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# Office of the Attorney General
## Washington, D. C. 20530

July 15, 1996

Thomas B. Griffith, Esquire
Senate Legal Counsel
United States Senate
Washington, D.C. 20510

Re: ACORN v. Edwards, No. 94-30714 (5th Cir.)

Dear Mr. Griffith:

On April 22, 1996, the United States Court of Appeals for the Fifth Circuit ruled in the above-captioned case that a provision of the Lead Contamination Control Act of 1988 (LCCA), requiring the States to establish remedial action programs for the removal of lead contaminants from school drinking water systems, violates the Tenth Amendment. See 42 U.S.C. 300j-24(d); Pub. L. No. 100-572, 102 Stat. 2884, 2886-2887. Pursuant to 2 U.S.C. 288k(b), I am writing to notify you that the United States has determined not to petition the Supreme Court for a writ of certiorari to review that decision. The time for petitioning for a writ of certiorari expires on July 21, 1996. I have enclosed a copy of the Fifth Circuit's decision.

Under LCCA, the Administrator of the Environmental Protection Agency (EPA) is required to publish a list of all models of drinking water coolers that are not lead-free. See 42 U.S.C. 300j-23(a). The Administrator is also required to distribute a list of non-lead-free water coolers to the states, and to publish a guidance document and testing protocol to assist local schools in determining the source and degree of any lead contamination in their drinking systems, and in remedying such contamination. 42 U.S.C. 300j-24(a)-(b). Each state is then required to disseminate the Administrator's guidance document, testing protocol, and list of non-lead-free coolers to local educational agencies. 42 U.S.C. 300j-24(c).

LCCA further requires the states to establish "remedial action programs" for the removal of lead contaminants from school drinking water systems. 42 U.S.C. 300j-24(d). With respect to water coolers in schools, those state remedial action programs must include measures for the reduction or elimination of lead

contamination in school water coolers, and must be adequate to ensure that all such water coolers with lead contamination are repaired, removed, or disabled by January 31, 1990. See 42 U.S.C. 300j-24(d)(3). Although LCCA provides that the Administrator shall make grants to the States to assist them in complying with these mandates and authorizes the appropriation of funds for such assistance, 42 U.S.C. 300j-25, Congress has never appropriated funds for such assistance to the states.

In the above-captioned case, a citizen's group (ACORN) brought suit against officials of the State of Louisiana, contending, among other things, that the state had not complied with its statutory obligations to disseminate a list of non-lead-free water coolers to schools and to establish a remedial action program for the removal of lead contamination from school drinking water systems. The district court dismissed ACORN's claims as moot, concluding that the state had complied with both provisions of LCCA, but it awarded ACORN attorney's fees. The state appealed that award, and argued that the relevant provisions of LCCA are unconstitutional.

The Fifth Circuit notified the Attorney General that the constitutionality of LCCA had been drawn in question, and the United States intervened pursuant to 28 U.S.C. 2403(a). The United States argued that the court did not have to reach the constitutionality of the remedial-action-program requirement because the award of fees could be based on ACORN's claim arising out of the state's obligation to disseminate the list of non-lead-free water coolers, which was constitutional.

The Fifth Circuit concluded that the remedial-action-program requirement of LCCA, 42 U.S.C. 300J-24(d), violates the Tenth Amendment, as interpreted by the Supreme Court in New York v. United States, 505 U.S. 144 (1992). The court of appeals noted that, in New York, the Supreme Court stated that, "[w]hatever the outer limits of [state] sovereignty may be, one thing is clear: The Federal Government may not compel the states to enact or administer a federal regulatory program." Slip op. 16 (quoting New York, 505 U.S. at 188). It then observed, "[f]ew Congressional enactments fall as squarely within the ambit of New York as does [42 U.S.C.] 300j-24(d)." Slip op. 16. It found that, under LCCA, "[t]he states thus face a choice between succumbing to Congressional direction and regulating according to Congressional instruction, or being forced to do so through action in the federal courts. * * * [S]uch Congressional conscription of state legislative functions is clearly prohibited

under New York's interpretation of the limits imposed upon by Congress by the Tenth Amendment." Ibid.

After careful consideration, I have determined not to file a petition for a writ of certiorari in the present case. EPA has informed the Department of Justice that every state has established a program for addressing lead contamination in school drinking water systems. The deadline for compliance with LCCA has passed, and EPA has concluded that all the states have done as much as could be reasonably expected under LCCA to address the problem of lead contamination in schools. As noted above, Louisiana has also put a remedial action program in place, even though it contends that the federal statute requiring it to do so is unconstitutional. Not every local school system may have participated in the state programs for redressing lead contamination in drinking water systems, but participation by the schools (as opposed to the states) is voluntary under LCCA. It appears, therefore, that Congress' objectives in enacting 42 U.S.C. 300j-24(d) have been accomplished.

I would also note that the Tenth Amendment objections to 42 U.S.C. 300j-24(d) are substantial, and that a defense of the constitutionality of that provision would be quite difficult. Under the Supreme Court's decision in New York v. United States, the Tenth Amendment forbids Congress from "command[ing] a state government to enact state regulation." 505 U.S. at 178. Following that decision, the Fifth Circuit concluded that Section 300j-24(d) violates the Tenth Amendment because it "is an attempt by Congress to force States to regulate according to Congressional direction." Slip op. 17.

Sincerely,

Janet Reno

cc: Geraldine Gennet, Esq.
Acting General Counsel to the Clerk
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