ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

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

CASE NO: 96-552 & 96-553

PLACE: Washington, D.C.

DATE: Tuesday, April 15, 1997

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IN THE SUPREME COURT OF THE UNITED STATES

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RACHEL AGOSTINI, ET AL., :

Petitioners :

v. : No. 96-552

BETTY-LOUISE FELTON, ET AL.; :

and :

CHANCELLOR, BOARD OF EDUCATION :

OF THE CITY OF NEW YORK, :

ET AL., :

v. : No. 96-553

BETTY-LOUISE FELTON, ET AL. :

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Washington, D.C.

Tuesday, April 15, 1997

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:07 a.m.

APPEARANCES:

WALTER DELLINGER, ESQ., Acting Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Federal Respondent, supporting the Petitioners.

PAUL A. CROTTY, ESQ., Corporate Counsel of the City of New York; on behalf of the Petitioners.

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APPEARANCES:

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P R O C E E D I N G S

(10:07 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 96-552, Rachel Agostini v. Betty-Louise Felton, and a consolidated case.

General Dellinger.

ORAL ARGUMENT OF WALTER DELLINGER

ON BEHALF OF THE FEDERAL RESPONDENT

SUPPORTING THE PETITIONERS

GENERAL DELLINGER: Mr. Chief Justice and may it please the Court:

We ask you today to overrule Aguilar because it is inconsistent with this Court's Establishment Clause decisions and because it continues to impose burdens that seriously impair the Federal Government's critical title I program.

I would like to discuss both the reasons why we believe that this is an appropriate procedural posture for the reconsideration of Aguilar, and why we believe that a decision to overrule Aguilar need not require any major doctrinal revisions of this Court's Establishment Clause jurisprudence.

In brief, the critical features that support the constitutionality of on-premises services under title I and the lifting of the outstanding injunction are these.

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Unlike all of this Court's other primary and secondary parochial school aid cases, this case involves an act of Congress that provides new and additional resources to both public and private school students.

Ninety-seven percent of the funding under title I goes to children who are in pubic schools. These services are completely secular. They are required by law only to supplement and not to supplant any necessary educational --

QUESTION: General Dellinger --

GENERAL DELLINGER: Yes.

QUESTION: -- you're not suggesting that an act of Congress should be treated any differently than an act of a State legislature, are you, for purposes of Establishment Clause jurisprudence?

GENERAL DELLINGER: No, I am not, Mr. Chief Justice. What I intend to suggest by that is that many of the State acts that this Court has struggled over provided funds -- since there was a background of public education provided funds just for nonpublic schools. The Ohio act in Wolman v. Walters was an $88-million appropriations for the nonpublic schools.

This is a national act, where Congress is for the first time in 1965 trying to deal with the problem of low income, learning-disabled and learning-handicapped

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children Nation-wide in providing funds to so broad a group. Of the 6.4 million, for example, 6.2 million went to public schools. It's so broad a group.

QUESTION: Do you take the position that Congress, or for that matter a State, could simply appropriate money generally for the teaching of secular subjects and that money could go into the parochial schools without a First Amendment problem?

GENERAL DELLINGER: We do not, Justice Souter.

QUESTION: Well, how do you draw the line? You have spoken of this as being a supplementation of what is regularly done, but as I understand it, the money is spent on what are called remedial programs.

In other words, if a group of children or a child cannot read at whatever the grade level, this money is used to provide special training, but it seems to me that what that boils down to is teaching a child to read, or teaching a child who can't add how to do math, and I don't see what the distinction is between the supplementation and simply the school's normal mission to teach reading or to teach math, or whatever the secular subject is.

GENERAL DELLINGER: Justice Souter, I think it is well-established that -- though I do agree that there's no bright line between remedial mathematics and other

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math, but what is critical is that the Federal title I money was so clearly intended to be, and the statute and the regulations require it to be, a supplementation that goes to the benefit of these low-income needy children that I do not think this case raises the question that would be raised when taxpayer funding takes over a significant portion of the regular educational curriculum. That is, the -- it is not unfamiliar throughout Federal law for Congress to have requirements, as title I does, that the funds should be used to supplement and in no case supplant the level of services that would in the absence of this funding have been available.

QUESTION: Well, what if Congress comes along and says every school district in the United States that spends less than X dollars per pupil will be subject to supplementation by Federal grant for the teaching of secular subjects, and this money can go to parochial as well as private schools. Would that fall under the rubric of legitimacy that you urge this morning?

GENERAL DELLINGER: As you describe it, I believe that that would cause a more far-reaching revision of the Court's Establishment Clause jurisprudence than anything we --

QUESTION: How would we draw the line?

GENERAL DELLINGER: -- seek here.

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QUESTION: Congress would say this is a supplement for poor school districts.

GENERAL DELLINGER: You draw the line here because this appropriation has none of the indicia of Congress providing the support that then enables the institution to engage in its religious function more fully. For example, in the case --

QUESTION: Well, it allows parochial schools to teach reading better than they could teach it otherwise just as public schools can teach reading better than they could teach it or are teaching it otherwise, so I don't see how we draw the line.

GENERAL DELLINGER: Well, first of all, that is, of course, as true under the program as it has existed from 1965 to 1997 as it is under the issue that is before is here. There's still the --

QUESTION: Except --

GENERAL DELLINGER: There's the same supplementation --

QUESTION: Except that at least an attempt is made to draw a visual line, if you will, between what the school is ultimately accomplishing and the secular source by which it is accomplishing this extra objective. There's an attempt made to avoid an appearance endorsement kind of problem, and on your scheme there wouldn't be an

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attempt made.

GENERAL DELLINGER: Here, I believe the attempt is not only made but it is fully successful to differentiate this program from a program like Grand Rapids v. Ball, which we are not challenging, which we -- in this submission at all.

QUESTION: General Dellinger --

GENERAL DELLINGER: Yes.

QUESTION: -- I assume that it enables a parochial school to teach better if you allow a person who knows sign language to enable its deaf students to understand what is being taught in a class better. That enables a parochial school to do a --

GENERAL DELLINGER: Of course it does, Justice Scalia, as does --

QUESTION: And we've approved that. We've approved that, haven't we?

GENERAL DELLINGER: Right, and -- in Zobrest you approved that. It is accepted. You can have school lunch programs. You can have health programs. We have a wide range of programs. Zobrest and Witters I think are decisions by this Court that have clearly --

QUESTION: We've crossed that line.

GENERAL DELLINGER: You have crossed the line --

QUESTION: Well, have we crossed the line, then,

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to the point of saying that any aid for the teaching of a secular subject in a parochial school is therefore constitutional?

GENERAL DELLINGER: I don't think you have crossed that line for this reason. If you take a case like Grand Rapids that has a very different profile, where 40 of the 41 schools that were benefited were sectarian schools, unlike the 3 percent here, and where the courses that were provided were courses provided that were a part of the school curriculum -- in fact, they were ordered up by the school. They were much more woven into the normal school day.

This is a title I service which is provided to kids, low-income educationally deprived children who need this service, and what this Court's decisions I believe in Zobrest and Witters and Bowen v. Kendrick reject is an arbitrary, rigid, formalistic notion that you cannot have those services provided by a public employee who is hired, fired, supervised, and paid by other public employees inside the school building, but instead you must make children -- and in this case, 70 -- a majority of these kids are in grades 1 to 3.

QUESTION: General -- General --

GENERAL DELLINGER: Seventy percent are nonhigh school. Yes.

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QUESTION: General Dellinger, may I deflect you for a moment, because you're launching right into the merits as you did in your briefs, and you have to get your foot in the door properly.

I do not know of any use, ever, of 60(b) such as we see here, essentially to gain rehearing by this Court, so if you could spend just a couple of moments --

GENERAL DELLINGER: I would be glad to, Justice Ginsburg. You are correct that this -- we do not know of another instance in which Rule 60(b) has been used in this way, but maybe for very good reasons.

That is, the understandable reasons may be that they are in a -- in a messy and complicated country like ours, there are usually lots of other cases that bubble up, other jurisdictions that simply don't comply with this Court's holdings, but here the Secretary of Education will not permit any school district in the United States to provide these services on premises, so that there is for that reason unlikely to be an issue.

Now, in terms of --

QUESTION: What about the two cases that are -- are there not cases involving State law similar to title I, one in Louisiana and the other, is it in Minnesota?

GENERAL DELLINGER: Two responses. First of all, as I said, I think those may well be different than a

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program of the breadth of title I, but secondly there is no suggestion -- there have been a series of cases where the provision of these title I services off-premises has been challenged. The courts have upheld against Establishment Clause challenge those cases, and those who brought the case have not sought certiorari in this Court.

I think that there must be some way for a court to modify one of its own prior judgments that has continuing prospective effect.

QUESTION: I'm just curious, why can't the Secretary of Education create a test case, if -- I mean, why couldn't --

GENERAL DELLINGER: Because he believes --

QUESTION: -- exactly what you said, the laws change in our opinion and therefore we think in this partic -- you know, deliberately do it in order to raise the issue in a different --

GENERAL DELLINGER: That is a fair enough question, Justice Breyer. I believe that the Office of Legal Counsel's proper response would be, though we read the law to have changed since Aguilar, we do not believe that the Secretary of Education any more than a district court judge should go directly in the teeth of a decision of this Court which this Court has not itself overturned. In fact, I think --

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QUESTION: Well, that's part of the problem, General Dellinger, really, because we're reviewing, are we, an action by the district court judge?

GENERAL DELLINGER: Yes, you are.

QUESTION: Under 60(b)?

GENERAL DELLINGER: Yes.

QUESTION: And we have to find that that judge abused discretion in refusing the 60(b) reopening, and yet that judge could look at Aguilar and say, I just don't have room to do that. That's the Supreme Court's holding. How am I supposed to reopen this case?

How do we deal with that?

GENERAL DELLINGER: Justice Ginsburg --

QUESTION: I mean, it isn't as though it's coming directly --

GENERAL DELLINGER: Yes -- no --

QUESTION: -- to this Court --

GENERAL DELLINGER: No. That is correct.

QUESTION: We're reviewing the action of the district court, so --

GENERAL DELLINGER: That is correct.

QUESTION: So what standard do we apply there? How did the district court abuse its discretion in saying, boy, it isn't up to me?

GENERAL DELLINGER: You approach that exactly as

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you do a case in which you're up on a preliminary injunction but the question is a rule of law, and this Court has held that the abuse of power general standard, which is a discretionary standard for the orderly administration of justice, cannot force this Court into making an erroneous decision of law just because a district court on a preliminary injunction or in this context or in any other got it wrong as a matter of law.

QUESTION: General Dellinger --

QUESTION: Well, but the focus -- the focus, it seems to me, of Justice O'Connor's question is, what do you tell the district judge -- if you're the law clerk for the district judge, or the counselor to the district judge, one of the attorneys, what do you tell him he should do in this case?

It seems a little strange to say he abused his discretion by following the law. On the other hand, we know that abuse of discretion is sometimes a too-onerous word to describe what the -- phrase to describe what the judge has done. He's made a mistake of law.

GENERAL DELLINGER: Justice Souter, you -- I'm sorry, Justice Kennedy, you inform the district judge as he anticipated in this case, that the rule of law he was required to apply is not what this Court believes is currently the rule of law.

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QUESTION: General Dellinger --

GENERAL DELLINGER: This is not -- yes.

QUESTION: Isn't it so that under our precedent a district judge is locked in? He has no authority to overturn a decision of this Court and, indeed, the district judge would have abused his discretion if he said, I predict that the Supreme Court is going to overrule Aguilar?

GENERAL DELLINGER: If he followed that by ruling and not applying Aguilar you're exactly correct, and we told the district judge that.

QUESTION: The district judge and the court of appeals both said, I think quite correctly --

GENERAL DELLINGER: Right.

QUESTION: -- that they -- there was nothing that they could do, so if we're going to be candid about what's involved here, isn't it really a request for rehearing by this Court, and the 60(b) is just a pass-through, because stage 1 and stage 2 cannot do anything but reject the application?

GENERAL DELLINGER: Your premises are correct, but the conclusion is wrong, and it's wrong for this reason. This would be no different if a new case were brought, if there were a new school system that started providing these services in school and there were a

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lawsuit the district court in that case in Chicago or Milwaukee or wherever would be just as bound by Aguilar v. Felton as the district judge in the Southern District of New York, and would come up --

QUESTION: And the school district could appeal the denial of the order that it wanted, and this Court could rule on it without, in effect, granting a rehearing on a prior case in which the judgment was final.

GENERAL DELLINGER: That is --

QUESTION: That's the way the law --

GENERAL DELLINGER: I would not say that this is --

QUESTION: That's the way the law gets changed --

GENERAL DELLINGER: I would not say that this is in effect a rehearing, because it is quite useful to have the screening mechanism of district courts. Here --

QUESTION: Well, it may be useful, but I don't see on your principle why any losing litigant subject to a continuing order cannot come in at any subsequent time so long as that order remains pending and say, perhaps for very good reason, I would like another shot at arguing the law.

GENERAL DELLINGER: The reason is, Rule 11 sanctions, if there's no predicate for it. The reason --

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QUESTION: Why should there be a Rule 11 sanction if this is allowed?

GENERAL DELLINGER: Because, Justice Souter, what this permits is a party who has got a basis for believing that an injunction which has continuing effect no longer reflects the law or the Constitution to seek to have that injunction lifted. I think it would raise --

QUESTION: Do you rely on the fact that this is a continuing injunction? Does that somehow enter into the calculus and make your response different?

GENERAL DELLINGER: Justice O'Connor, it is critical to the calculus. It is critical to the calculus because it would raise a very serious question about the role of courts and judges in a constitutional democracy if a party did not have a way to be relieved from a court order. It is of course --

QUESTION: Why is that so? Why shouldn't a party have one opportunity to litigate the case and if then through some other means the law changes, whether it be a statutory change or whether through other litigation this Court takes a different turn, then the party can come in and say, you have changed the law and therefore it's inequitable to leave me subject to it.

GENERAL DELLINGER: The question I would --

QUESTION: But that's a very different thing

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from saying it's inequitable to leave me with only one opportunity to litigate the law in my case.

QUESTION: Excuse me. I thought that the claim here was that the law has changed.

GENERAL DELLINGER: That is indeed the claim.

QUESTION: The decision in this case hasn't changed, but I thought the assertion is that the law has changed.

GENERAL DELLINGER: Our point would be for how many years or decades would you expect a party to be under an order which would be tolerable if it reflects the Constitution, but if it just rests upon a judge's determination --

QUESTION: But General, your premise, the premise of your argument was that the law had not changed and that's why it was not error for the district court to rule as it did. You're saying that the law has to change in this case before this Court. Am I wrong?

QUESTION: May I just add to that that this Court did tell district judges in quite clear terms, it's not your job to predict that the Supreme Court's going to over --

GENERAL DELLINGER: That is correct. That is correct. That is why --

QUESTION: You can't do that. Only we can do

it.

GENERAL DELLINGER: That is why we told the district court to do precisely what it did in this case.

QUESTION: But did the district court follow the law or not? Did the district court follow the law or not?

GENERAL DELLINGER: Justice Stevens, the precise answer is that the district court followed the binding effect of this Court's decision in Aguilar, which we believe no longer reflects the law or the Constitution as it has been articulated by this Court in Zobrest, in Witters, in Mergens --

QUESTION: May I do what the Chief Justice often does and ask you yes or no?

GENERAL DELLINGER: I'm sorry. The question is?

QUESTION: May I do what the Chief Justice often does --

GENERAL DELLINGER: -- and answer yes or no?

QUESTION: -- and suggest to you that the answer is either yes or no?

GENERAL DELLINGER: Did the district court follow the law?

QUESTION: Yes.

GENERAL DELLINGER: Yes, but the law he followed was by the binding force of the Court's decision in Aguilar v. Felton, a decision which we believe these

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litigants, who are spending -- who have spent $100 million complying with Aguilar, a decision that cost the Secretary $300 million a year in deadweight social loss, that they were entitled to come before you and to tell you that they -- while that is tolerable if it reflects the Constitution, since there are decisions that are out there that indicates that it does not, the question is whether the popularly elected officials at the local, State, and national level should be bound merely because judges won't say so where they have a good faith claim.

QUESTION: Well then perhaps, General Dellinger, we should have, or Congress should authorize some proceeding for rehearing out of time by this Court, but we're talking about stages below this Court where they -- there is nothing that they can do except pass the question up to this Court and then this Court will rehear a case that was decided --

GENERAL DELLINGER: Justice Ginsburg, that is precisely what would happen in any suit brought to challenge Aguilar in any case by any litigant in this country. It would be passed up because Aguilar is binding on every district, and Congress -- and this Court has passed --

QUESTION: Well, that's not quite so, is it? Even in the title -- the cases like title I that are in

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district courts there's a record being developed. It's a different case, and -- isn't that so, in those --

GENERAL DELLINGER: That is correct, and there is a record here which could be supplemented on remand, but when Rule 60(b) says that you can get relief where it is no longer equitable, that such a judgment should have prospective application?

QUESTION: But 60(b) is a Rule of Civil Procedure addressed to the district court and here the district court can't do anything.

GENERAL DELLINGER: Because of this Court's holding, but this Court, however, can, as it could from any district court, revise that ruling.

I'll reserve the remainder of my time. Thank you.

QUESTION: Very well, General Dellinger.

Mr. Crotty.

ORAL ARGUMENT OF PAUL A. CROTTY

ON BEHALF OF THE PETITIONERS

MR. CROTTY: Mr. Chief Justice, and may it please the Court:

New York City schoolchildren who are poor and educationally disadvantaged are not getting the Title 1 educational help they need because of Aguilar. Many are receiving remedial education that is less effective than

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it could be, and the expensive alternatives mandated by Aguilar are taking money that could be used on educating poor, educationally disadvantaged children and spending it on buses and leased sites.

In the 1993-'94 school year there were 260,000 students who received title I instruction in New York City. This is from a larger pool of 350 to 400,000 who were eligible but couldn't get it because funds weren't available.

Approximately 8 percent, or 22,000 of those Title 1 students, attend parochial school. Those children received instruction either on buses or with computer-assisted instruction. Eleven thousand were educated on a bus. Seventy-five hundred received computer-assisted instruction. Each of these, according to the Secretary of Education, is not an effective method and it makes it difficult to give a quality education.

If you look at the buses, and there's a picture of the bus in the record, it's noisy because it needs its own generating capacity, so you have generator noises. It's parked on the city street in New York City. It's very noisy.

It's cramped. There are 10 students and a teacher cramped into the back of the bus. There are small windows. The windows themselves are caged.

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There's no bathrooms, and there's no storage room in these buses, so that the teacher does not have access to books and instructional materials which would be very helpful with discharging the title I teacher's responsibility.

QUESTION: It's these children's fault for going to parochial school, I assume. They could have gone to public school, couldn't they have?

MR. CROTTY: Well, no. In New York City public schools, Your Honor, are terribly overcrowded right now, and I think they would receive -- it would be very difficult for them to receive an education in public schools simply because the public schools are so crowded.

On the other hand, it's their parents' absolute choice under this Court's teaching that they should have an opportunity to educate their children in a parochial school.

QUESTION: Well, let me ask -- suppose that it is very expensive and impractical for the program involved to comply with the Establishment Clause. That doesn't mean that there's no Establishment violation does there, or does there? Is Establishment --

MR. CROTTY: No --

QUESTION: -- a question of practicality?

MR. CROTTY: Justice Kennedy, no, of course not.

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The Establishment Clause, if it did require these expenses, well then, we'd have to pay these expenses. There's no doubt about that.

The issue here really is, in light of the Court's change in, changing jurisprudence with regard to Establishment Clause in Zobrest, in Witters --

QUESTION: Is it a change? I mean, what is your response basically to Judge Friendly's opinion in Fenton?

MR. CROTTY: Well, my answer, Justice Breyer, is that there has been a substantial change.

QUESTION: What on the merits? I mean, this hasn't been -- the -- I found that a rather powerful argument on the other side, Judge Friendly's opinion, purely on the merits, leaving precedent and so forth out of it, so if that's right in the front of your mind -- if it's not, I'll ask more specifically, or -- but is that opinion -- are you pretty familiar with it?

MR. CROTTY: Yes, I am, Your Honor.

QUESTION: All right. So what would your response be to Judge Friendly in -- on the merits of the issue?

MR. CROTTY: Well, on the merits, Your Honor, I would say that that is no longer the applicable law.

QUESTION: He has a number, four or five reasons why, in terms of the basic purposes of the Establishment

Clause, it makes sense, though of course you'll get bizarre cases. Of course it will mean added expense. Of course it's not bad for a child to be in parochial school. It's good.

But in terms of the basic purposes of the Establishment Clause, he points out why that line is a helpful though sometimes irrational line, so I'm interested in what your response to that is.

MR. CROTTY: The answer, very --

QUESTION: Basically it was along the lines that Justice Souter was saying earlier, but I don't want to characterize it if you're familiar with it.

MR. CROTTY: The answer, Your Honor, I believe is that under the teaching not reflected in Judge Friendly's decision, because it occurred subsequently and in this Court, in Zobrest, where you had a child who was handicapped, what the Court said was, when you have a broad program of benefits that are available to everyone, regardless of their religion, it can't be denied to that particular child because he happens to be going to a parochial school.

QUESTION: All right, so it's quite clear that a handicapped child, one who is a particularly strong case for breaching the line about sending the public school teachers into the schools, but then once that line is

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breached, is it then logical that you could have science taught for the lower third in the class, math, et cetera?

What Judge Friendly was worried about was breaching a line.

MR. CROTTY: Well, the line here, Your Honor, is, unlike in paroch -- excuse me -- in public schools under title I, where they have area-wide schools, where enough of the population is in poverty they make the entire school title I eligible and all kinds of things happen, that's not available in the parochial schools.

Parochial schools only get a very thin slice. They don't get science courses. They don't get enhanced reading courses. They get remedial courses, and it's remedial English, and remedial math, and English as a second language, and they're not taught -- unlike the Grand Rapids situation or the Meek situation, they are not taught by parochial teachers being funded by public funds. They are taught by public school teachers.

QUESTION: Mr. Crotty, Justice Breyer suggests that there is a line between a physical handicap and a mental handicap, which is what these children are laboring under. Do you agree that you can draw a line between those two?

MR. CROTTY: Well, I don't agree with that at all, Your Honor, and I don't think that's a

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constitutionally significant --

QUESTION: Well, the reason would be, I suppose that the basic line is as to whether or not large numbers of public school teachers are going to be physically in the parochial school, and we have a whole list in the opinion of problems that grow out of that.

MR. CROTTY: Well --

QUESTION: And now this Court's created an exception to that, and the exception, I take it, is in the situation where it's hardest for a child physically to leave the school.

MR. CROTTY: Well, it's hard for these children to physically leave the school.

QUESTION: All right.

MR. CROTTY: It's terribly --

QUESTION: So what in your opinion, then, is the line? Is the line that it is okay under the Establishment Clause to send large numbers of public school teachers into the parochial schools in order to teach what? A third of the class, the lower third, any secular subject, all secular subjects? What in your opinion, is the line?

MR. CROTTY: Well, what I ask only, Your Honor, in reversing Aguilar is that the title I program go forward. Within the parochial schools it's not all parochial children that receive this instruction, and even

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within the parochial schools that get the instruction, it's not all the children within that particular parochial school which is receiving the title I instruction.

What I'm suggesting is that when you have a narrow, well-defined program which can be monitored to make sure that the concerns that Justice Friendly had, Judge Friendly had are not really applicable -- we've had 30 years' experience on the record of this case. There hasn't been a single case, and Mr. Geller has been litigating now for 30 years on this case. There is not a single case where he can demonstrate that a public school teacher has had his mind or her mind so overwhelmed that they began to teach secular -- excuse me, sectarian topics.

So what I would say, Your Honor, is there has been a change in the jurisprudence, and there's no facts that would support the hypothesized concerns that Judge Friendly had.

QUESTION: What does the record tell us about the amount of monitoring that goes on in the buses to find out what the teachers do?

MR. CROTTY: The same amount of monitoring, Your Honor, goes on in the buses that would go on in the public schools.

QUESTION: What is that amount of monitoring?

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MR. CROTTY: The -- I think the teachers are visited once a month by their supervisors, and once or twice a year, depending on the teacher's tenure status under the collective bargaining rules they get an evaluative study.

QUESTION: They're visited in the bus, so somebody comes into the bus once a month?

MR. CROTTY: They're visited once a month in the bus, and then there's an evaluation study either once or twice a year, depending upon the union, the teacher's status.

QUESTION: Have there been any fact-finding hearings on what's happened during the last 30 years, because I guess this case was dismissed right on the pleadings, wasn't it?

MR. CROTTY: Well --

QUESTION: I mean, on the Rule for a 60(b) motion.

MR. CROTTY: -- after a full record was made in a preceding case, called the Pearl I case, which was a three-judge court case, and then appeal was taken here to the Supreme Court, and it was out of time and so it was dismissed.

That record was then incorporated into the Aguilar record. There's since been a hearing, Your Honor,

on related attack to our compliance with the title I program as constituted after Aguilar as to whether that violates the Establishment Clause, so there's been two hearings on this, one in 1978, and one just recently, concluded in 1996. There has been more than an adequate opportunity to make this case on the facts. It hasn't been made.

QUESTION: Mr. Crotty, we're still looking for a limiting principle. You referred to the Zobrest situation. You could say in Zobrest that the particular child either had to get the services in the parochial school or the child simply could not go and learn in a parochial school because there was no -- there could be no communication.

So that at least is a possible limiting principle between, as Judge -- Justice Breyer was saying, the concerns that Judge Friendly raised, and the claim that was being made in Zobrest, and in effect that was the only way to allow the child to have the education.

Is there any limiting principle here between what you are asking and a broader support for secular education in the schools, in the parochial schools?

MR. CROTTY: The limitations, Your Honor, are contained in the regulations.

QUESTION: No, but that's not a constitutional

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limitation. Is there any constitutional principle that this Court could look to to support the position that you are making?

MR. CROTTY: I would say that a program that is limited and made available only to those who objectively need it, without regard to their religion, would be a program that is constitutionally permitted and consistent with the Court's teaching in Zobrest.

Thank you very much.

QUESTION: Thank you, Mr. Crotty.

Mr. Geller, we'll hear from you.

ORAL ARGUMENT OF STANLEY GELLER

ON BEHALF OF THE PRIVATE RESPONDENTS

MR. GELLER: Mr. Chief Justice, and may it please the Court:

The respondents in this case have tried very hard to adhere to the facts of this case, and we have pointed out repeatedly that this case deals with not the statute -- and I hear questions all about the statute. When we brought this case first, many years ago, we brought it to challenge the New York City plan for title I in religious schools.

And I point this out to you at the outset, because something has been said about 97 percent of the aid in title I going to public schools. That, of course,

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raises no question. There is no question about using public funds for public school students.

Now, hear this fact about -- and it is a fact --

QUESTION: Or private school students. I suppose you have no problem with using those public funds for private school students as well, so long as they're not religiously affiliated private schools.

MR. GELLER: Let me -- yes. I have this problem, Your Honor, and a very serious problem. The statute may speak of nonpublic students. Here's what happens, or happened within the title I program in New York City. Ninety-nine point --

QUESTION: Can't you answer Justice Scalia?

MR. GELLER: Oh, I'm sorry.

QUESTION: I didn't think you answered Justice Scalia's question.

MR. GELLER: I'm sorry.

QUESTION: You have no problem in principle with making public funds available to public schools and to private schools. It's only those private schools that are religiously affiliated that you have an objection to, isn't that right?

MR. GELLER: Oh, right, I'm sorry, Your Honor.

QUESTION: Yes.

MR. GELLER: Yes. My problem is with --

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constitutionally with the religious schools because of the Establishment Clause, but by way of answering your question --

QUESTION: You have no problem with the Free Exercise Clause.

MR. GELLER: I have no problem --

QUESTION: Those parents must forego that, that subsidy, even for remedial purposes if they happen to select a private school that is a religious school.

MR. GELLER: I don't --

QUESTION: You see no Free Exercise problems with it.

MR. GELLER: I -- to the extent that I see a Free Exercise problem, I see it as being seriously overcome because of the Establishment Clause problems. I have never agreed that the Free Exercise Clause enters into this picture at all.

I do not believe that religious school -- religious schools, or religious school students have a Free Exercise right to receive public funds. I'm of the belief, and I think -- and it happens all the time, that a public -- a Government, Federal, State or local can provide funds for public schools and public school students without providing them for --

QUESTION: Mr. Geller, it's not a matter of

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their having a right. It's a matter of how rigidly one is able to apply the Establishment Clause without overriding very important values that are contained in the Free Exercise Clause, and when you say to people that you must forego the entirety of the educational subsidy that the State provides in all forms if you make a religious decision to send a child to a religious school, that certainly calls into play the values that are embodied in the Free Exercise Clause.

MR. GELLER: I --

QUESTION: And to adopt the absolutist view of the Establishment Clause that you're proposing simply ignores that aspect of the matter, it seems to me.

MR. GELLER: Oh, I don't have to adopt that view, because I can see where, if you had the religious school students obtaining their remedial instruction in public schools like the public school students do, then they would be able to get that instruction.

QUESTION: They'd go to public school --

QUESTION: Suppose there were a showing that that alternative did not work?

MR. GELLER: That that alternative --

QUESTION: Suppose there were a showing that that alternative did not work? The students have to go there late, in which case they are not efficient at

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absorbing their lessons, or they have to go there during the midday, which disrupts the regular instruction, and it's very costly. Suppose it was shown that this was simply impractical?

MR. GELLER: That question, Your Honor, contains the assumption that it is so. The respondents --

QUESTION: Yes, of course it's an assumption.

MR. GELLER: The respondents --

QUESTION: The assumption is that it's impractical, and my question is, what if that assumption is true?

MR. GELLER: If the assumption was true, it would bear some weight, but the fact, the actual fact is --

QUESTION: So that practicality does enter into our determination of whether there's an establishment violation.

MR. GELLER: It would, if it were factually warranted. May I suggest that it is not factually warranted, that in the school year '86-'87 the Chancellor and the Board of Education offered a program to the religious schools in New York City whereby 80 percent -- 80 percent of those schools and their students who are entitled to participate in title I could go to public schools to receive their remedial instructions that were

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within 10 minutes by walking or by bus to the matching public schools, and they refused that out of hand -- out of hand.

Which brings up another question that I would point out to the Court. Not only does the New York City program, as it was in effect in 1985, not only are 99.56 percent of the so-called nonstudent, nonpublic students in the program go to parochial schools, but the fact is that this is not -- this is not a program that flows to the students, and I'll tell you why, because the program cannot even get to the parochial school students unless their parochial school authorities decide to enter into the program. It doesn't begin to flow directly to the students.

And when the religious schools, the parochial schools have opted out of the program, as they did in '86-'87, then 50 percent of the students that had been in the program were no longer in the program.

The New York City -- as a matter of fact, there's one other factual point that I wish to make, because it was made for me by the petitioners. They stated that 11,000 of the 22,000 religious school students who receive this aid -- that's 50 percent of them, 50 percent of the participating students, 50 percent of the entire religious school body receive title I instruction.

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That's an enormous amount of instruction. It is not the situation that has been brought up of a single deaf-mute student in Zobrest who has the benefit of a sign language interpreter. How does that affect the -- impose on the religious school? It doesn't affect them at all.

But when you have a huge body of religious school students in a program like New York City receiving this aid, then it is no longer the attenuated aid that is readily distinguishable in Zobrest.

I did want to cover a point that Justice O'Connor --

QUESTION: I assume that the State can provide buses to these parochial school students, right?

MR. GELLER: They can provide --

QUESTION: Public services such as fire, fire protection and so forth?

MR. GELLER: Yes, Your Honor.

QUESTION: And is that true even if that advances the mission of the parochial school?

MR. GELLER: I don't see how it advances the mission.

QUESTION: You don't think busing students to go to the school advances the mission of the school?

MR. GELLER: It does not.

QUESTION: All right.

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MR. GELLER: I don't see how that does at all, and as a matter of fact, we point out in our brief that when in Everson v. Board of Education that was permitted, the Court noted that this was the very verge of the aid, if it could be called aid, that would go to a public school, religious schools or religious school students.

QUESTION: How about books? Can you provide books to parochial school students? You can do that too, can't you?

MR. GELLER: They -- they --

QUESTION: And that doesn't help the mission either, does it?

MR. GELLER: They can do that under Allen, yes. I can't go back on Allen any more than I think the Court can --

QUESTION: Can on Zobrest, right.

MR. GELLER: What?

QUESTION: No more than you can on Zobrest.

MR. GELLER: I don't go back on --

QUESTION: I mean, it seems to me that there's not --

MR. GELLER: I don't go back on Zobrest.

QUESTION: It seems to me there's not this clear line you're trying to draw between any assistance that the Federal Government provides to the accomplishment of the

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mission of parochial schools.

It seems to me the line we've tried to draw is between assisting them in the accomplishment of their distinctively religious mission. You just simply cannot maintain the point that the State cannot or the Federal Government cannot at all assist the parochial schools in the accomplishment of their purely sectarian -- or secular educational mission.

MR. GELLER: The line that respondents draw, Your Honor, is as far as I'm concerned as clear as clear can be. I can't go back on Allen, although I never agreed with it, yes. You can lend books to religious schools and religious school students.

But the distinction was made in Lemon by then Chief Justice Burger, who said, teachers are different from books, and our line is, don't send teachers in. You can't change what books do because --

QUESTION: Why are teachers different from books?

MR. GELLER: Because teachers are uncontrollable, and I point this out --

(Laughter.)

MR. GELLER: Yes. Yes, and -- uncontrollable and sometimes very unprofessional. I hear arguments made that we should rely on the professionality --

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QUESTION: That's an argument -- Mr. Geller, you can't seriously expect this Court to accept that argument, that teachers are unprofessional and uncontrollable. I mean, that just flies in the face of experience and reality.

I think we have to assume that a public school teacher who is employed by the State and is told not to inculcate religion when teaching remedial reading will follow that instruction. I think that assumption is a fair one for us to make.

MR. GELLER: When I said teachers are uncontrollable, I may have used a strong word, but not much stronger than Chief Justice Burger did in Lemon, and when he pointed out that books are controllable because once they're printed and they contain nothing that offends the Establishment Clause, that's the end of it.

QUESTION: Well, we had -- New York had 19 years of title I education programs without a single identifiable incident of a public school teacher inculcating religion, and it worked fine, until this Court got the notion that that program somehow failed the Establishment Clause test.

MR. GELLER: Those many years of nonreported violations are very easily explained, and Justice Breyer asked questions about -- to Mr. Crotty about Judge

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Friendly's opinion on that point, and I believe that's the -- that speaks much better than I could ever speak.

The reason that there are no reported violations is because the only people that could report a violation would be the violators themselves. What system of surveillance can prevail in a small classroom, whether it's inside a religious school or in a bus? What system will disclose violations of the Establishment Clause or conduct on the part of a teacher that is --

QUESTION: What is there in our civic tradition that says that surveillance is necessary to ensure that citizens obey the law?

MR. GELLER: I didn't --

QUESTION: What is there in our civic tradition that says surveillance is necessary to ensure that citizens obey the law?

MR. GELLER: In this particular case, I would assume it's necessary. This isn't merely Aguilar. This goes back to Lemon v. Kurtzman, Marburger, Meek -- it was felt by this Court --

QUESTION: Is it any easier to bug the buses than it is to bug the classrooms?

(Laughter.)

MR. GELLER: Is it any easier to bug the buses --

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QUESTION: To bug the buses than it is to bug the classrooms?

MR. GELLER: Well --

QUESTION: I mean, if you have this problem about teachers inculcating religious values, why couldn't it happen on the bus?

MR. GELLER: That's --

QUESTION: I mean, somehow the teacher magically, when she walks into the public -- into the parochial school classroom is transformed from an impartial employee of the State, without any secular interest in mind, to somebody who's going to teach religion. Why does that happen when she goes from the bus to the classroom?

MR. GELLER: My answer to that has to be, Your Honor, one case at a time. We are opposing the buses as mere adjuncts of the religious schools in a case now before the Second Circuit, and as a matter of fact --

QUESTION: The buses are not even any good.

MR. GELLER: If you want an honest answer from these respondents, yes, the buses are a violation, because we see little difference between the buses right outside the door of the religious school and a title I classroom inside the door. The students tramp out the door, they go into class a few steps away, and then they go back, all

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fitted within the religious school schedule, but as I say, that's another case.

But what we're saying is simply that the mandate of this Court in several precedents was yes, when you have public school teachers inside a parochial school, then you have to take some steps to see that they don't offend the Establishment Clause, and as a matter of fact, this isn't original with us.

The Board of Education in Aguilar in the original case vaunted the system of surveillance that they had. Of course, it was a paper system that didn't work, because you cannot send an inspector into a classroom of one teacher and 10 students and expect the teacher not to be aware that he's being inspected for all kinds of things.

QUESTION: Before you finish, could you spend a couple of minutes addressing the 60(b) question? That is, the Solicitor General said, and he certainly seems to me to have a point, he says there must be a way procedurally to bring people outside an injunction that requires them to spend $10 million a year if the law has undergone a sea change, or is about to. They should have some method of testing it out.

And he then said there is no other way that the Secretary of Education can't just give money to this, and

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I don't know, I think of declaratory judgment suits. I think of the Secretary possibly saying, I would give you money if. I think of some school board who wanted to do it, but is it right that there is no other way to test out this issue than the 60(b) motion here, in your opinion? If not, what is the other way?

MR. GELLER: My answer to that, Justice Breyer, is twofold. First of all, I do not agree that there is no other way. I think that there are cases coming up now in which this Court could address the merits of the determination in Aguilar.

QUESTION: Mr. Geller --

QUESTION: But it's an odd calculus, isn't it, Mr. Crotty, that only the person who's most -- Mr. Geller, excuse me. It's an odd calculus, isn't it, that only the party most affected cannot get relief?

MR. GELLER: That is odd, but I was going to answer Justice Breyer by saying, Justice Kennedy, that that is the precise situation in which many, many parties before this Court have found themselves, and they have had to wait, some of them many, many years, to have a case come before this Court -- very few cases -- in which the determination in their case is overruled. That --

QUESTION: Mr. Geller, on the question of cases -- you mentioned there were cases. I am aware of

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only two. You are au courant in this field. Other than the case in Louisiana, and the one in Minnesota, both in district courts, is there any other case?

MR. GELLER: Yes, the case that respondents have now -- it's suspended pending this case -- in the Second Circuit Court, in which we are challenging the present, what we call the alternative plan in New York City which relies largely on busing. We are challenging that, and we are challenging it on the theory that it is no different from the situation in Aguilar in substance.

If we prevail in that case, that case could come to --

QUESTION: Have your opponents in that case urged that Aguilar be overruled?

MR. GELLER: Oh, the opponents take precisely the same position that they're -- that the petitioners are taking in this case, yes, that Aguilar is no longer the law, and we --

QUESTION: Would the district court be able to grant them that wish that Aguilar no longer be the law?

MR. GELLER: The district court already --

QUESTION: No, I mean in that case could the district court pronounce Aguilar to be dead?

MR. GELLER: The district court distinguished the buses from the --

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QUESTION: Yes, but assume it couldn't distinguish. I mean, do you think that district court -- I mean, one of the arguments here is that look, this district court under 60(b) has no authority to say Aguilar is dead.

Can you conceive of any case in which a district court would have the authority to pronounce Aguilar dead?

MR. GELLER: Depending on the facts of the case that are developed.

QUESTION: I don't understand that answer. I though this Court had said that's not the job of lower courts. It's for the Supreme Court to overrule its own precedents.

MR. GELLER: Well, it's not the job of lower courts, but what has happened in the case -- the Walker case in California is, that went past the court of appeals out there, was that the court of appeals -- that was a Chapter II case, a title II case on books and equipment rather than a title I case, but there the court of appeals did hold on the basis of the change in the law that the petitioners here argue --

QUESTION: Well, it shouldn't, Mr. Geller. We have said very clearly that we overrule our own cases. It's -- and if that is so, then no matter how it comes up, if Aguilar is ever going to be overruled, we are going to

have to say that a district court was wrong for doing the right thing.

MR. GELLER: Yes.

QUESTION: That is, it was wrong in obeying our instructions that it should follow Aguilar. No matter how it comes up, we're going to have to say that --

MR. GELLER: I never --

QUESTION: -- the court that did the right thing was wrong, aren't we?

MR. GELLER: All right, Justice Scalia -- I never got to the second point of my answer to Justice Breyer, and that is, it was suggested by Justice Ginsburg. If it cannot be done under present rules, you don't break these rules. You don't bend them. Instead, you promulgate a new rule.

And as Justice Ginsburg suggested, if there's such a hardship problem in this type of case, then the Court should recommend a rule to Congress, and Congress should promulgate it as part of the Federal Rules of Civil Procedure that you can have a rehearing out of date.

QUESTION: Mr. Geller, even assuming that were not done, I have assumed that there would be no difficulty for any school district, for example, to protest the Secretary's position and litigate that. There's -- it seems to me that there are myriad cases that could come up

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here by which Aguilar could be reexamined without implicating the 60(b) problem if anybody wanted to take the trouble to bring it up. Am I missing something?

MR. GELLER: Oh, well, that was the third part of my answer to Justice Breyer's question.

The citizens of this great country have devised a myriad of ways to develop cases in order to test prior determinations of this Court. I do not -- I think it's just a fiction that there cannot be a case developed within a State, within a locality, where the principle cannot be tested that public school teachers or guidance counselors cannot go into --

QUESTION: Well, Mr. Geller, you're not suggesting that this Court has never granted a rehearing out of time, are you?

MR. GELLER: I thought it never had.

QUESTION: Have you -- are you familiar with the Gondack case?

MR. GELLER: I must not be, because I thought that -- I thought that this case was unprecedented.

QUESTION: How could you not be familiar with the Gondack case?

(Laughter.)

MR. GELLER: I am not -- I said that -- yes, I must admit. I think we all are --

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QUESTION: Mr. Geller, I believe that was a question --

QUESTION: I think he's answering my question, Justice Ginsburg.

MR. GELLER: Yes, I did answer that.

QUESTION: Gondack may have been an error on our part, but there was a case 20, 25 years ago where we did grant a rehearing out of time.

MR. GELLER: Out of time, and before a bench that was so different from the bench that sat on Aguilar, with not even -- not even a single Justice here that indicates that he would change his vote?

QUESTION: Well, this was perhaps 2 years out of time, not as far out as -- now it's very much out of time by our rule.

QUESTION: Was it a question -- I don't recall -- of action on a cert petition rather than a decision on the merits? I may -- I don't know -- I don't recall that Gondack was a decision on the merits as this was, with a sharply divided Court. I thought that that was a case involving a denial of a petition for review, and then a rehearing on that denial.

MR. GELLER: Well, having had to admit that I'm not familiar with Gondack --

(Laughter.)

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MR. GELLER: -- I accept your --

(Laughter.)

QUESTION: Mr. Geller, can you give me -- I mean, it's fine that you say some other district may be able to raise this issue. That's not very comforting to New York, that's spending $10 million a year.

Is there any way that you think that this particular entity, that New York City, which is under, now, an injunction that it thinks does not comport with what this Court has said the Constitution requires, is there any way that New York could raise it, other than 60(b)?

MR. GELLER: I do not see it at this late date. One of the -- and this would be an answer to something that Justice O'Connor suggested. This is an ongoing injunction, but -- and --

QUESTION: We're not imaginative enough to find some way to provide relief to somebody who is laboring under an injunction that is assumedly unconstitutional?

MR. GELLER: That I obtained?

QUESTION: That you obtained, but assume, just posit --

(Laughter.)

QUESTION: Just posit for present purposes -- and the 60(b) issue assumes that. Assume that the law has

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changed, that Zobrest now makes it clear that the injunction was wrongly granted.

MR. GELLER: Yes -- yes --

QUESTION: Is there no way that we can give relief to New York, or to just tell them, well, wait for somebody else to bring a lawsuit, maybe you'll get lucky?

MR. GELLER: I was about to answer Justice O'Connor's suggestion, and it will answer yours. Sure there was a way. If -- if the law had really changed here, and there was a change either in the law or the factual circumstances, yes, under rules of equity you might modify an injunction, perhaps even an injunction that's a mandate on a constitutional point.

But look what happened here. For 12 years after this injunction issued, the Board of Education was faced with the same cost and the same inefficiency, and they did nothing about it until Kiryas Joel and the comments that were made in Kiryas Joel about Aguilar, which don't have the binding effect of law.

But if the law had really changed, and if the factual circumstances had changed, yes, under rules of equity that rule 60(b) subsumes these parties could have -- the petitioners could have brought a case, but they didn't do that, and the law didn't change.

As a matter of fact, we have pointed out that

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the very comments in Kiryas Joel showed very clearly that the law hadn't changed, and the comments were that Aguilar perhaps should be overruled in a proper case, and we say this is not a proper case.

QUESTION: If we took the position that Zobrest had in fact undermined Aguilar to the point that there was nothing left of it, that it had in fact overruled it, even though we did not say that in express terms, then I suppose it would be proper for us to employ or to sanction the employment of Rule 60(b) to grant the relief that they want. Do you agree?

MR. GELLER: Yes. Yes, if you had done that, if the Court had done it in Zobrest, but I have to emphasize how much respondents believe that Zobrest is distinguishable from Aguilar and Grand Rapids and Meek, and the extent of the aid that goes -- that flows to the public school. Of course, it ultimately flows --

QUESTION: And yet the type of aid that's given actually enables the sign language interpreter to inculcate religion, if that's what's being taught. In a sense, it goes beyond what the parties are asking for here, doesn't it?

MR. GELLER: In a way it does, yes, Your Honor, but with a single student. Look at the difference. In this case, as has been pointed out, 50 percent of the

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students, 11,000 out of 22,000, are being given aid, and what is the --

QUESTION: Zobrest applies to only one individual? He has this special privilege? There's nobody else in the country that can get the same kind of remedial assistance?

MR. GELLER: But it would still be much more attenuated than the aid -- that's the word that this Court --

QUESTION: Don't say one individual. We adopted a principle that would apply to a lot of people.

MR. GELLER: Well, the question, Your Honor, is, did you apply -- did you adopt a principle that overrules the cases in which the Court has held that -- it's sometimes called massive aid, or funding of religious schools, is unconstitutional as in Grand Rapids, as in Meek v. Pittenger?

I don't think so, and the word that was used in the Court's opinion in Zobrest was that the aid that was given to that student was only attenuated aid.

QUESTION: Thank you, Mr. Geller. I think you've answered the question.

MR. GELLER: Thank you.

QUESTION: General Dellinger, you have less than a minute left.

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REBUTTAL ARGUMENT OF WALTER DELLINGER

ON BEHALF OF THE FEDERAL RESPONDENT

SUPPORTING THE PETITIONERS

GENERAL DELLINGER: The line that this Court has itself drawn in Ball and in Zobrest is that a State may not in effect subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects.

Justice Breyer, Justice Friendly was concerned about cases like Lemon and Grand Rapids. Here, there's no realistic danger of advancing religion. That was entangled as a solution in search of a problem.

Justice O'Connor, your decision in Cooter in 1990 deals with abuse of discretion.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, General Dellinger. The case is submitted.

(Whereupon, at 12:08 p.m., the case in the above-entitled matter was submitted.)

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RACHEL AGOSTINI, ET AL., Petitioners v. BETTY-LOUISE FELTON, ET AL.; and CHANCELLOR, BOARD OF EDUCATION OF THE CITY OF NEW YORK, ET AL., v. BETTY-LOUISE FELTON, ET AL.
CASE NO. 96-552 & 96-553

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

BY Ann Marie Federico

(REPORTER)