harm, and the appellees agree, having acknowledged it as a good and successful program that has contributed substantially to the educational needs of educationally deprived children.

QUESTION: General Lee, these programs are offered nationwide. Are there some around the country that are not offered on the premises of the private schools? And would you be able to characterize the extent to which other programs under Title 1 are offered within public schools?

MR. LEE: Those that have had experience with Title 1, Justice O'Connor, have almost universally come to the conclusion that off premises just doesn't work, that it is educationally unsound. I am informed by my colleagues at the Department of Education that there is

one special circumstance in one school district that has been able to make it work because of special circumstances. The Department of --

QUESTION: Is there then only one school district in the nation that is offering it?

MR. LEE: I am not certain that that is the case. I am only aware of one where it in fact has been able to work.

Now, I should add this, that in a study done by the Department of Education in the State of Missouri, and this quote is in the brief, and of course the study itself is in the record, the Department of Education based on that study raised the question whether off premises Title 1 services could ever really be comparable as Congress declared that it should be.

And the facts of this case demonstrate why that is a problem. There are theoretically four possible time and place combinations available to any local education agency that is charged with the responsibility of seeing to it that Title 1 programs offered to nonpublic schools are comparable to the programs that are available to public school children.

Those four combinations are off premises during the regular school hours, off premises after hours or before hours, on premises during the regular

school hours, and on premises after hours.

During the 1965-66 school year, the New York City Board of Education explored all three of the other alternatives before settling on the one at issue in this case as the only one that was educationally sound. Its experience with the two after hours options demonstrated them both to be what the board described as a total failure. The students were tired. The parents were concerned about safety.

There was something of a stigma effect because the students, many of them concluded that they were being punished because they were required to stay after school, and communication between Title 1 teachers and the regular classroom teachers was virtually impossible.

We turn now to the off premises options, which is more directly responsive to your question. What New York found was that in addition to those problems that characterized the after hours problems, and there are some of those, because any time you go off premises you consume prime time that ought to be used for study, and prime time is particularly important when you have students whose motivation is in any event below average. It is particularly important that it be used for study purposes. But the other problem with off

premises, unless it is just very, very close, is the cost.

In order to pay the transportation and other noninstructional costs in the case of this particular program would have consumed about 42 percent of the total nonpublic Title 1 budget for the City of New York, and that would have meant that about 5,000 children in New York City would have been deprived of Title 1 services. It literally would have been a trade of bus services for Title 1 services.

And since the Department of Education has consistently interpreted the equal expenditure provision as requiring that instructional services be equal, most of the children eliminated from the program in order to pay these noninstructional costs would have been public schcol students.

In short, the New York City Board of Education was bound by the Congressional mandate to provide comparable services to children attending public and nonpublic schools. This Court in Wheeler versus Barrera held that the plenary responsibility for determining whether the nonpublic program did or did not comply with the comparability requirement set by Congress was to be vested in the local education agency, and that is exactly what the New York Board of Education did, and

its selection of the option which would fulfill that obligation was based purely on educational considerations.

The board's actual experience showed what common sense would in any event have confirmed, that children learn better when they are not tired, that they can learn better in a classroom than they can on a school bus, and that money and time spent for transportation doesn't do much to remedy reading or math deficiencies.

This case is different from others that have previously come before this Court in that we are not left to speculate about how the program might work. This one has been in existence for over 18 years. The case was tried based on an extensive record developed before an earlier three-judge District Court in a case called the Pearl case, and on selected additional affidavits and documents.

QUESTION: And what has happened to the Pearl case?

MR. IPE: The Pearl case, Justice Brennan, went to a decision by the three-judge District Court, including findings, and then the appellants -- and it was favorable to the program. It was held constitutional. Then the appellants in that case failed

to perfect their appeal to this case, so it became res judicata.

QUESTION: Did they try to appeal it here?

MR. LEE: Yes, but it was a technical deficiency in the --

QUESTION: Dismissed for want of jurisdiction?

MR. LEE: That is correct.

QUESTION: Because of failure to meet deadlines?

MR. LEE: That is correct. That is exactly correct. Then this case was tried on the basis of the Pearl record plus additional affidavits, so we have the unfortunate circumstance where in my experience it is the first time that you have findings by two separate trial courts, and those findings are identical.

The Pearl court, for example, found that in compliance with the extensive Title 1 regulations, New York had established what it called a well defined dichotomy between purely secular instruction and activity subject to religious influences, and those findings were confirmed by the findings of the District Court in this case, and I quote, "The concerns of the Meek court about the potential for the unconstitutional mingling of government and religion in the

administration of this type of program have not materialized."

These findings are buttressed by uncontradicted evidence in the record that the services are provided in religiously neutral locations. There have been no instances of Title 1 teachers being pressured or influenced by private school personnel, and no instances of Title 1 teachers advancing religion.

I would like to make two comments with respect to these findings by two separate trial courts. The first is that they really only confirm what in any event a common sense examination of these programs would have told us. Even if we could ignore what actually happened, this just isn't the kind of case that raises serious risks that government is going to establish a religion.

This is not a case like Lemon versus Kurtzman where church personnel are teaching across a broad spectrum of subjects. These are public school teachers. Their job is to teach supplemental remedial courses. Their task is difficult. It has a narrow focus. And it supplements the core curriculum. Just how is it even if the record didn't show otherwise that religious indoctrination is somehow supposed to infiltrate this process.

Is the danger that public school teachers might teach religion? If that is the supposed risk, why have the appellees failed to uncover even one single instance in which that actually in fact occurred over the almost two decades the program has been in existence?

And in any event, the argument proves too much, because the risk is just as great when public employees teach in public schools. Well, if that is not the risk, is it the danger that the nonpublic teachers will, once these public professionals come on with their -- somehow block these public teachers and indoctrine them?

Surely the courts' decisions suggesting a distinction between aid to elementary schools and aid to colleges would teach that indoctrination of other adults is not the risk with which this Court's establishment clause jurisprudence is concerned. Those distinctions apply a fortiori when it is not college students but college graduates, professional teachers.

In short, there is an air of unreality about the notion that this program is a candidate for serious problems of religious indoctrination, and the actual record completely belies the notion that extensive surveillance was required or that it actually occurred.

QUESTION: Mr. Solicitor General, what if it turns out that the Grand Rapids program is stricken down under the First Amendment? What bearing do you think that would have on this case?

MR. LEE: Well, I would hope that in that very unfortunate event that the Court would not err twice.

(General laughter.)

QUESTION: You think the Title 1 program is realistically distinguishable from the Grand Rapids program for constitutional purposes?

MR. LEE: Of course it is. The distinctions that I would suggest are not controlling and should not be controlled. There are a couple of distinctions, and I think they were adequately brought out in the previous argument. It may be a little easier to identify these as supplemental and as non-core, but that is only because of this happenstance.

There is a statute, and it is cited at -- a section of the statute. It is Section 3807(b) of the statute, which specifically requires, which specifically prohibits any of the Title 1 funds being used for regular curriculum purposes, and it cannot be used to provide services that are not otherwise available, and if they are used for those purposes, then we sue to get the money back.

We have done it before, and we have another case that will be here later this year involving, in this instance, services that are used for -- that were otherwise available, but the lesson that comes from that is not that the Grand Rapids program is bad and ours is good.

It is rather that the -- that this rather clean analytical framework has been provided where you have a federal government that is not in the education business and therefore must necessarily superimpose its remedial program on an existing program as demonstrating the clean distinction between remedial programs on the one hand and core curriculum programs on the other.

But that distinction should be no less available to a state that does not have a similarly clean analytical framework because there is just as much of a distinction between remedial programs and non-remedial programs.

Now, there is one other distinction, and it is not one that is dispositive, but it is certainly one that -- well, I think it is persuasive, and that is that these -- that this is, after all, a Congressional determination that we are dealing with.

Surely a Congress -- well, in the final analysis the issue here is whether Congress can require

that its benefits be spread equally.

QUESTION: You mean a Congressional determination as opposed to a state determination? Well, I think that would be the ultimate irony, that you would take the religion clauses of the First Amendment which by their terms apply to Congress and only through the adoption of the Fourteenth Amendment have been held to apply to the states and now say they apply with greater force to the states than to Congress.

MR. LEE: I do not mean to suggest, Justice Rehnquist, that that is a distinction between this case and the Grand Rapids case. I simply mean to suggest that whether in the context of either a Congressional determination or a determination by the Grand Rapids school board that we are dealing here basically with policy judgments that are entitled to be upheld, and I would like to explain what the basis for that is.

We have here a problem that has been faced by three separate branches of government at two different levels of goverment. On the one, from the legislative branch, Congress has made its basic policy decision to spread the benefits of this program equally between public and nonpublic students.

A local executive agency has done a commendably conscientious and thorough job of

administering that decision, of implementing that decision consistent with sound educational practices and two separate trial courts have found that the concerns hypothesized in other cases have not materialized in this one.

If the judgment of the Court of Appeals is affirmed, the comparability requirement acknowledged by this Court in Wheeler will still be in place, as will most aspects of Title 1.

The consequence will not be, as Mr. Geller argues in his brief, that all those Title 1 funds will then simply be transferred over to the public sphere, because if the Court of Appeals is correct that it is the on premises function that renders it unconstitutional, you still have in place the Congressional determination that these programs must be equal, but with the one option that has been demonstrated to be educationally sound, the most educationally sound and available.

So that the result will be a program which still serves both public and nonpublic children but serves fewer of them, some of them not as well, a program which will expend scarce dollars and student time on bus rides instead of remedial instruction.

Now, all of that, we are told, is required not

because of anything in this record, but because this Court held, laid down in Meek versus Pittenger a per se rule that requires us to ignore the actual facts of the particular case, and instead erects a per se rule that any on premises instruction constitutes an establishment of religion, and the Court of Appeals simply misread Meek versus Pittenger.

This Court made it very clear in Lynch versus Donnelly that the Court has consistently declined, and I am quoting, "to take a rigid, absolutist view of the establishment clause, and that in each case the inquiry calls for line drawing. No fixed per se rule can be framed."

QUESTION: Was the entire Court in agreement with your statement just made?

MR. LEE: Lynch versus Donnelly, as you indicated, Justice -- as you implied, Justice Blackmun, was a five-four decision. But it was, of course, a holding of the Court. Moreover --

QUESTION: But that is a factual statement that you are making.

MR. LEE: Excuse me. I guess I misunderstood the question. It is correct that Lynch versus Donnelly was a five-four decision, and I have correctly quoted from the Lynch majority.

In Meek there was no actual experience, and here there is. We would not be in this courtroom today, moreover, if the Constitution prohibited all Title 1 services on parochial premises because such a rule would have been dispositive when Title 1 was before this Court in 1974 in Wheeler versus Barrera.

Rather than deciding for all time and all purposes that on premises instruction was mandated by the First Amendment, this Court rather carefully outlined -- declined to reach that issue on that case specifically for this reason, that it would be wholly inappropriate for us to attempt to render an opinion on the First Amendment when no specific plan is before us.

A federal court does not sit to render a decision on hypothetical facts, and the Court of Appeals was correct in so concluding, and I believe that that is also a rejection of a per se approach in these establishment areas.

Moreover, perhaps even more helpful is an example that the Court used in Wheeler versus Barrera in which it gave some of the types of problems, some of the types of possibilities that might be considered by a local education agency in performing its responsibility to assure that these programs were comparable, and I am quoting.

"For example, a program whereby a former parochial school teacher is paid with Title 1 funds to teach full time in a parochial school undoubtedly would present quite different problems than if a public school teacher solely under public control is sent into a parochial school to teach special remedial courses a few hours a week."

Now, that was not a ruling on the constitutional issue, but it does identify a range of possibilities that might be considered, and it precisely describes the Title 1 experience, which is presumably at the permissible end of that range. It is difficult, I submit, to see how in this case, on this record, there has been any establishment of religion.

Certainly none has been proven. And even the Court of Appeals recognized that it depended on its view of Meek versus Pittenger to reach that conclusion. It is also difficult to see that there has even been any injury to what might be called establishment clause values, and most difficult of all to perceive how these values are possibly enhanced by making such a successful program more cumbersome, more expensive, and less effective.

QUESTION: Mr. Solicitor, can I ask this one question about any possible impact on establishment

clause values? This is the case, I believe, in which there is the desanctification of the classrooms. They must remove religious objects from the classroom. Do you think that if a religious school is told that you can have some money or some public benefit if you take down some religious objects from your classroom, that that has any impact at all on --

MR. LEE: No, Justice Stevens, I really don't, for this reason. That really isn't the way the option is put to them under the Title 1 program.

QUESTION: But it is a condition, is it not?

MR. LEE: Well, I don't know whether it would be constitutional and therefore acceptable to the Title 1 administrators if there were or were not -- the religious objects were or were not removed, but that is a decision that the parochial schools have made in making their application, and I think this Court has observed on a number of occasions that we have to be a bit sensitive about not getting, on the one hand, what is demanded by the Constitution, what is demanded by the Constitution, and on the other hand what is permitted by the Constitution, so close that there isn't any room to steer between that Cylla and Caribda, and frankly, it is almost a damned if you do and damned if you don't option that is left to the church school.

I know my opponents make this point, but I just don't find it that persuasive. I think that is their judgment. It is their judgment to make an application for these Title 1 funds, and I think it lies within the proper scope.

QUESTION: I take it your answer in effect is, your response is that if the religious symbols were left in the room, your adversaries would hammer you with that fact, and therefore at most removing them neutralizes the problem.

MR. LEE: Of course. That is exactly right.

QUESTION: In this connection, do you have any comment on the Missouri case?

MR. LEE: I agree with Mr. Ripple, Justice Blackmun, that the Missouri case, like all cases, will stand on its own facts and on its own record.

QUESTION: So that if you prevail here, that does not necessarily mean you will prevail in the Missouri case.

MR. LEE: That is correct. That case will have to be examined on its own facts and its own record, and I am not sufficiently familiar with the Missouri case at this point to express an opinion.

QUESTION: Well, you sent a copy of it up here, as did your opponents, and at least a cursory

review of it would indicate that things were done in the Missouri case which you claim are not done here.

MR. LEE: I think that's correct. I think that's correct. Let me just --

QUESTION: At least that shows the possibility of abuse.

MR. LEE: And you have laid -- you have put your finger, Justice Blackmun, on what I think is the most important key in this case, and that is that consistent with what the Court said in Wheeler versus Barrera, these cases have to be approached on a case by case basis.

You also said in the Rohmer case -- excuse me, in the Regan case that in a slightly different context the parties had simply misread Meek when they read it to apply a per se rule, and that, I think, is the most important principle to come out of this case.

It would be a real travesty if under the religion clauses the net result of this particular litigation would be to convert such a successful program into one which deprives thousands of needy children of all Title 1 benefits all because the parents of some of those children exercised their First Amendment rights.

Unless the Court has further questions, I will reserve the rest of my time, Mr. Chief Justice.

CHIEF JUSTICE BURGER: Mr. Geller.

ORAL ARGUMENT OF STANLEY GELLER, ESQ.,

ON BEHALF OF THE APPELLEES

MR. GELLER: Mr. Chief Justice, and may it please the Court, I am glad that after about one hour and perhaps 15 minutes somebody who stood up to argue before you mentioned Meek against Pittenger. I thought that was never going to be mentioned, because the appellees do not come before this Court in a void.

There have been decisions by the Court not only in Meek but in Marburger and there is the rationale of the decision in Lemon against Kurtman and the rationale of the decision in Wolman against Walter that firmly support the position that the appellees took in this case.

And while we are mentioning that there were two lower courts that decided on the New York City Title 1 program before the Court of Appeals did so after an alleged trial record, keep in mind that the trial, the so-called trial in this case consisted merely of the submission of written affidavits. There were no witnesses. There was no credibility. The same affidavits were before the Court of Appeals, and the Court of Appeals unanimously decided otherwise than the District Courts on the same record, and with the same

ability to do so.

QUESTION: Did the Court of Appeals reject findings of fact that had been made by the District Court?

MR. GELLER: The Court of Appeals did not reject the findings of fact. It rejected the conclusions that were drawn from those findings, and I will go into the findings of fact because I don't believe that this so-called record supports the position that the government and the board of education and the intervenors take in this appeal, and I will tell you why.

But first, let me say this about the benefits of the statute. We agree with the appellants that this is a good statute and a good program, and it benefits needy children, and there need be no change in that. I am amazed that the Solicitor General gets up and says that if you should strike down this program, that it will affect thousands of children. It need not affect one, and I pointed that out in my memorandum, and it was not countered by the appellants in their memorandum.

There have never been enough funds in the Title 1 program to provide for all of the eligible children in the program, so that if the -- and just confining ourselves to the New York City program, if you

took the 20,000 children, and that is the total of it, who are now in that program, in the parochial schools mainly of New York, if you took them out of the program, you would be able to use those funds to provide the benefits to 20,000 eligible children in the public schools of New York who now do not receive the benefits of the program.

In other words, the only thing that stops this, of course, is that the statute says that the aid must be provided equally, but I cannot believe that the Administration and the Congress, faced with a purpose, which I understand to be their purpose, to provide aid to needy children, would then waste money trying to get, if this Court struck down the program, waste money trying to get services to needy children in parochial schools when they could take the same money and provide the same needy children in the same school district with the full benefits of the Title 1 program.

If this Court struck down this program as it is now applied, it need not, if Congress acts rationally, which I would assume it would do, affect the purpose of Congress, which is to provide aid to needy children.

QUESTION: Do you mean that if Congress takes some additional action, this result which you describe

will prevail?

MR. GELLER: Yes, I do, Your Honor, and what I cannot believe is that faced with a report from the Administration and from the Solicitor General that the program just doesn't work off premises, that Congress would insist on wasting money trying to deliver aid to the needy children in parochial schools when they could supply the same aid to needy children from the same background who happen to be attending public schools.

And, Your Honor, I really do not accept the presumption which is made in this case that the parochial school students in New York City go to their schools primarily even because of their religious beliefs. They are going to private schools because their parents perhaps don't want them to go to public schools, and if the aid were changed in this case, Congress would achieve its educational purpose.

It might not achieve a purpose. It might not achieve a purpose that runs afoul of the establishment clause, but it could surely achieve its educational purpose 100 percent in the way in which it is achieving now.

The only question -- the question -- I won't say the only question, but the question that then arises may arise under the equal protection clause or the

preexercise clause, but I understand that this Court has decided that when it decided that no state need supply every service to parochial schools that it supplies to private schools.

Let me go to the question of the record in this case and what it professes to show, however, but let me start by saying what I understand and I think is conceded about what this Court determined in Meek and Marburger, and again in -- really in Lemon and Kurzman.

This Court decided all of those cases and the statutes and the programs in those cases on the face of the statute. It held that it had sufficient common sense, as the Solicitor General argues, and the experience to know that when you place teachers and counselors on the premises of public schools, you have created a grave potential that they would in some manner foster religion, and the manner in which they do that I will come to in a moment. It is not in the way that the Solicitor General mentioned.

And the Court said further, the only way you can avoid that potential danger is to have an almost inquisitorial surveillance, one which is so comprehensive and discriminating and continuing that the surveillance in itself would bring about an excessive entanglement that was an evil as great as the evil it

sought to guard against, that of government fostering of religion.

I don't -- let me add just one thing. The Court said, and this was a corollary, that surveillance was, as far as it could see, the only way in which you could avoid this government fostering of religion because you could not rely on the good faith and the professionalism of the teachers.

On that score, I would like to make one further point. Some distinction appears to be attempted to be made between Lemon and Kurtzman and Meek, because in Lemon and Kurtman the teachers were religious school teachers, and somehow the idea is that you could not accept the word of a religious school teacher that he would not engage in some act that would foster religion, but you can accept the word of a public school teacher.

I don't think that makes any sense at all, and that in fact when it comes to award, you might well be more willing, if anything, to accept the word of a devoted nun, brother, priest, that he would not violate the establishment clause than that of any public school teacher.

In this case, the present case, the appellants come before you and they say you were wrong deciding Meek and Marburger and Lemon facially because now you

have before you 18 years of actual experience. They say that the record shows that there is no evidence of an actual fostering of religion primarily, primarily by specific overt acts of teachers or guidance counselors actually inserting religious matter into their teaching.

The same record, however, shows you that you don't have any evidence of a real system of surveillance that the Court said in Meek and Marburger and Lemon would be required to detect that evidence of government fostering of religion and to guard against it.

So, in the record that you have now before you, you are still being asked to rely on the good faith and professionalism of the teachers, because the only way, the only way you would have got the evidence of impermissible conduct on the part of the teachers and counselors was that if they committed these detectable acts of impermissible conduct, they would have turned themselves in.

There is no other way short of surveillance, of getting any such evidence. You either have to get it from the teachers and the guidance counselors themselves, or you don't get it, and that is why in this record -- that is why this record is no proof that the Court or the majority of the Court were incorrect in

deciding Meek and Marburger and Lemon facially.

On the record also, and the appellees argue, point out to you that the Court of Appeals held that this statute has done much good and little detectable, little detectable harm.

Now, I put it to you that the kind of fostering of religion that this record would show is not the kind in which you would actually find overt specific acts injecting religious matter into teaching. The kind of harm actually lies elsewhere, and that is why in our papers we argue the fact that actually the main test to be applied here or a main test is the primary effect test, because what you have here is a kind of aid to religion which does not lie in the specific or overt act, but lies in the simple fact that you place public school teachers and guidance counselors on the premises of public schools and allow them to teach there.

How is that done?

QUESTION: Private schools.

MR. GELLER: Yes.

QUESTION: On the premises of private schools.

MR. GELLER: On the premises of private schools. How is that done? This Court has decided before that the placing of instructional equipment and materials on the premises of parochial schools,

religious schools in itself would be impermissible, but now you don't have a blackboard, you don't have a piece of chalk.

Now you have a real live teacher. You have somebody that this Court itself in the past has said is at the center of the educational process, and in addition, you have a remedial teacher. You have somebody who is -- without whose help the remedial students might never be able to progress at all in their --

QUESTION: Are you suggesting, Mr. Geller, that religious dogma could be somehow subtlely filtered into remedial mathematics?

MR. GELLER: Not at all, Your Honor. I agree with you there, and I would be foolish to argue that you could insert religious dogma into mathematics or -- well, the other subjects are easier, because when you have remedial reading, you have broad topics, and when you have English as a second language, you also have a broad scope of topics that you can cover in teaching it so that it is possible.

But, Your Honor, that is not my point. It would be very difficult, and that is what the Court of Appeals has stated quite wisely, to detect these specific overt acts of injecting religious material into

this remedial instruction.

The aid and support that this program, any program of supplying teachers and counselors onto the premises of private schools -- parochial schools or religious schools gives to those schools does not lie in the injection of religious matter into the instruction.

It lies in the fact that you are providing someone, a teacher who is -- actually can become the school personified. You have one good, admired, well respected teacher and that teacher is the symbol of the school itself.

So that what the government, what the -- is doing in a case of this kind is providing a means by which teachers enhance the image and the reputation of the school, and this is a school that the Court has recognized as a dominant religious mission, and that is the way in which this kind of program aids the religious purpose of the religious schools.

There are concrete ways, however, that are never discussed and can never be detected because you would never find the specific evidence. In this case you have a remedial teacher teaching remedial students who are the poorest students in the school educationally.

These are students many of whom -- most of

whom do not like school. They do not like school, and the the only school that they know, the only school that they know is the particular school to which they are going. You place a remedial teacher on the premises to give them instruction or a guidance counselor and the guidance counselor is confronted by the remedial student with the fact that he does not like the school.

He says, teacher, this is a rotten school, or Sister Regina, my regular classroom teacher, is a bad teacher. Or, why do I have to go to -- and say religious prayers or attend religious courses in this school, perhaps even when the student is not in a parochial school a Catholic student where the religious prayers and the exercises are mandatory.

What does the remedial teacher do under those circumstances? The remedial teacher, whose job it is to reintegrate this remedial student back into the regular program of the school, is supportive of the school. That is not injecting religious matter into the instruction, but what it is doing is supporting the school, a school that has a dominant religious mission.

The remedial teacher says to the student, Willy, whatever his name is, this school has your best interests at heart. It is going to give you a good education, and when you grow up you will have a good

job, and you will be able to lead a good life.

Or, Sister Regina is a good teacher. She has got your interest at heart. In every way --

QUESTION: Mr. Geller?

MR. GELLER: Yes.

QUESTION: Is there anything in the present record that indicates any incidents like these actually happened?

MR. GELLER: No, Your Honor, and that is what the Court of Appeals pointed out, is the reason why there is little, if any, detectable harm. This is a -- these are matters that are not subject to actual proof. You are not going to get little school children to come in and tell you that they don't like school.

That is something that this Court or any court is capable of knowing. What I am pointing out to you is not something that this Court has not considered before. This Court has repeatedly in the cases involving prayers and religious exercises noted that when you take a public representative, a public school teacher, or the public school system, and you lend that system to religious prayers and exercises when conducted in the public schools, even though conducted separately in the public schools, as in McCollum, what you are doing is lending the prestige and the power of the

public school system to these prayers and religious exercises that are being stated separately in the school. The situation is --

QUESTION: That may be the hypothesis of those cases, but I don't think the hypothesis was based on the sort of speculation that you were engaging in.

MR. GELLER: Yes, Your Honor, it was based on just that speculation. Nobody came in in McCollum and testified, and testified that the power and the prestige of the public school was being lent to the religious teacher that came into the public school and gave religious instruction within the public school.

That was a fact that the Court could assume on the basis of common sense and experience, and it did. There is no proof, there is no proof that the public school system lends its power and prestige to anything. I don't see where you would get that concrete proof in the record.

And what the Court did in McCollum we say the Court should acknowledge and do here. When you take now the public school teacher and you move him into the parochial school, or you have what the government says is a school within a school, you are once again lending the prestige of the public school system to everything that goes on in the religious school, all of the prayers

and exercises, just as much as when the religious teacher came to the public schools.

There is no basic difference in that, and if one is aiding religion, the other is aiding it in the same way. Consider what the Court did in Meek and Walman that is unquestioned. The Court said that the mere placing of instructional equipment and materials on the premises of public schools constituted aid to the -- private schools constituted aid to those schools and their religious mission. Merely instructional equipment.

QUESTION: Mr. Geller, these classes go on during -- these remedial classes go on during the regular school day, don't they?

MR. GELLER: I understand they do. Yes, Your Honor.

QUESTION: And I would take it that if they weren't going on and weren't being paid for by the Title 1 funds, they would be -- the same hours would be taught by private school teachers.

MR. GELLER: The same hours would be taught by private school teachers.

QUESTION: And these remedial classes relieve the private school of the necessity of filling up those hours.

MR. GELLER: They do more than that.

QUESTION: Well, don't they?

MR. GELLER: They do that, Your Honor, but they do more than that.

QUESTION: Well, I know, but they -- it just means they perhaps don't have to have as many professors. I would think you would argue that it would be -- that is a direct aid.

MR. GELLER: I was coming to that, Your Honor. One of the greatest aids that is performed here is the aid that the remedial school teacher gives to the regular classroom teacher.

QUESTION: It just saves -- yes, but I think it -- wouldn't it just very likely save the private school some money?

MR. GELLER: It saves the private schools a tremendous amount of money. I didn't argue that --

QUESTION: Even if the private schools would never put on a course like this, it nevertheless would save them money, because --

MR. GELLER: In the case of remedial instruction particularly so.

QUESTION: But even if they do nothing --

MR. GELLER: What you are doing is taking the worst students out of the classes and allowing all of

the regular students to move forward.

QUESTION: Well, I would think if there is X number of hours a week that you used to have a private school teacher to teach, if you no longer have to have a private school teacher to teach those hours, you perhaps can get by with a smaller staff.

MR. GELLER: I --

QUESTION: There is no evidence of that?

MR. GELLER: It is possible. There is no evidence of that, Your Honor, but I don't think that you need any evidence to know and to decide that when you -- just from the very purpose and the nature of the statute and the program itself, you are taking the worst students out of their regular classes and you are teaching them so that they will be able to go back into those classes and keep up with the classes.

QUESTION: Well, Mr. Geller --

MR. GELLER: You are not only aiding the teacher there, but in respect of those students you are aiding the teacher with respect to every other student in the regular classroom.

QUESTION: Mr. Geller, maybe I don't understand the program. I thought it just took selected students out of some classes under the Title 1 program, and was not in fact reducing the number of teachers

required in the private school to do that.

MR. GELLER: I didn't say that.

QUESTION: I thought it was taking selected students and giving them some remedial programs.

MR. GELLER: Absolutely, Your Honor.

QUESTION: Now, is that correct?

MR. GELLER: That's correct. And Justice White --

QUESTION: It is not reducing the number of teachers required?

MR. GELLER: It does not reduce the number of teachers, and if it did that, the government as it is doing in the Kentucky case might go after the religious schools and try to get the money back. I wasn't suggesting that, but that is not the only aid that this kind of program gives to the religious schools. It is not merely a question that it enables them to reduce their number of teachers, and we don't say so, but it gives great --

QUESTION: Mr. Geller, how do you think that the program is generally perceived by the community at large? Is it perceived as a program to aid disadvantaged children, or a program perceived as aiding religious schools?

MR. GELLER: I will tell you how I think of

that. When you tell anybody in New York City today, are you aware that for the last 18 years there are public school teachers teaching on the premises of private, religious schools, they are aghast, and there is rarely a person that does not conceive of that as being aid to the religious schools and their mission.

QUESTION: Your answer is, it just isn't perceived at all, either way.

(General laughter.)

MR. GELLER: It is not perceived -- oh, Your Honor, by the parents whose children are going to the religious schools, it is perceived as a program which aids needy children. By the parents whose children are going to public schools, of course it is perceived as aiding needy children.

But what the vast, vast majority of the citizens of New York City do not know is that public school teachers are the ones who are carrying the program to the religious schools, and if you ask me how they perceive it on the basis of my experience, I tell you they perceive it as using their tax dollars to support a religious school with a religious mission, and they are aghast when they are told about it.

Of course, the parents in each type of school know about the program, but they don't know about the

program in the other schools, and they really don't know how it is being carried out.

QUESTION: Mr. Geller, before the noon bell rings, I want to ask you this. If this case is reversed and the ruling is against you, can the Court make that reversal without overruling Meek against Pittenger in your estimation?

MR. GELLER: I don't think so, Your Honor. I really don't think so, because I don't think that you have -- and that was my main point when I began. I don't think that you have any facts in this record that can prove to you that the majority was wrong in Meek against Pittenger when it worried about the potential, because there has been no real surveillance.

QUESTION: So that s for the Court to be candid in reversing, it must overrule Meek against Pittenger.

MR. GELLER: I would say, Your Honor, that it would in effect be overruling Meek against Pittenger or, if I may, I think it would be -- it would err respectfully in this sense, if it took this record and said that this record was proof that the Court had been wrong in Meek against Pittenger in deciding the statute in that case and in numerous other cases facially, because you have no experience, you have no experience

in this case other than an experience which is necessarily based on reliance on the good faith and professionalism of the teachers, which was rejected in Meek, and there is nothing in this record that shows you that you have any more reason to rely on the good faith and professionalism of the teachers and guidance counselors in this case than in Meek.

CHIEF JUSTICE BURGER: Your time has expired now, Mr. Geller.

MR. GELLER: Thank you.

CHIEF JUSTICE BURGER: Do you have anything further?

ORAL ARGUMENT OF REX E. LEE, ESQ.,
ON BEHALF OF THE APPELLANTS - REBUTTAL

MR. LEE: Just two brief points, Mr. Chief Justice.

The first is that we have been exposed to a proposed First Amendment jurisprudence that is nothing less than astounding and that would completely turn on their heads these propositions that I had always assumed to be fundamental, that Constitution are presumed to be constitutional, that plaintiffs have the burden of proof, that findings are controlling unless clearly erroneous and cannot be overcome by speculation.

My second point responds to Mr. Geller's

suggestion that Congress may change its mind if this Court were to affirm, and to revoke the determination that it has now made on three occasions that these funds should be equal, equally available, those who do and those who do not exercise their constitutional right to send their children to private schools.

And I submit that if that were to be the case, and Congress were to be told that it has no option other than to do that, that that result would be even less consonant with the religion clauses, less consonant with basic separation of powers principles, and the kinds of judgments that ought to be left to Congress, and would be an outrage to principles of basic fairness, particularly given the fact that we are dealing here with a Congressional determination that has been made by a legislative body that has been held to have a wide discretion with respect to its spending power, and that the choice to attend a religious school is itself constitutionally protected.

So that the parents in poverty areas are put really to this option. They must either give up their right to a religious education or forfeit an equitable and equal share in this program that is purely secular and is purely directed at creating educational equality and has proven to be so successful. It would be the

ultimate constitutional irony if the religion clauses were the source of a rule which put the parents of private school children to that option.

Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 12:02 o'clock p.m., the case in the above-entitled matter was submitted.)

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:

#84-237-YOLANDA AGUILAR, ET AL., Appellants v. BETTY LOUISE FELTON, ET AL.;
#84-238-SECRETARY, U.S. DEPARTMENT OF EDUCATION, Appellants v. BETTY-LOUISE FELTON, ET AL.;
and
#84-239-CHANCELLOR, BOARD OF EDUCATION, CITY OF NEW YORK, Appellant v. BETTY-LOUISE FELTON, ET AL.

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

BY Paul A. Richardson

(REPORTER)