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FOR THE NINTH CIRCUIT

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U.S. COURT OF APPEALS

NO. 96-17131

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

v.

THE STATE OF CALIFORNIA AND
THE CALIFORNIA COMMISSION ON TEACHER CREDENTIALING,
Defendants-Appellees.

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

THE HONORABLE WILLIAM H. ORRICK PRESIDING
DOCKET NUMBER CV-92-3874-WHO

BRIEF OF DEFENDANTS-APPELLEES

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STATEMENT OF JURISDICTION

Defendants agree with Plaintiffs' recitation of the statutory authority for jurisdiction.

STATEMENT OF ADDITIONAL ISSUES PRESENTED FOR REVIEW

- I. Whether the District Court's interlocutory ruling that Title VII applies to Defendants' licensing activities should be reversed?
- II. Whether the District Court's interlocutory ruling that Title VI applies to Defendants should be reversed?

STATEMENT OF THE CASE

A. PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

On September 23, 1992, Plaintiffs-Appellants initiated this action on behalf of themselves and all others similarly situated by filing a Complaint in the Northern District of California against Defendants the State of California ("the State") and the California Commission on Teacher Credentialing ("CTC") (collectively "Defendants"). (CR1). On November 13, 1992, Plaintiffs served and filed their First Amended Complaint. (CR13). Defendants timely filed their Answer on December 3, 1992. (CR15).

Plaintiffs allege that the statutory requirement, passed by the State legislature in 1980, which prohibits the CTC from issuing a teaching credential to any person to teach in the California public schools unless that person demonstrates proficiency in basic reading, writing, and mathematics skills in the English language, and the CTC's subsequent implementation of the California Basic Educational Skills Test ("CBEST") pursuant to the legislation, resulted in the use of a discriminatory selection device in violation of Titles VI and VII.

(CR13). The relief requested was limited to an injunction prohibiting Defendants from denying Plaintiffs or members of the class they sought to represent a credential to teach in the California public schools based on CBEST test results. (CR13).

Defendants' Answer denied the substantive allegations of Plaintiffs' claims and raised, inter alia, certain jurisdictional defenses under both Title VI and Title VII. (CR15). Since these defenses challenged Plaintiffs' right to proceed in court, the parties filed cross-motions for summary judgment on Defendants' jurisdictional challenges. (CR23). On August 25, 1993, the Court granted Plaintiffs' motions for partial summary judgment holding that Defendants are subject to claims pursuant to both Title VI and Title VII. (CR51). See AMAE v. California, 836 F. Supp. 1534 (N.D. Cal. 1993). Defendants' motion for certification of the order for interlocutory appellate review pursuant to 28 U.S.C. § 1291 was denied. (CR93).

After a limited discovery period and oral argument on Plaintiffs' Motion for Class Certification, the Court certified the following class:

All Latinos, African-Americans and Asians seeking California public school credentials and certificated positions who are or will be adversely affected in their ability to obtain credentials and certificated positions by California Basic Educational Skills Test results.

(CR132). Less than one month later, Plaintiffs moved to amend the class definition to include a previously unstated claim for "backpay and frontpay relief." (CR135). The Court denied Defendants' motion to reopen discovery and for an evidentiary hearing, and granted Plaintiffs' motion to amend the class definition. (CR142). The Court bifurcated the proceedings, ruling that

Stage I would address liability and Stage II, if any, would address Plaintiffs' claims for monetary relief. (Id.).

At the pre-trial conference, the Court decided that Stage I of the trial would proceed in two phases -- Phase I for the testimony of fact witnesses and Phase II for testimony of expert witnesses. Additionally, the Court determined, from having reviewed the parties' written submissions,^{1/} that it would need to designate a Court-appointed advisor for Phase II of the trial. The Court heard fact witness testimony from February 5-7, on February 21 and March 8, 1996.

On June 3, 1996, the Court designated Dr. Klein as its court-appointed advisor. (CR375). Phase II of the trial ran from June 3-20, 1996. On September 17, 1996, the Court entered its Opinion and Order, holding that "Defendants' requirement that Plaintiffs pass the CBEST in order to obtain employment in the California public schools does not violate Plaintiffs' rights under Title VI or Title VII of the Civil Rights Act of 1964." (CR417). The Court entered judgment in favor of Defendants. (CR418). Plaintiffs did not file any post-judgment motions.

^{1/} Since this case was tried to the bench, the Court directed the parties to submit all expert witness direct testimony in writing. These filings occurred prior to the status conference on February 1, 1996.

B. STATEMENT OF FACTS^{2/}

The CTC

Effective January 1, 1971, based upon "the need for excellence in education," the California Legislature adopted the Teacher Preparation and Licensing Law of 1970 "to set broad minimum standards and guidelines for teacher preparation and licensing." (CR29at4). This legislation created the Commission for Teacher Preparation and Licensing ("CTPL") as a State agency responsible for the development of standards and procedures for the certification of education professionals. (Id.) In 1982, the Legislature changed the name of the CTPL to the Commission on Teacher Credentialing.^{3/} (CR29at5). The CTC is composed of 15 voting members and 4 ex officio members, the majority of which are current classroom teachers in California's public schools, and includes current school administrators, school counselors, university professors and representatives from the general public. (RT2/7/96at433).

The CTC's powers and duties include establishing standards for entry into the education profession, reviewing and revising the code of ethics for the teaching profession, establishing sanctions for the misuse of a license, accrediting teacher preparation programs at public and private universities and

^{2/} Plaintiffs' opening brief devotes substantial attention to facts which are irrelevant to the issues presented. Defendants cite the relevant facts here, and expand on the facts in the Argument Section as they relate to the issues presented.

^{3/} Defendants use the term CTC as a reference to the current Commission as well as its predecessor, the CTPL.

colleges, and encouraging professional growth and continuing education, Educ. Code §§ 44225(a),(c),(e)&(h), 44227, 44277 & 44370. Additionally, the CTC is charged with disciplining licensees for professional misconduct and may suspend or revoke a credential for various reasons. Educ. Code § 44420.

The Basic Skills Legislation

In 1976, the Legislature passed AB3408, which requires the students in California's schools to pass an examination of basic reading, writing and mathematical skills to receive a high school diploma. (RT2/7/96at417). The parents of the school children responded that they favored basic skills testing of students, but the students were at a disadvantage because many of the classroom teachers and school administrators responsible for educating the children could not pass a basic skills examination themselves. (RT2/7/96at418). Accordingly, Assemblyman Gary Hart ("Hart") proposed legislation requiring every person seeking a credential as a teacher or administrator to demonstrate proficiency in basic reading, writing, and mathematics skills in the English language by passing a state basic skills proficiency test.^{4/} (CR29at4;7). Hart introduced the legislation in response to the concerns expressed by the parents:

If one is going to be a role model for students and demonstrate what is good practice for students, you have to be able to exhibit those skills yourself, and the extent to which a teacher does not use good grammar, writes notes home to parents with gross misspellings, those kinds of things, I think send the wrong message not only to the

^{4/} Hart subsequently became a member of the State Senate and the Chair of the Senate Education Committee. Hart presently is the Director of the Institute for Education Reform in the California State University System. Prior to joining the legislature, Hart was a classroom teacher at Santa Barbara High School. (RT2/7/96at412-13;415).

students but to the parents as well, that the school system is not functioning properly. (RT2/7/96at421).

At the time, the teaching profession was the only profession in California which did not have a licensing examination as a prerequisite for entry into the profession. (RT2/7/96at419).

Adoption and Implementation of the CBEST

The basic skills legislation became effective January 1, 1982, and the test that eventually was developed is known as the CBEST. Initially, the California Department of Education ("CDE") was charged with development of the CBEST. The CDE accomplished this undertaking by selecting and contracting with Educational Testing Service ("ETS") for technical assistance in test development, field testing, and the initial validity study. (CR29at9). CDE selected ETS because: (1) the proposal received the highest quality rating from the review panel; (2) proposed costs, per examinee, were lower than the costs proposed by other firms, and (3) ETS' demonstrated experience in establishing test centers and providing for administration of tests was considerably stronger than that of the other firms.^{5/} (RT2/6/96at282-83; PX22;32). Pursuant to the contract with the CDE, Drs. Wheeler and Elias of ETS directed the 1982 CBEST Validity Study, which involved a detailed job analysis of the positions at issue and a content validity study of CBEST test questions. (PX120). As set forth below, the State and ETS more than complied with the professionally

^{5/} ETS administered the CBEST from December 1982 to June 30, 1995. Beginning July 1, 1995, National Evaluation Systems ("NES") succeeded ETS as the CBEST test contractor.

accepted standards for validation in place at the time this CBEST study was conducted. (RT2/7/96at376-77).

The end result of this process produced a three-part test consisting of a reading section and mathematics section, each containing 40 multiple choice questions, and a writing section, which requires the test taker to write two essays.^{6/} On January 13, 1983, Superintendent Honig set the passing scores on the CBEST at 70% correct for reading, 65% correct for math and a raw score of 12 (on a scale from 4 to 16) on the writing. (RT2/6/96at181;192; PX120atF).

Continuing Validation of the CBEST

In its ongoing review of the CBEST's validity, the CTC commissioned the 1985 Practitioners' Review, which also involved a detailed job analysis and content validity study of the CBEST. Additionally, using a widely-accepted standard setting technique, the 1985 Practitioners' Review confirmed the passing score levels set by Honig. Based upon the data collected, the 1985 Practitioners' Review indicated that the passing score of 65% correct on math was somewhat low. (PX118;DX1969at40-41).

In 1994, the CTC retained Dr. Kathleen Lundquist to examine the job-relatedness of the CBEST.^{7/} Defendants also retained Dr. William Mehrens,

^{6/} A sample of the test may be found in the 1995-96 CBEST Registration Bulletin, (DX1873), attached in Defendants' Record Excerpts.

^{7/} In over 16 years' applied experience as an Industrial Psychologist, Dr. Lundquist has conducted or been responsible for approximately 100 validation studies, most of which were content validation studies, and at least 20 criterion-
(continued...)

who is a nationally-known and respected psychometrician and educational measurement expert.^{8/} While not stated as an issue on appeal, Plaintiffs suggest in their brief that Defendants' validation efforts were tainted in unspecified ways by the existence of this litigation. This claim was readily disposed of by the trial testimony of Plaintiffs' witness, who admitted that there is no evidence to suggest, nor reason to believe, that the existence of this litigation influenced the work done by Lundquist in this case. (RT6/11/96at1626). If the existence of this litigation had any effect on the studies, it resulted in the application of overly stringent criteria to every decision made along the way.

Lundquist began her investigation by undertaking a comprehensive job analysis. (DX1541). Lundquist's job analysis project was conducted to investigate empirically the type and level of the reading, writing and math skills required for the K-12 positions in the public schools in California. (DX1967at7). The study also examined whether the same set of basic skills applies to administrative and teaching support positions. (Id.) These data were used to ascertain the extent to which the skills measured by the CBEST are supported by current job analytic information. This job analysis project

7/(...continued)

related validation studies. The Court certified Dr. Lundquist as an expert at trial. (RT6/6/96at1274;1293).

8/ Among other distinctions, Dr. Mehrens served as President (1985-1986) of the National Council on Measurement in Education (NCME), as well as having been elected to and served on its Board of Directors. The Court certified Dr. Mehrens as an expert at trial. (RT6/10/96at1430).

consisted of four major research steps, culminating in the collection of ratings from a large statewide sample of teachers and administrators.

Ultimately, a survey was mailed to a sample of over 6000 teachers and over 1100 administrative and teacher support personnel in California. (DX1967at15). The return rate from this mailing was approximately 20% for each group. (DX1541). The data established that this group of respondents was demographically representative of the relevant population, with the exception that all minority groups were overrepresented. Plaintiffs agreed that the sample size was sufficiently large for analysis and that overrepresentation of minorities was appropriate. (RT6/12/96at1772).

As discussed below, Lundquist used the survey results to identify important activities performed on the job. In addition, Lundquist analyzed the skills for subgroup differences by ethnicity, credential category and primary language usage (i.e., 0% versus 75-100% use of languages other than English in reading, writing and total job activities). (DX1541atTable5-21).

While the job analysis confirmed the job-relatedness of virtually all reading and writing skills contained on the CBEST, relatively fewer math skills were endorsed by a consensus of teachers and administrators as required for minimally effective job performance. For math, the findings of the job analysis survey were contrary to the collective experience of the CTC Commissioners (who are professional educators and other stakeholders with substantial experience and expertise in the field of education and educational measurement). (RT6/6/96at1323-25; RT6/19/96at2552-53). Given the counter-intuitive nature and potential impact of the findings from the job analysis survey

on the proposed new CBEST test specifications, it was determined that a follow-up study should be conducted to ensure that the conclusions drawn from this job analysis were reliable and unlikely to change in the near future.

In August 1995, new forms of the CBEST were implemented, including a revised math test designed to meet the new test specifications recommended by Lundquist following the job analysis and content validation study of the CBEST. Defendants did not change the passing scores. In addition, the unrebutted evidence at trial established that the revisions to the math sub-test had no effect on the overall passing rates of any ethnic group at issue. (DX1966at1).

The grade level of the CBEST

Defendants undertook a study to investigate the extent to which the knowledge, skills and abilities assessed by the CBEST are included in the curriculum and instructional materials utilized in California public schools within the seventh to twelfth grade levels. The results of this project demonstrate that none of the math skills on the CBEST is beyond a seventh grade level, (DX1972), and none of the reading or writing skills beyond the high school level. (DX1971). Plaintiffs offered no evidence to the contrary. The skills tapped by the CBEST are well within an appropriate range for K-to-12 teacher candidates and are available to be learned by students afforded a fair opportunity in K-to-12 education.

Wheeler, who co-authored the 1982 CBEST validity study, testified that she administered 80 CBEST math items to her son, who was in the third grade at the time. "He finished in 45 minutes . . . and missed two items out of

80 and he found printing errors on two items." (RT2/7/96at366-67). Wright administered the test to his then-11-year-old triplets. They answered all of the questions correctly, and, after completing the test, informed their father that it was "easy." (DX1964at23). Lefkowitz agreed that a review of score distributions indicates that the subtests on the CBEST are relatively easy. (RT6/11/96at1666).

The alleged adverse impact of the CBEST

The Court found that Plaintiffs met their burden of proving that the CBEST has an adverse impact on the Plaintiff class. Plaintiffs obviously do not take issue with this finding on appeal, yet curiously devote a good portion of their appeal brief to the evidence of adverse impact presented. Defendants address the issue, briefly, to correct factual misstatements and to respond to the wholly unsupported contention that the CBEST has resulted in a segregated workforce in California's public schools.

On the latter point, the undisputed evidence at trial established that since passage of the CBEST legislation, the percent of minority teachers in California has increased, as have the absolute numbers of minority teachers in all minority groups. (DX1964at14). This increase is due to the substantial efforts undertaken by the CTC every year to encourage minorities to enter and remain in the teaching profession as well as implementation by the CTC of a number of affirmative programs to assist minorities in their efforts to become teachers. (DX1964at12-14).

The CTC has never admitted that the CBEST has had an unlawful adverse impact. Prior to the study conducted by Dr. Haworth, the CTC never

conducted adverse impact analyses on the CBEST taking into account all relevant factors to determine whether race or ethnicity, as compared to test takers' relevant preparation and/or skill level or lack of English fluency, caused CBEST scores.^{9/} Haworth's study established that basic skill preparation by the test-taker (including number and level of english and/or math classes taken), rather than membership in an ethnic group, determines the CBEST performance of the test takers. Haworth's analysis of the data demonstrated that skill preparation differs among ethnic groups and that those differences, rather than ethnicity, affect the performance of test takers in various ethnic groups. (DX1965at4).^{10/} The Court found Haworth's analysis encouraging "because it appears to show that preparation factors play a strong role in a candidate's performance on the CBEST, regardless of the candidate's race or ethnicity."

As Mehrens reported, the most compelling evidence supporting the need for the CBEST is the failure rate on the test itself. (RT6/10/96at1449). Overall, 20% of the entire test-taking pool (all races) fails on the first attempt,

^{9/} Dr. Haworth is President of ERS, a firm which performs research on employment discrimination issues with substantial experience in labor economics, statistical analysis and database design and construction. The Court qualified her as an expert in labor economics and statistical analysis. (RT6/3/96at786).

^{10/} The results of Haworth's empirical studies are confirmed by the anecdotal evidence presented at trial. Robert Williams (a named Plaintiff) received his bachelor's degree in Physical Education by taking (and receiving grades of As and Bs in) PE classes such as Folk Dancing and Badminton, but without ever taking a single mathematics class. Not surprisingly, Williams was unable to pass the mathematics sub-test of the CBEST. Similarly, Toua Yang (a named Plaintiff) testified that English is his fourth language. Yang passed the mathematics portion of the CBEST on his first attempt, yet had trouble passing the reading and writing portions of the test because of his lack of English fluency, not his race.

many of whom are college graduates. Poggio testified that there is evidence of the CBEST's validity, (RT6/13/96at1993), and agreed that the higher the failure rate on a valid test, the greater the demonstrated need for the test.

(RT6/13/96at1927). Plaintiffs' recitation of the percentages of test-takers from California's colleges and graduate schools who fail the test supports the need for the test. Haworth's multivariate analysis establishes that the lack of preparation explains these failure rates and confirms the need for the CBEST. (CR276at3).

C. STANDARD OF REVIEW

1. This Court's review of the grant of summary judgment to Plaintiffs on the applicability of Titles VI and VII is plenary, requiring application of the same legal standards as those that bound the District Court. Musick v. Burke, 913 F.2d 1390, 1394 (9th Cir. 1990).

2. This Court's review of the District Court's final judgment is pursuant to Federal Rule of Civil Procedure 52(a), which states that the findings of fact "shall not be set aside unless clearly erroneous." Plaintiffs seek to substitute a de novo standard of review for the more strict clearly erroneous standard (one which they cannot satisfy) by summarily claiming that the issues presented are "mixed questions of law and fact." Plaintiffs are not entitled to a de novo review of the Court's ruling because Plaintiffs have not identified any legal error committed by the Court. As the Supreme Court explained in Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982), when the district court is not faulted for misunderstanding the law or applying an erroneous definition

of discrimination, the reviewing Court must apply the clearly erroneous standard of Rule 52.^{11/}

As stated in Plaintiffs' brief at page 5, a de novo review of alleged mixed questions of law and fact is proper only when the "facts are established or admitted."^{12/} Review of Plaintiffs' appeal brief reveals that Plaintiffs take issue with the factual findings below, which prevents Plaintiffs from claiming that the facts are "established or admitted" and distinguishes the cases cited by Plaintiffs where a de novo review resulted in the application of law to undisputed facts. See Bratt v. County of Los Angeles, 912 F.2d 1066, 1067 & 1071 (9th Cir. 1990) (reviewing district court's ruling de novo where "the facts [were] not in dispute"); U.S. v. McConney, 728 F.2d 1195, 1197 (9th Cir. 1984) (reviewing district court decision de novo where conviction was based on stipulated facts).

Application of the clearly erroneous standard to this case comports with the overriding policy consideration of conserving appellate resources for issues it is best situated to decide (questions of law), leaving the primary responsibility for factual determinations with the district court because it is in a "superior position" to evaluate and weigh the evidence, in turn relieving the

^{11/} In the Civil Action Docketing Statement filed by Plaintiffs with this Court on December 10, 1996, Plaintiffs correctly phrased the issue to be presented as "Whether the district court's factual findings regarding validity, job relatedness and CBEST alternatives are clearly erroneous."

^{12/} When citing Pullman-Standard, 456 U.S. at 289 n.19, Plaintiffs fail to mention that the discussion in footnote 19 of the decision is dicta inasmuch as the Supreme Court stated there that it "need not address the much mooted issue of the applicability of Rule 52 to mixed questions of law and fact."

appellate court of the burden of engaging in a full scale independent review and evaluation of the evidence presented at trial. McConney, 728 F.2d at 1201. The Supreme Court adopted this rationale in Anderson v. City of Bessemer City, 470 U.S. 564 (1985):

[T]he parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. . . . the trial on the merits should be the main event rather than a tryout on the road.

In this case, the parties expended considerable energy and resources persuading the trial court of their respective positions during the four year life of the litigation below, concluding in four weeks of trial in 1996. The trial on the merits in this case was very much the main event, with the introduction of scores of expert reports and extensive, involved and highly technical expert testimony and documentation, all of which were weighed and evaluated by the trial court. Plaintiffs' attempted recharacterization of the standard of review here runs afoul of this Court's warning that "more than mere lip service to [the] standard requires that [the Court] . . . not ransack the record, searching for mistakes." Jauregui v. City of Glendale, 852 F.2d 1128, 1132 (9th Cir. 1988).

Plaintiffs' suggestion that all disparate impact cases, as opposed to disparate treatment cases, by definition require a de novo review finds no support in the case law. None of the cases cited by Plaintiffs for this proposition involved a claim for disparate impact. See McConney, 728 F.2d at 1199 (in criminal case, de novo review of exigent circumstances for search of defendant's home); Bratt, 912 F.2d at 1071 (reviewing de novo reasonableness

of employer's claim of exemption under the Fair Labor Standards Act). This and other Circuit Courts have applied the clearly erroneous standard in disparate impact cases involving issues of business necessity and job-relatedness. See Clady v. County of Los Angeles, 770 F.2d 1421, 1434 (9th Cir. 1985) (plaintiffs "failed to demonstrate that the court's finding of job-relatedness was clearly erroneous"); Chambers v. Omaha Girls Club, 834 F.2d 697, 702 (8th Cir. 1987) ("Business necessity determinations in disparate impact cases are reviewed under the clearly erroneous standard of review applied to factual findings").

The correct standard of review, then, is the clearly erroneous standard of Rule 52:

If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Anderson, 470 U.S. at 573. As set forth below, the District Court's rulings are more than plausible in light of the record evidence at trial.

SUMMARY OF ARGUMENT

In their opening brief, Plaintiffs selectively cite portions of the District Court's opinion in this matter for the absurd notion that the CBEST was upheld as job-related based solely on the concept of "face validity." Review of the Court's opinion reveals that the trial court thoroughly and thoughtfully considered the extensive empirical evidence and expert testimony and properly concluded that Defendants' use of the CBEST as a low level screen for

minimum competency of public school educators more than complies with the requirements of Titles VI and VII. Defendants undertook three separate validity studies of the CBEST -- the Wheeler and Elias Study, the Practitioners' Review and Dr. Lundquist's Job Analysis and Content Validity Study -- all of which complied with the professional standards in place at the time for establishing the job-relatedness of the CBEST.

This Court should disregard the recurring theme in Plaintiffs' brief that the only correct validation methodology is one which comports with Plaintiffs' view of the world. Simply put, there is no such thing as a perfect test, nor a perfect study. This premise is recognized by well-established case law, which requires only that the test-user conduct a professionally acceptable study. Defendants' evidence more than satisfies this requirement.

Furthermore, the requirements of Title VII must be viewed in combination with the human risks and societal costs involved in this case, where the CBEST is critical to the State's determination of minimum qualifications of a teacher candidate, whose impact in the classroom (positive or negative) is great and lasts a lifetime. Chrisner v. Complete Auto Trans., Inc., 645 F.2d 1251, 1262 (6th Cir. 1981) (when job at issue requires a certain degree of skill and economic and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden). Indeed, as Plaintiffs agreed at trial -- "the critical issue is the education of the children of California."

In this appeal, Plaintiffs attack the Court's factual findings, apparently in the hopes that this Court will weigh the evidence and testimony differently.

Such a review is beyond the purview of this Court. Nevertheless, Defendants respond to each of Plaintiffs' issues by setting forth (within the space limitations) the evidence presented at trial in support of the Court's findings, which should be affirmed in their entirety.

ARGUMENT AND CITATION OF AUTHORITY

I. **Defendants are entitled to judgment as a matter of law because Title VII does not apply to Defendants' licensing activities.**

"The specific evil at which Title VII was directed was not the eradication of all discrimination . . . but the eradication of discrimination by employers against employees." Silver v. KCA, Inc., 586 F.2d 138, 141 (9th Cir. 1978). "The 1972 amendments to Title VII refer to government entities in their role as employers in the customary sense of the word and not in their role as regulators." George v. New Jersey Bd. of Veterinary Medical Examiners, 635 F. Supp. 953, 956 (D.N.J. 1985), aff'd, 794 F.2d 113 (3d Cir. 1986). The State engages in many activities, only one of which is employment. This case presents a textbook example of Defendants acting pursuant to state police powers in their roles as regulators. As such, under well established case law, Title VII is not applicable to the licensing functions of Defendants. Haddock v. Board of Dental Examiners, 777 F.2d 462 (9th Cir. 1985) ("the legislative history of [Title VII] supports the conclusion that the Board is not an employer with respect to the persons taking the dental licensing exam."); George, 794 F.2d at 114 (Title VII "is not applicable to the licensing functions of a public agency exercised under the police powers of a state."); Woodard v. Virginia Bd. of Bar Examiners, 420 F. Supp. 211, 214 (E.D. Va. 1976) aff'd, 598 F.2d

1345 (4th Cir. 1979), ("[T]he principles of test validation developed under Title VII do not apply to professional licensing examinations.") ; Ehret v. The State of Louisiana, 58 Fair Empl. Prac. Cases (BNA) 658, 662 (E.D. La. 1992) ("a state agency is not an employer for the purposes of the ADEA or Title VII, however, when it is sued in its licensing or regulatory capacity.").

The CTC's administration of the CBEST is indistinguishable from the role of the Board of Dental Examiners and the State Bar Examining Committee. While failing the test may prevent some individuals from being licensed in California, conversely, passing the test does not ensure that any individual will be hired by any entity. As a licensing exam, CBEST, like every other licensing exam, does not purport to establish that the licensed individual satisfies the requirements for any particular job, but only that the person meets the minimum criteria for the specific profession at issue. See Woodard, 420 F. Supp. at 214.

The Ninth Circuit already has rejected the argument that by regulating the profession, Defendants become the Plaintiffs' employer. In Haddock, the court held that the definition of "employer" under Title VII does not apply to the licensing activities of the State of California. 777 F.2d at 463-464. This Court held that the Board's licensing activities were beyond the scope of Title VII because the Board "neither pays the wages nor engages the services of the examinees." Id. at 464. It is undisputed that Defendants do not pay the wages or engage the services of CBEST examinees. (CR37).

In a case the District Court here failed to mention, the Fifth Circuit rejected application of Title VII in the context of teacher competency testing.

In Fields v. Hallsville Independent School District, 906 F.2d 1017, 1020 (5th Cir. 1990), cert. denied, 498 U.S. 1026 (1991), the court held that because the evidence established "no more than a licensing relationship," Title VII did not apply to the State's administration of the TECAT. The court in Fields relied on the absence of control by the State over the "'work of an individual, not only as to the result to be achieved, but also as to the details by which that result is achieved.'" Id. at 1019 (quoting Spirides v. Reinhardt, 613 F.2d 826, 832 (D.C. Cir. 1979)). Applying this "control test," the court found that the State did not play a role in the general hiring or firing of teachers and was not involved in the daily supervision of teachers. Id. at 1020. Rather, because the school districts in Texas hire and fire the teachers and are listed as the employer on applications and personnel forms, the court affirmed summary judgment for the State of Texas on Plaintiffs Title VII claims. Id.

Plaintiffs' case here presents a similar situation. The State does not hire or fire teachers, nor is it involved in the daily supervision of teachers. Moreover, the school districts not only hire and fire the teachers, but also are listed as the employer on applications and personnel forms. (CR29;CR37). The Fifth Circuit's holding in Fields, and its application to the present case, is consistent with the due regard which must be accorded to the states when they act in a regulatory capacity.

The District Court's reliance on Sibley Memorial Hospital v. Wilson, 488 F.2d 1338 (D.C. Cir. 1973), and its progeny for a different result is misplaced. Sibley "had nothing to do with state police power." National Organization for Women v. Waterfront Commission, 468 F. Supp. 317, 320

(S.D.N.Y. 1979) ("NOW"). The court in Darks v. City of Cincinnati, 745 F.2d 1040, 1042 n.3 (6th Cir. 1984), found that the rationale in Sibley has no application to licensing activities because Sibley "did not involve a government's licensing powers." See also Lavender-Caballero v. Department of Consumer Affairs, 458 F. Supp. at 213, 215 (S.D.N.Y. 1978) (distinguishing Sibley on the grounds that the hospital was not "a state or city licensing agency performing a separate, and presumably necessary public, as opposed to private function"); Delgado, 442 F. Supp. at 730 ("We are not persuaded that . . . Sibley . . . brings the relationship between bar applicants and the Board within the purview of Title VII."); George, 635 F. Supp. at 955 ("[W]here a governmental organization is exercising its police power, the control it exerts over a person's access to the job market does not render the governmental organization an 'employer' or 'employment agency' within the meaning of Title VII."), aff'd, 794 F.2d 113 (3d Cir. 1986); EEOC v. Supreme Court, 19 Fair Empl. Prac. Cases (BNA) 448, 450 (D.N.M. 1977) ("The procedures for admitting persons to the practice of law are distinguishable from personnel decisions in private industry. The Sibley rationale, therefore, does not apply to this case."). Accordingly, Defendants' licensing activities are not subject to a challenge under Title VII.

II. Defendants are entitled to judgment as a matter of law on Plaintiffs' Title VI claims.

As originally adopted, Title VI did not contain a definition of the terms "program or activity." Pursuant to the Civil Rights Restoration Act of

1987 (CRRRA), Congress amended Title VI to include a definition of "program or activity:"

For the purposes of this subchapter, the term "program or activity" and the term "program" mean all of the operations of -

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government. 42 U.S.C. § 2000d-4a (1988).

This language demonstrates that the provisions of Title VI do not, nor were they intended to, cover an entire state government. Rather, the statute defines "program or activity" unambiguously to cover only a department or agency of a state government which receives Federal financial assistance. Moreover, the legislative history of the CRRRA establishes that while the definition of program or activity "make[s] clear that discrimination is prohibited throughout entire agencies or institutions if any part receives Federal financial assistance[,] . . . [f]or State and local governments, only the department or an agency which receives the aid is covered." S. Rep. No. 64, 100th Cong., 2d Sess. 4, reprinted in 1988 U.S.C.C.A.N. 3, 6.

Construing the statute to apply only to the department or agency of the State receiving aid is consistent with the reasoning in the Supreme Court's decision in Gregory v. Ashcroft, 111 S. Ct. 2395 (1991), which held that when determining whether Federal legislation applies to a State government, courts must "be certain of Congress' intent before finding that federal law overrides" the constitutional balance of federal and state powers. Id. at 2401. "If

Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute."" Id. (quoting Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989)). Application of the "clear statement" rule of interpretation to the present case reveals that under the plain language of the statute, Congress intended that Title VI apply only to a state department or agency, not to the state itself. Accordingly, the State is not a program or activity as defined by the statute, cannot be sued under Title VI, and is entitled to judgment as a matter of law on Plaintiffs' Title VI claims.

While the CTC is an agency of the State, the CTC does not nor has it ever received Federal financial assistance. (CR29at5). The provisions of Title VI speak specifically to programs and activities which are "receiving" Federal financial assistance. Since the CTC is not receiving such assistance, nor has it ever, the CTC cannot be sued under Title VI. Stephanidis v. Yale Univ., 652 F. Supp. 110, 113 (D. Conn. 1986) (no coverage absent receipt of federal financial assistance at the relevant time; the act applied only during the "period in which federal financial assistance was being extended"), aff'd without opinion, 814 F.2d 654 (2d Cir. 1987).

Finally, even if Defendants could be sued under Title VI, Plaintiffs should not be permitted to pursue a disparate impact claim under Title VI. Defendants recognize that in Guardians Ass'n v. Civil Service Commission, 463 U.S. 582, 610 (1983), a bare majority of the Supreme Court held that practices having a disparate impact may be actionable under certain agency regulations. Id. at 642 & n.14. The Court has established a confusing "two-pronged" approach to Title VI. Alexander v. Choate, 469 U.S. 287, 293 (1985). While Title VI itself requires a showing of intentional discrimination, disparate impact may be actionable under the regulations.

Although the majority in Guardians held that disparate impact may be actionable under the regulations, the validity of the regulations was not at issue in Guardians. To the extent that such regulations apply to this case, they are invalid because they exceed the scope of the statute which they seek to effectuate.^{13/} See Bakke, 438 U.S. at 332, ("[n]owhere is there any suggestion that Title VI was intended to terminate federal funding for any reason other than consideration of race . . . by the recipient in a manner inconsistent with the standards incorporated in the Constitution."). "If 'nowhere' is there any evidence that Congress intended the Title VI standard to differ from the constitutional standard, clearly an agency interpretation to the

^{13/} Neither the State nor the CTC qualifies as a program or activity receiving Federal financial assistance. Thus, the regulations promulgated by the different agencies of the United States government do not apply to the State or CTC. Notably, Plaintiffs fail to cite to any specific agency regulations in their First Amended Complaint which apply to Defendants.

contrary is entitled to no deference." Guardians, 463 U.S. at 611 n.5 (Powell, J., concurring in judgment).

III. The District Court's finding that the Wheeler & Elias Study and the Practitioners' Review both included a proper job analysis in compliance with professional standards is not clearly erroneous.^{14/}

Plaintiffs' first issue -- whether Defendants conducted a professionally acceptable validity study of the CBEST, including a job analysis, at the time of its implementation -- is easily dismissed upon a proper review of the facts presented at trial. Wheeler and Elias testified that their 1982 validity study included an analysis of the jobs at issue and examined the content validity of CBEST test questions.^{15/} The Wheeler and Elias study analyzed the jobs at issue by empaneling 289 experts in the field of education -- administrators,

^{14/} Applying the more stringent burden of proof to Defendants, the Court reached the proper result that Defendants "satisfied this burden" by showing "that basic skills in reading, writing and mathematics are important elements in the jobs for which the CBEST is required and that the CBEST actually measures such basic skills." (CR417at29). Even if this Court concludes that Defendants did not carry the heavier burden of proving that the CBEST was job-related, in connection with the validity studies conducted in 1982 and 1985, the Court still must conclude, under the proper Wards Cove standard, that Defendants carried the burden of producing evidence of job-relatedness. Defendants' pre-Act conduct is governed by Wards Cove, and only required Defendants to produce evidence of job-relatedness. See U.S. v. \$814,254.67, 51 F.3d 207,212 (9th Cir. 1995) (change in burden of proof "directly implicates concerns that animate the Landgraf default rule against retroactivity"). Plaintiffs not only failed to disprove job-relatedness, but also failed to carry their burden of proving the existence of equally valid alternatives. Wards Cove, 490 U.S. at 659 (defendant only has "burden of producing evidence of a business justification for [the] employment practice. The burden of persuasion, however, remains with the disparate impact plaintiff"). Plaintiffs' failure to challenge the Court's holding on this latter burden is fatal to their claim that the use of the CBEST violates Title VII.

^{15/} Both Wheeler and Elias were well qualified for the assignment. (RT2/5/96at96;117-120;DX1960;RT2/7/96at339-341;DX1961). The Court certified Wheeler as an expert at trial. (RT2/7/96at350).

teachers and teacher trainers representing "the different subject areas, teaching assignments and grade levels" in the State -- who reviewed the CBEST test questions and made judgments about the accuracy, fairness, and clarity of each item and the relevance of the basic skill measured by each item to the job of teaching in California's public schools.(RT2/5/96at121-122;RT2/7/96at343;347) (PX120). As Elias testified, "the evaluation process by the panels of educators, experts, good teachers, administrators, teacher trainers across the state" constituted the job analysis, which was in full accordance with the professionally accepted methods at the time. (RT2/5/96at122;125). Similarly, the Practitioners' Review involved 234 expert panel members from the field of education -- administrators, teachers and teacher trainers -- who were asked to judge the relevance of the skills assessed by CBEST and the individual CBEST test questions. (PX118).

Mehrens testified that the Principles for the Validation and Use of Personnel Selection Procedures: Second Edition (APA, Division of Industrial-Organizational Psychology, 1980) was the edition of SIOP Principles in place at the time of the original development and validation of the CBEST in 1982 and at the time of the 1985 Practitioners' Review, and hence, set forth the professional standards to be complied with at the time.^{16/} The 1980 Principles

^{16/} This Court should review carefully Plaintiffs' references to the professional standards for proper time frame and contextual use. The parties introduced two sets of SIOP Principles, the second edition published in 1980 and the third edition published in 1987, and two sets of APA Standards, the 1974 edition and the 1985 revised edition. Frequently, Plaintiffs cite to the 1987 SIOP Principles and 1985 APA Standards when discussing the 1982 and
(continued...)

state that a job analysis "...may be a formal investigation, or *the pooled judgments of informed persons* such as production engineers, job incumbents, their supervisors, or personnel specialists." (DX1969at19-20); see also 1974 APA Standards at 29 ("The performance domain for published tests might be defined by the pooled judgments of job designers, incumbents and supervisors"). Mehrens further testified that the pooled judgments of the 289 education experts in the Wheeler and Elias study and of the 234 education experts in the Practitioners' Review constituted a formal job analysis in compliance with the relevant standards at the time. (DX1969at23-24; RT6/11/96at1562).^{17/}

The job analytic and job relevance tasks undertaken in the Wheeler and Elias study and the Practitioners' Review are strikingly similar to the work directed by Poggio (Plaintiffs' expert) in Kansas in 1985 and 1993, in his studies for teacher licensing for the State of Kansas, in which he conducted job analyses by empaneling educators who were asked to rate the relevance of the skills on the test to competent teaching performance in Kansas, regardless of

^{16/}(...continued)

1985 studies, which clearly pre-date the cited versions of the professional publications.

^{17/} Plaintiffs' claim that Mehrens is not qualified to render such an opinion is ludicrous. The Court certified Mehrens as an expert at trial. (RT6/10/96at1430). Acceptance of Plaintiffs' argument will result in a finding that Plaintiffs failed to present even one qualified witness on the subject of validity. Like Mehrens, Poggio and Haertel are education professors, not I/O Psychologists, yet they too rendered opinions regarding validity. Plaintiffs' only testifying I/O Psychologist, Lefkowitz, was found "not credible" by the Court, rendering his "opinions" a nullity in this appeal.

area of specialization. (RT6/17/96at2105-06;2196;DX1727;1748). Poggio agreed with Mehrens that the pooled judgments of panelists in the studies constituted a "formal job analysis," (RT6/17/96at2105-06), and "adher[ed] to standards for educational testing and in consideration of legal standards for employment testing." (DX1727at159).

Accordingly, the Court properly found as a matter of fact that the Wheeler and Elias study and the Practitioners' Review involved "an appropriate form of a job analysis under the professional standards of the time, particularly the then current version of the SIOP Principles." (CR417at49-50). In view of the foregoing, this factual finding is fully supported by the evidence at trial, including the expert testimony presented by Defendants and credited by the District Court. This Court cannot disturb such findings. Contreras, 656 F.2d at 1282 (holding that district court conclusion that examinations are job-related and resolution of factual issues in favor of defendants' expert are determinations not to be disturbed on appeal).

Plaintiffs attempt to respond to this finding by claiming that the case law, the professional standards and the Uniform Guidelines required Defendants to conduct a job analysis in a different fashion.^{18/} First, the case law does not require strict adherence to any single formula when conducting such a study, but instead requires "that the method chosen be professionally acceptable." Contreras, 656 F.2d at 1281; see also Washington v. Davis, 426 U.S. 229, 247

^{18/} Plaintiffs' "discussion" related to this particular point (at pp. 36-38) is unsupported by a single record citation, and is a "speaking" piece created by Plaintiffs on appeal.

n.13 (1976) ("It appears beyond doubt by now that there is no single method for appropriately validating employment tests for their relationship to job performance."). None of the cases cited by Plaintiffs stand for the proposition that all job analyses must be conducted in the exact same fashion. The District Court relied on the formulation set forth by this Court in Craig v. County of Los Angeles, 626 F.2d 659 (9th Cir. 1980), which lists the general steps to be taken in the validation process, but does not purport to require an established methodology for satisfying those steps.^{19/} Plaintiffs concede that Defendants accomplished the first step (specifying the skills to be measured) and third step (demonstrating a relationship between the test and work behaviors) described in Craig, placing at issue the second step -- determining that the skills identified in the first step "are important elements of work behavior comprising or relevant to the job for which applicants are being screened." Id. at 662-663. As set forth above, the panel members in both studies were instructed to rate the relevance of the basic skill measured by each item to the jobs in California's public schools, which resulted in importance ratings for the skills.

(RT2/5/96at121-122;RT2/7/96at343;347;PX120). As Mehrens explained:

Results regarding relevance were what I would consider to be very positive. The relevance judgments were made on a four point scale: crucial, important, questionable, or not relevant. As can be seen from Table 13 of the Wheeler & Elias report, 34 of the 40 reading items and 24 of the 40 mathematics items had 70% or more of the judges rate the skills the items measured as crucial or important. In mathematics, the skills measured by another 9 items were rated as

^{19/} Plaintiffs' reliance on the exact same quote from Craig (on page 37) further confirms that Plaintiffs do not take issue with the legal rulings of the Court (as they agree with the law as set forth by the Court), but instead disagree with the Court's factual findings.

crucial or important by between 60% and 69% of the judges. Only one of the reading items and three of the mathematics items received ratings of crucial or important by less than 50% of the judges. As the data in Tables 14 and 15 of the report indicate, there were few major differences across the categories of judges. Further, "for each of the major groups of judges, at least 76% of the ratings for the reading section were judged crucial or important. The comparable figure for the mathematics section is 65%" (DX1969at20-21;PX120at18).

The professional standard for what is acceptably high judgment when rating importance is the 50% rule. (DX1969at21).^{20/} The Court thoroughly reviewed and credited the testimony of Defendants' expert, (CR417at31-36). This testimony establishes that Defendants satisfied the second step in Craig -- the skills identified in step one were empirically proven to be important elements of work behavior comprising or relevant to the job for which applicants are being screened.^{21/}

Second, Plaintiffs' quote from the Uniform Guidelines, as presented at page 34 of their brief, simply stands for the proposition that a job analysis should be conducted, but does not stand for the sweeping proposition that one particular methodology is proper. In fact, the same section of the Uniform Guidelines is prefaced with the following statement:

^{20/} When conducting similar studies for the use of teacher tests, Poggio empaneled job incumbents to make relevance ratings and applied what he calls "the strong majority rule," which means he will retain a skill rated as important or critical by as few as 56% of his panelists. (RT6/17/96at2196-98).

^{21/} The District Court made similar findings with respect to the Practitioners' Review. (CR417at35-36).

Any method of job analysis may be used if it provides the information required for the specific validation strategy used. 29 C.F.R. § 1607.14(A) (emphasis added).^{22/}

Third, the "quote" from the 1980 Principles presented on page 35 of Plaintiffs' brief is a disingenuous and misleading combination of selected sentences from two different pages of the Principles. Properly presented in context, the same portion of the Principles supports the Court's finding that Defendants conducted a proper job analysis in compliance with the standards at the time [the portion deleted by Plaintiffs is in bold]:

Job analysis is essential to the development of a content oriented procedure. **A number of job analysis procedures exist, each differing in terms of its possible contribution to the objectives of the particular study or a portion of the study.** (PX650at4).^{23/}

In addition, the last sentence of Plaintiffs' "quotation" begins with the words "For example," obviously indicating that the development of task or behavior

^{22/} This Court has followed the developing trend which holds that the Uniform Guidelines are not legally binding. Clady, 770 F.2d at 1428. "To the extent that the Guidelines reflect expert, but non-judicial opinion, they must be applied by courts with the same combination of deference and wariness that characterizes the proper use of expert opinion in general." Guardians, 630 F.2d at 91.

^{23/} Ironically, in footnote 30 of their brief, Plaintiffs accuse the Court of engaging in "selective reading" and "radical rewriting" of the 1980 Principles. The Court properly cited the section of the 1980 Principles referenced by Mehrens, which discusses the use of "pooled judgments of informed persons" as a proper job analysis technique. (PX650at13). Plaintiffs, on the other hand, deleted the relevant language from their quotation and combined other sections of the Principles out of context. In addition, Plaintiffs provide only pages 4&5 of the 1980 Principles, but not page 13, which is the portion relied on by the District Court. Plaintiffs' failure to quote this document properly, including those portions adverse to their position, borders on the sanctionable.

statements is one, not the only, acceptable job analysis methodology.

(PX650at4).^{24/}

As the Court held, subsequent revisions to the CBEST in light of later studies (discussed below) "does not mean that the prior version of the CBEST was invalid." Instead, Defendants properly validated the CBEST in accordance with the professional standards in place at the time, and the evidence from the studies justified the use of the test as job-related. Lundquist's study and the CTC's subsequent modifications to the CBEST demonstrate Defendants' commitment to complying with the evolving professional standards and, when new research suggested that the job had changed, the test was modified. To have done so in the midst of litigation should be commended, not condemned.^{25/} Defendants' voluntary actions, taken in the ordinary course of business, renders Plaintiffs' claims moot so long as Defendants show that the

^{24/} Plaintiffs' reliance on Section E12 of the 1974 APA Standards is misplaced. As Wheeler testified, Section E12 (and its subparts) applies to tests which are designed to test the entire universe of skills in a particular job. The CBEST is designed to test a necessary part of teaching skills (basic reading, writing and mathematics), not the entire universe of teaching skills (which would include classroom instruction technique and other pedagogical skills). Accordingly, Section E12.4 has no application here. (RT2/7/96at404-406).

^{25/} Plaintiffs' reliance on the denial of Defendants' Bill of Costs is specious. In the context of ruling on a motion pursuant to Federal Rule of Civil Procedure 54, the Court stated that this case was different from cases cited by Defendants because this case had merit. The Court did not find, or even implicitly concede, that Plaintiffs somehow established a violation of Title VII when denying costs to Defendants.

changes are permanent and Defendants will not return to the challenged conduct. United States v. WT Grant Co., 345 U.S. 629 (1953).^{26/}

The Court considered all of the evidence, including the testimony of the experts, and decided as a matter of fact that the 1982 and 1985 studies were conducted in accordance with the professional standards at the time and included a proper job analysis. This finding is not clearly erroneous, but instead is fully supported by the substantial evidence and expert testimony credited by the Court.

IV. The District Court's finding that the CBEST is job-related is not clearly erroneous.

On page 41 of their brief, Plaintiffs frame Issue Number 2 by claiming that the Court erred when "concluding that one or more separate job analyses were not in order for nonteaching jobs." This quote, however, is not the Court's conclusion, but instead a piece of Plaintiffs' argument presented below. The Court concluded "that the CBEST has been adequately validated with respect to nonteaching jobs." Furthermore, Plaintiffs' contention that the Court relied solely on "opinion evidence" for a finding of so-called "face validity" for nonteaching jobs is specious. Once again, a review of the record and the Court's factual findings readily disposes of Plaintiffs' claim.

^{26/} The changes to the test were made effective August 1995 and remained in effect at trial in June 1996 and remain in effect today. Despite Defendants' revisions to the math section, the evidence at trial demonstrated that the adverse impact on the Plaintiff groups remained unchanged. Even if the items removed were not "job-related," Plaintiffs are not entitled to any relief because (1) the removal of the items moots a claim for injunctive relief and (2) the presence of the items did no harm and negates any claim for monetary relief for "past harm."

First, the Court held that Defendants "have shown that basic skills in reading, writing and mathematics are important elements in the jobs for which the CBEST is required and that the CBEST actually measures such basic skills." (CR417at29). The Court cited the evidence which supports this conclusion, which includes:

The Wheeler and Elias study included teachers, administrators and other nonteachers as panelists who reviewed and rated the importance of the skills tested for the jobs at issue. After concluding that the importance ratings in this study supported a finding that the skills were important to the teaching positions at issue, the Court found that "there were no major differences between the relevance ratings made by teachers and those made by nonteachers;" (Id.at32-35);

The Practitioners' Review similarly included teachers, administrators and other nonteachers as panelists who reviewed and rated the importance of the skills for the jobs at issue. Again concluding that the importance ratings in this study supported a finding that the skills were important to the teaching positions at issue, the Court found that "[b]y examining the data from the Practitioners' Review, it is possible to determine whether the [importance] responses of nonteachers differed from the responses of teachers. They did not;" (Id.atn.36);

The Court exhaustively reviewed the results of Lundquist's study, which included "a literature search . . . on basic skill requirements for teachers at the kindergarten through twelfth grade levels;" interviews of teachers in different grade levels; job analysis survey form for teacher job activities; "a

version of the survey for administrators was created to determine whether they shared a common set of skill requirements with classroom teachers;" distribution of the survey to 6000 teachers and 1100 administrators; and subgroup analysis by credential category, with items being dropped if any subgroup analysis did not meet the required importance rating. (Id.at36-42).^{27/} When summarizing the results of Lundquist's study, the Court found that "[b]ased on her comparison of teachers' and administrators' responses, Lundquist concluded that 'all of the skills identified as important for teachers were also important for administrators.'" (Id.)

Based on the foregoing, the Court properly concluded that "the evidence shows that nonteachers generally rated the items on the CBEST to be as relevant to their jobs as did teachers. Both the Wheeler and Elias study and Lundquist's job analysis showed no significant difference between the importance ratings made by teachers and those made by administrators and other nonteachers." (Id.at49). This conclusion is fully supported by the record evidence.

Moreover, Plaintiffs simply are incorrect when they claim that the CBEST must be validated for over twenty different "jobs" or "positions." Passage of the CBEST is not required for any particular teaching or administrative job(s) or position(s). Instead, passage of the CBEST is one step in the process of obtaining a credential. (DX1964at28). There are four credentials issued by the CTC for which the CBEST is required: (1) multiple

^{27/} Lundquist also conducted subgroup analyses by ethnic group, finding no difference in ratings by ethnicity.

subject, (2) single subject, (3) special instruction/education and (4) administrative. Educ. Code § 44256 and § 44270. As the Court properly found, Lundquist analyzed the skills for subgroup differences by each of these credential categories. (DX1541atTable5-21). Lundquist examined directly the ratings by each credential category and eliminated skills which, according to the empirical data, did not undergird all credential categories at issue. (DX1541; DX1967). In fact, when Lundquist analyzed the subgroup of "single subject credential," she analyzed all single subject credentials together. This analysis favored Plaintiffs--by including all single subject credentials in one group (math, reading, social studies, physical education), Lundquist retained only those skills found to be applicable and important by 80% of all of the people in this group. Accordingly, all credential holders had a voice, which resulted in the identification of only the lowest, common denominator skills important to all groups. As a result, Lundquist testified at trial that there simply is no evidence that the basic "lowest common denominator" type acquired cognitive skills tested by the CBEST differ for the credential categories. (RT6/6/96at1302-03).

A comparison of the results of Lundquist's job analysis with the literature reviewed at the outset reveals that across all of the studies the investigators found similarity in terms of the basic skills required for all teachers. (DX1541atChap.2;PX216). The literature review supported the conclusion that a common set of basic skill requirements cuts across the full range of K-12 positions. (DX1967at18). Lefkowitz testified that he is not aware of any empirical data to the contrary. (RT6/12/96at1752-53). As

indicated by Poggio's 1985 study, he also believes that these basic skills cut across all jobs. (DX1727;1748).

Legally, there can be no dispute that Defendants' studies carried the day. The APA Standards include separate chapters on employment testing (Chapter X) and on professional and occupational licensure and certification testing (Chapter XI). (PX208). The licensure and certification chapter (XI) makes it clear that licensure and certification tests, unlike employment tests, have the purpose of protecting public safety. (PX208at63). The validity of licensure and certification tests for credentials (like the CBEST) must therefore be ascertained statewide in relation to basic public safety considerations rather than the actual requirements of particular jobs offered by particular employers. (DX1964at23). Under the relevant Chapter XI of the APA Standards, a licensing or certification agency need not analyze every teacher's job or administrator's job *separately* from an analysis of test specifications and questions. Instead, an analysis in which licensees (such as current teachers and administrators) examine test questions in relation to the requirements of the credentials is professionally proper and appropriate for licensure exams.

Nevertheless, Lundquist's Job Analysis established the importance of the basic skills tested by the CBEST for each of the credentials at issue, which is more than "suitable" as required, and it is abundantly professionally acceptable. See e.g., United Black Firefighters v. Akron, 66 Fair Empl. Prac. Cases (BNA) 1452, 1460 (N.D. Oh. 1994) (approving of defendant's studies on basis of submission of "lengthy reports detailing all of the steps, including a review of the literature and a comprehensive job analysis"); United Black

Firefighters v. Akron, 66 Fair Empl. Prac. Cases (BNA) 1452, 1460 (N.D. Oh. 1994) (reports submitted by defendant's expert "show that every effort was made to conform to test-development standards adopted by the APA and . . . every effort was made to assure job-relatedness").

V. The District Court's finding that the CBEST items actually measure the basic skills of reading, writing and mathematics is not clearly erroneous.

Plaintiffs' Issue Number 3 is a theoretical exercise. Basically, Plaintiffs contend that once a job analysis is conducted and the skills to be measured by a test identified, then the actual test items must correspond to the skills identified. There is no "magic" or single correct formula for demonstrating the content validity of a test. Instead, as this Circuit has held, and the Court recited, the test must be job-related, "that is, 'that it actually measures skills, knowledge or ability required for successful performance of the job.'" (CR417at28), quoting Contreras, 656 F.2d at 1271. In accordance with this legal standard, the Court found "[Defendants] have shown that basic skills in reading, writing and mathematics are important elements in the jobs for which the CBEST is required and *that the CBEST actually measures such basic skills.*" (Id.at29). In response, Plaintiffs rely on Contreras for the over broad proposition that content validity of test items (the third step in Craig) can be accomplished only if patterned on the precise procedure approved in Contreras. Plaintiffs, of course, overlook the basic admonition by this Court in Contreras that a "a key requirement of this third step . . . is that the validation method be professionally acceptable." Contreras, 656 F.2d at 1282. A review of the facts

presented at trial in this case will result in the same conclusion here as was ultimately reached in Contreras:

At trial, [Defendants] produced expert testimony that its validation procedures met professional standards. [Plaintiff] produced expert testimony that the procedures were professionally unacceptable. The district judge resolved this conflict of testimony in favor of the [Defendants'] expert, not only by ruling that the examinations were job related, but also by resolving every testimonial dispute between the experts in favor of the [Defendants]. [The appeals court] will not disturb such a credibility determination. Id.

The procedures followed by Defendants and their contractors was as follows: ETS trains professionals on its staff to be item writers, who match the CBEST items to the test specifications. This match is then subjected to a review by other trained ETS professionals, who are not involved in the initial writing and matching process, but instead make an independent review for verification of match of items to skills. Both Ms. Merritt and Mr. Ponisciak (from ETS) testified that they found a good match of the items to the specifications in their work on the Curriculum Matching Project. (DX1971;1972). When NES took over the administration of the CBEST, NES professionals examined the ETS classifications and matched the items into the test specifications. As Wright testified, the NES personnel involved were qualified for the task and performed it properly. (RT6/20/96at2682-83). Lundquist reviewed the NES match into the specifications and verified them as accurate. (DX1968at12).

Defendants' expert testimony at trial (credited by the Court) established that the items on the CBEST actually measure the job-related basic

skills of reading, writing and mathematics.^{28/} Based upon his review of the foregoing as well as the Wheeler and Elias study, the Practitioners' Review and Lundquist's study, Mehrens testified that the procedures followed for validating the content of the test itself (matching items to the skills) were proper, the overall test development process was professional and resulted in appropriate content validity. (DX1969at31-33). Mehrens ultimately concluded that the items on the test were matched to the content domain as required by the Standards. (RT6/10/96at1475-84). Plaintiffs' expert witness, Poggio, testified that he agreed that Defendants and their contractors professionally, appropriately matched CBEST items to skills. (RT6/17/96at2119).

A brief review of the examples of CBEST items presented by Defendants at trial further confirms that Plaintiffs are merely theorizing when they contend that items were not matched to skills on the test. Defendants presented the following two math questions with the corresponding skills demonstrated to be job-related:

Item: If the price of an item is raised from \$4 to \$6, what is the percent of increase?

Skill number 72: Recognize relationships in numerical data (e.g., percent change).

Item: How many 1/2 pint servings of milk can a teacher give to her students out of 5 gallons of milk?

Skill number 77: Understand and use standard units in U.S. measurement system.

^{28/} As to Plaintiffs' expert witness, the Court expressly found "Dr. Lefkowitz lacking in credibility." (CR417atn.20). Accordingly, Plaintiffs' repeated citation to Lefkowitz' "opinions" presented to the Court in support of their arguments are of no moment in this appeal.

Not only did both sides' experts testify that these items clearly are job-related and match the skills identified (RT6/13/96at1943;RT6/17/96at2064), but also counsel for the parties so stipulated. (RT6/6/96at1186). In response, Plaintiffs failed to present even one example of an item on the test that does not match the skills identified to be job-related.^{22/} Accordingly, Plaintiffs' contention in the abstract that the matching of items to skills was not conducted properly was refuted by the evidence presented at trial by Defendants, coupled with Defendants' expert testimony that the procedures were professionally acceptable. The Court's finding is further supported by Plaintiffs' inability to identify even one item on the CBEST which does not match the job-related skills.

VI. The District Court's finding that the retention criteria used in Lundquist's Job Analysis was professionally acceptable is not clearly erroneous.

At trial, Plaintiffs took issue with various aspects of Lundquist's Job Analysis. On appeal, Plaintiffs have abandoned the vast majority of their claims that the Job Analysis was somehow methodologically flawed and on appeal focus on the decision rules applied by Lundquist when analyzing the survey responses. Lundquist's job analysis project was conducted to investigate empirically the type and level of the reading, writing and math skills required for the K-12 positions in the public schools in California. (DX1967at7). The

^{22/} Rather, the scored item Plaintiffs presented is properly classified as a simple algebraic problem, which is skill number 75 and was determined by Lundquist's studies to be job-related. (RT6/6/96at1271-72;DX1968at12). The Court agreed with Lundquist that the item at issue involved solving for a single unknown. (CR417atn.33).

study also examined whether the same set of basic skills applies to administrative and teaching support positions. (*Id.*) These data were used to ascertain the extent to which the skills measured by CBEST are supported by current job analytic information. This job analysis project consisted of four major research steps, culminating in the collection of ratings from a large statewide sample of teachers and administrators. Lundquist mailed the survey to over 6000 teachers and over 1100 administrators, with a return rate of approximately 20% for each group. (DX1541). The 1100 who responded to Lundquist's survey constituted a large enough sample to provide stable and reliable results. Moreover, the data established that this group was demographically representative of the relevant population, with the exception that all minority groups were overrepresented. Plaintiffs agreed that the sample size was sufficiently large for the analysis and agreed that overrepresentation of minorities was appropriate. (RT6/12/96at1772).

For data analysis of the survey responses, Lundquist used a four-point scale (0 to 3), with anchor points of 0 = not applicable, 1 = minor, 2 = important, 3 = critical. (RT6/6/96at1307). To identify important activities performed on the job, two relatively stringent decision rules were used. Items were considered important if *both* at least 80% of the survey respondents rated the activity as applicable to the job *and* the mean Importance rating was 1.5 or higher (on the 0-3 Scale). Even Poggio and Lefkowitz agreed that the use of

the 80% decision rule is professionally acceptable and, by comparison to their own work, exceptionally stringent.^{30/}

The dispute on appeal with respect to Lundquist's decision rules focuses on the use of a mean Importance rating of 1.5 or higher on the 0-3 scale.^{31/} There is no real dispute that a 1.5 mean Importance rating is the midpoint of Lundquist's scale. Plaintiffs contend, however, that Lundquist should have used a mean Importance rating of 2.0 instead. This argument overlooks the basic factual nature of the scale used. As Lundquist testified, she used a continuous scale, and the survey respondents rated skills by assigning a number of 0 to 3 to each skill. When calculating the mean importance rating for each skill, Lundquist averaged the ratings assigned by the 1100 survey respondents. Obviously, an average of responses necessarily resulted in fractions of numbers (i.e., 1.2, 1.5, 2.6). Once these averages, or mean importance ratings, were determined for each skill, then Lundquist exercised her professional judgment to determine the proper cutoff for importance. The decision to use a mean Importance rating of 1.5 or higher is a matter of experience and professional judgment. (RT6/12/96at1787). The testimony at trial by both sides was that there is no single professionally appropriate standard

^{30/} Poggio applies what he calls "the strong majority rule," which means he will retain skills that are rated as applicable by as few as 56% of the survey respondents. (RT6/17/96at2196-98).

^{31/} At trial, Plaintiffs took issue with both decision rules. On appeal, Plaintiffs take issue with only the 1.5 mean importance rating. Since the rules were used in the conjunctive, it is misleading for Plaintiffs to isolate the 1.5 mean importance rating from the 80% rule and then claim that the use of the 1.5 mean importance rating was too low. In combination, Lundquist's decision rules were overly stringent.

for retention of skills for the simple reason that there is no single scale used for evaluating skills. (RT6/11/96at1635-36). The Court properly held that Lundquist's judgment was professionally acceptable in light of the fact that the importance of a skill is rated on a continuous scale (as described above) and 1.5 (which legitimately rounds to 2.0) was the lower limit of Important on Lundquist's scale. Plaintiffs summarily claim on page 47 of their brief that the Court's finding does not satisfy the professional standards, yet fail to cite any, much less credited, evidence to the contrary.

The professional standards require that "[a]ny scales used to evaluate tasks and knowledges, skills and abilities (KSAs) should have reasonable psychometric characteristics." (PX207at5). Judged against this professional standard, the Court properly found that Lundquist's decision "reflected manifestly reasonable professional judgment." (CR417atn.38). This is all that was required. See Contreras, 656 F.2d at 1281 ("Title VII requires only that the methods be professionally acceptable"); Guardians, 630 F.2d at 95 (study provides adequate assurance that the identified tasks and KSAs are those needed to perform the job).

Plaintiffs' citations to the Principles, the Standards and the Uniform Guidelines should be closely scrutinized by this Court inasmuch as they either do not stand for any relevant issue or are misquoted and rewritten by Plaintiffs. To begin, the portion of the SIOP Principles cited at the top of page 46 of Plaintiffs' brief, while properly quoted, is irrelevant. The quoted portion expressly applies to sampling *job domains*, which are distinctly different from the issue of evaluating *skills*. The *job domains* at issue in this case are the

broad categories of reading, writing and mathematics, which, as discussed above, have been demonstrated as important to the jobs at issue in this case. (DX1969at17-18). Plaintiffs' complaint about Lundquist's job analysis and retention criteria addresses *skills* within the domains, such as math skill number 77 -- understand and use standard units in U.S. measurement system.

Plaintiffs have dramatically rewritten Section 14(C)(2) of the Uniform Guidelines by moving certain words around within the quote, and by so manipulating the language in this fashion, mislead the reader into believing that criticality is required here when it is not. The proper quotation actually reads:

The work behaviors selected for measurement should be critical work behaviors and/or important work behaviors constituting most of the job.

Accordingly, none of Plaintiffs' so-called citations to the professional standards actually support a conclusion that Defendants were required to demonstrate that the skills on the CBEST are "critical" to demonstrate job-relatedness.

As set forth in the "Issues Presented" section of their brief, and delimited on page 45 of the Argument Section, Issue Number 3 is limited to the use of the 1.5 mean Importance retention criteria. However, in a footnote, Plaintiffs also raise an entirely different argument, relating not to the criteria used in the Job Analysis, but instead to the criteria used in the subsequent Content Validity Study. Presumably, Plaintiffs would have included this footnoted discussion in the text of their brief if they in fact considered it an additional issue presented. While this Court should not permit Plaintiffs to present entire appellate issues in footnote discussion, Defendants respond. Lundquist's Content Validity Study was not a "second bite at the apple."

Instead, as the Court properly found, the CTC commissioned the Content Validity Study to reexamine the math skills on the CBEST. Furthermore, contrary to Plaintiffs ludicrous comment that the validity of the math section was rooted in "face validity," the Court's approval of the Content Validity Study when ultimately finding the test job-related, was well grounded in the substantial empirical evidence submitted by Defendants and explained by Defendants' expert witnesses.

The evidence at trial established that the findings of the job analysis with respect to math, in many instances, eliminated skills that were supported by the literature.^{32/} In two focus group sessions, twenty teacher educators were presented with the complete set of 37 math skills originally submitted in the job analysis survey and asked to rate the applicability of each skill, whether the skill was required upon entry to the job, the current importance of the skill, and the future importance of the skill. Statistical analyses of applicability and entry skill requirements were used to determine whether a skill was retained or eliminated. To be retained, a skill needed to: 1) be endorsed as applicable and needed upon entry by at least 80% of the teacher educators participating, and 2) have average current and future importance ratings greater than or equal to two

^{32/} Both Mehrens and Haertel testified that all teachers should be able to interpret percentages, percentiles, stanines, and other measures related to student test scores. (DX1969at27-28;RT6/18/96at2385). These skills (which were 101, 102 and 103 in the Job Analysis), were initially dropped by the survey results. Since, as Lundquist testified, and Mehrens and Haertel agreed, the results of the data on some of the math skills were contrary to expert thinking in the profession, it was appropriate to follow up on the math skills.

On a three point scale (1=minor; 2=important, and 3=critical).^{33/} Use of these relatively strict criteria resulted in retention of 26 of the original 37 math skills.

Next, job content experts and community group participants were provided with the set of 26 math skills determined by teacher educators to be important. These expert panelists were asked to provide applicability and required-upon-entry ratings and to judge what percent of minimally qualified teachers would be proficient in the skill today and what percent should be proficient in the skill in 3 to 5 years. Using the stringent 80% endorsement criterion on applicability and required at entry, content experts retained 17 of the 26 skills, while community group participants retain 16 of the 26 skills. A disjunctive model was used to combine the results of the content expert and community group ratings. A skill was retained for further analysis if either the content experts or community group members agreed that the skill was *both* applicable *and* required upon entry (using the 80% agreement threshold). This approach resulted in retention of 19 out of the original 37 math skills as applicable and required upon entry for the job.

The Court's findings with respect to the Content Validity Study are consistent with this testimony and hence not clearly erroneous. Additionally, the Court's ultimate conclusion that the math section is job-related fully

^{33/} Plaintiffs claim that, since Lundquist used a mean importance rating of 2.0 here (plus 80% applicable), she should have used the same in the job analysis. However, while 1.5 was the appropriate mean importance rating for the large sample job analysis, the very stringent 2.0 standard was proper here for disconfirmatory evidence.

comports with the legal standards. Specifically, after Defendants conducted a suitable job analysis, the remaining requirement was to conduct a content validity study, as outlined in Guardians, and demonstrate that the content of the test is (1) related to the content of the job, and (2) representative of the related content of the job. 630 F.2d at 95. The results of the Content Validity Study clearly satisfy these requirements.

VII. The District Court's finding that the passing score on the writing section reflects reasonable judgment about the minimum level of basic writing skills competence that should be required of teachers is not clearly erroneous.

An employer is not required to separately validate passing scores. Craig v. County of Los Angeles, 626 F.2d 659, 665 (9th Cir. 1980) ("EEOC guidelines do not require separate validation of passing scores"). Instead, "[w]here cut-off scores are used, they should normally be set so as to be reasonable and consistent with normal expectations of acceptable proficiency within the work force." See 29 C.F.R. 1607.5(H).^{34/} As the Court noted, the SIOP Principles provide that the setting of cut scores is a matter of judgment, as opposed to the result of empirical studies, and "the only justification that can be demanded" is that the scores be supported by a rationale which includes factors such as cost-benefit ratios and social policies of the organization. (CR417at64), quoting SIOP Principles at 32-33. Applying the proper legal framework, the Court then engaged in a careful review of all of the passing score studies conducted by Defendants (which establish an

^{34/} The APA Standards do not contain any language discussing validity of the cut score.

empirical basis for the cut scores in use) as well as the cost-benefit analysis and social policies implicated here.^{35/}

Defendants conducted a passing score study on the writing section as part of the Wheeler and Elias study. ETS gathered 44 readers, experienced college and high school faculty members, who reviewed 6800 essays from the December CBEST administration. (PX120at14-15;F). After this review (which resulted in over 20,000 readings) the readers worked together in a group discussion led by Dr. Burbank to determine the minimum score on the writing section for a person to be licensed to teach in California. They agreed unanimously that the desirable minimum passing score is 12 (on a scale of 4 to 16), with an absolute minimum of 11. (*Id.*). Consistent with these recommendations, a test-taker can pass with a minimum raw score of 11, which is converted to a scaled minimum pass of 39, and a raw score of 12, which converts to a scaled pass of 41. (DX1964at17-18). This writing score study reported by Dr. Burbank in his letter is the study reported by Wheeler in the text of the report. (*Cf.* PX120at14-15;*with* PX120atF). Honig, who was charged with setting the cut scores, testified that he considered the data from the Wheeler and Elias study, "took it into account" and even reviewed test items before making a decision. (RT2/6/96at184;190;207). Honig also testified that he took this responsibility seriously and when making his decision emphasized that the CBEST was a key step in the improvement of the quality of

^{35/} At trial, Plaintiffs challenged the cut scores on the math and reading sections as too high. On appeal, Plaintiffs do not challenge the Court's rejection of this argument and ruling that the cut scores actually may be too low.

the educators in California and eventually the improvement of California's public school. Evidently, Honig not only relied on the empirical data when making his decision, but also considered the social policies at issue with the CBEST. Indeed, as Mehrens testified, when administering an examination like the CBEST -- which serves the very purpose of protecting the public and the children from the incompetent -- the test user should undertake a cost-benefit analysis. Obviously crediting this testimony, the Court found that Defendants' cost-benefit analysis should weigh in favor of protecting the public. (CR417at66).

Contrary to the substantial evidence presented at trial and accepted by the Court, Plaintiffs now request that this Court engage in an "analysis" of the writing scores under an entirely new "theory," which Plaintiffs presented for the first time in the post-trial proposed findings. Plaintiffs did not elicit any testimony from their experts in any report or even at trial that the proper passing score on the writing section should be a "9 or 10."^{36/} All of the citations in Plaintiffs' brief relate to one table of data in a report and a 1982 article published in the field regarding passing score studies, without any actual testimony from an expert witness to explain the data or the publication, much less testimony as to the relationship of the data and publication to the writing cut score study in this case. By contrast, as set forth above, Defendants

^{36/} In footnote 43 of their brief, Plaintiffs claim that "this evidence and this issue" was presented below. Rather than citing to the transcript of the proceedings, or even to one of their experts' testimony, Plaintiffs cite to their post-trial proposed findings. Since Plaintiffs did not present actual testimony or "evidence" on "this issue," it was not properly before the Court and hence is not properly presented to this Court.

presented the testimony of Wheeler and Elias regarding their study and the results obtained by Dr. Burbank and his group of readers, as well as the testimony of Wright and Mehrens about the professional approach used and the social factors at work.

Defendants' evidence was credited by the Court and is not clearly erroneous. Indeed, the evidence established that the writing score was not set at an arbitrary level, but instead was set following a systematic process that reflects the good faith exercise of judgment. Richardson, 729 F. Supp. at 822-23; Thomas v. City of Evanston, 610 F. Supp. 422, 431 (N.D. Ill. 1985).

VIII. The District Court was not required to comply with the provisions of Federal Rule of Evidence 706.

Plaintiffs' final issue on appeal is easily resolved. Basically, Plaintiffs contend that Dr. Klein served as a court appointed expert pursuant to Federal Rule of Evidence 706, and as such, Klein should have provided an expert report to the parties and subsequently been cross-examined by the parties. This argument is meritless. First, the Court did not appoint Klein as a Rule 706 expert, but as a Technical Advisor to the Court." (CR 375at2). Accordingly, the provisions of Rule 706 are not implicated in this case. Reed v. Cleveland Bd. of Educ., 607 F.2d 737, 746 (6th Cir. 1979) (FRE 706 does not govern the appointment of non-testifying technical advisor). Second, Plaintiffs actually agreed that Klein was appointed as a technical advisor pursuant to the Court's inherent power, not pursuant to Rule 706. (CR431at13) ("Dr. Klein was a special technical advisor for the Court and not a court appointed expert."). Faced with this admission and open acknowledgement that Rule 706 is not

implicated in this matter, Plaintiffs' contention on appeal that Rule 706 applies and should have been followed is frivolous.

There is no question that the Court had the inherent authority to appoint a technical advisor and properly exercised that authority. Reilly v. United States, 863 F.2d 149, 155-57 (1st Cir. 1988) (recognizing court's inherent authority to appoint technical advisor when the court is faced with "problems of unusual difficulty, sophistication and complexity well beyond the legal questions of fact and law with which judges routinely grapple"). When appointing Klein, the Court found that this was just such a case. (CR375at2) ("finding this to be an extraordinary case . . . having problems of unusual difficulty, sophistication and complexity well beyond the legal questions of law and fact with which judges routinely grapple"). Plaintiffs did not object below to the appointment of a technical advisor nor did they object to the Court's order, entered on June 3, 1996, determining that Klein would be the Court's technical advisor.

While their brief is riddled with unsupported attacks on Klein's integrity and alleged, but unstated bias, Plaintiffs have framed the issue with respect to the use of Klein under Rule 706. Specifically, Plaintiffs' argument is limited to whether the Court was required to provide an expert report from Klein and permit cross-examination by the parties. As set forth above, Rule 706 was not the basis for Klein's appointment, and hence is not implicated. Reilly, 863 F.2d at 156 ("Since an advisor, by definition, is called upon to make no findings and to supply no evidence, provisions for depositions, cross questioning and the like are inapposite"). The same result would be reached

even if Rule 706 were implicated here. Rule 706 provides that a court appointed expert shall be subjected to cross-examination only if the witness makes factual findings. Plaintiffs have not cited any evidence in the record which would even suggest that Klein made factual findings in this case. Indeed, Plaintiffs have not cited a single reference in the Court's final order and judgment which was outside the record evidence presented by the parties and their respective witnesses.

More importantly, the Court announced in open Court its intention not to call Klein as a witness for cross-examination. (RT6/17/96at2062). Plaintiffs did not object. (Id.) Plaintiffs' failure to object to this decision is fatal to their claim on appeal that the Court should have made Klein available for cross-examination.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the District Court's judgment for Defendants be affirmed.

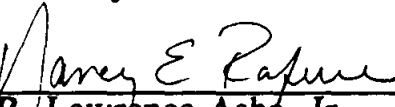
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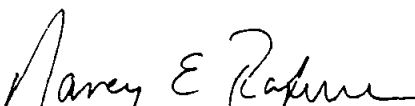

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CERTIFICATE OF TYPE SIZE AND STYLE

Pursuant to Ninth Circuit Rule 32-(e)(4), I certify that the text of

Defendants-Appellees' brief is double-spaced, with the exception of quotations, headings and footnotes, which are single-spaced, and this brief is proportionately-spaced, has a typeface of 14 points (times Roman) and contains ^{966/1782}13,993 words.

4/4/97
DATE


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PROOF OF SERVICE

I am employed in the City of Atlanta, State of Georgia. I am over the age of 18 and not a party to the within action. My business address is 600 Peachtree Street, Suite 2400, Atlanta, Georgia 30308.

On April 4, 1997 I served:

BRIEF OF DEFENDANTS-APPELLEES AND TWO VOLUMES OF DEFENDANTS-APPELLEES RECORD EXCERPTS

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I declare under penalty of perjury under the laws of the State of Georgia that the above is true and correct and was executed on April 4, 1997 at Atlanta, Georgia.

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