No. 72-6520

In the Supreme Court of the United States

OCTOBER TERM, 1972

KINNEY KINMON LAU, ET AL., PETITIONERS

v.

ALAN H. NICHOLS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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INTEREST OF THE UNITED STATES

The United States has substantial responsibility under 42 U.S.C. 2000c-6, 2000d, and 2000h-2, with respect to denials of equal educational opportunity based on national origin. Pursuant to that responsibility, the United States participated in the court of appeals as *amicus curiae* in this case, urging that the district court's judgment be reversed. The United States has previously expressed its views on issues similar to that presented here. Earlier this Term, in our memorandum as *amicus curiae* in *Keyes* v. *School District No. 1*, No. 71-507, argued October 12, 1972, we suggested that the school authorities in that case "might be constitutionally required to provide programs to meet special needs of Hispano students stemming

from language or cultural differences" (p. 17, n. 16). Moreover, the decision below, insofar as it holds that the respondents' practices do not violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d (Pet. App. 5a, n. 6), is contrary to the administrative construction given Section 2000d by the Department of Health, Education, and Welfare (Pet. App. 26a).

DISCUSSION

1. The decision below raises important questions concerning the scope of the equal protection clause. It has been determined that English should be the basic language of instruction in the San Francisco schools (see Calif. Educ. Code § 71; Pet. App. 11a), and respondents acknowledge that their non-English speaking students accordingly must "learn English so that they can communicate with others and proceed normally with classroom work."[1] Respondents' failure to provide compensatory language instruction to a substantial number of non-English speaking children of Chinese national origin thus effectively denies them equal access to education. Although, as the court of appeals found, the system may provide the petitioners the same teaching facilities as other students (Pet. App. 11a), it does not allow them to engage in the same learning process.

Both the court of appeals (Pet. App. 12a) and the respondents (Brief in Opposition, p. 7) suggest that the language-based classification involved here—a classification which inevitably denies an education to many children of Chinese national origin—is immune from constitutional attack because the petitioners' inability to speak and understand English is a condition

[1]Record as filed in the court of appeals, at p. 223.

not imposed by the respondents or other representatives of the State. However, at least in a context involving compulsory school attendance, we suggest here, as we did in *Keyes, supra,* that where "non-school-related factors produce differing educational needs among different racial and ethnic groups, the school system must seek to meet the needs of all groups equally" (Memorandum, p. 17).[2]

2. Apart from their constitutional claim, petitioners argue here (Pet. 16), as they did below, that the respondents' failure to provide English language instruction violates Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d. The court of appeals responded to the argument in a footnote, stating only that its determination of the constitutional issue "will likewise dispose of the claims made under the Civil Rights Act" (Pet. App. 5a, n. 6). By this, the court apparently meant that there can be no violation of the Act, just as there is no constitutional violation, because petitioners' language deficiencies are not the product of respondents' actions.

The court of appeals did not expressly consider either the applicable regulations of the Department of Health, Education, and Welfare (45 C.F.R. Part 80) or the Department's published guidelines on the "Identification of Discrimination and Denial of Services on the Basis of National Origin" (Pet. App. 26a). These reflect a "consistent administrative construction of the Act," which, as this Court has held, "is entitled to great weight." *Trafficante* v. *Metropolitan Life In-*

[2]If the Court reaches this issue in *Keyes* and agrees with our position there, it might appropriately vacate the judgment below in this case and remand for reconsideration in light of *Keyes.*

surance Co., 409 U.S. 205, 210. See, also, *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434.

The HEW guidelines are based on a finding by the agency that in many cases "inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program," and that this has "the effect of denying equality of educational opportunity to * * * disadvantaged pupils from * * * national origin-minority groups," in violation of Title VI (Pet. App. 26a).[3] The guidelines require "affirmative steps to rectify the language deficiency in order to open [the district's] instructional program to these students" (*ibid.*). HEW has actively enforced its interpretation of Title VI's application to national origin-minority groups throughout the United States. See *The Federal Civil Rights Enforcement Effort—a Reassessment*, United States Commission on Civil Rights, Jan. 1973, pp. 197 and 206. Since the decision of the court of appeals is contrary to this interpretation and since the issue is of obvious practical significance, the petition should be granted to resolve this difference and insure uniform application of the statute.

Respectfully submitted.

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MAY 1973.

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[3]This is in substance a finding that such children are, in the words of Title VI, "denied the benefits of" the educational program because of their national origin. Cf. *Katzenbach* v. *Morgan*, 384 U.S. 641.