No. 00-289

In the Supreme Court of the United States

J.T. YARNELL, CHIEF ENGINEER,
MISSOURI DEPARTMENT OF TRANSPORTATION, ET AL.,
PETITIONERS

v.

MICHAEL CUFFLEY, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether petitioners were required by Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, to deny respondents' application to participate in the Adopt-A-Highway program because respondents would exclude persons on the basis of race, color, and national origin from activities under the Adopt-A-Highway program.

2. Whether petitioners' denial of respondents' application to participate in the Adopt-A-Highway program was unconstitutional.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. The United States Department of Transportation, through its Federal Highway Administration, provides federal financial assistance to the Missouri Highway and Transportation Commission (MHTC) for the construction and maintenance of highways. For example, during the MHTC's fiscal year 1993, "approximately thirty-seven percent (37%), or $413 million out of $1,112 million, of the total highway user fees and taxes distributed" to the MHTC "for the maintenance and construction of state highways, were funds that were federally reimbursed." C.A. App. 64. Petitioners are various state officials of the MHTC and the Missouri Department of Transportation.

The MHTC is responsible, under state law, for the maintenance of state highways and, under federal law, for the maintenance of any highways constructed with federal funds, including litter pick-up on highway shoulders. See Mo. Ann. Stat. §§ 227.020, 227.030, 227.210(1) (West 1990); 23 U.S.C. 116 (1994 & Supp. IV 1998); 23 C.F.R. 635.505(a)(3). As one of the means of meeting its obligation to maintain the state highway system, the MHTC operates, through the Missouri Highway and Transportation Department, an "Adopt-A-Highway" (AAH) program, which promotes litter control and reduces the cost to the MHTC of litter abatement.

The AAH program allows volunteers to adopt a particular portion of a state highway on which the volunteers agree to pick up litter. C.A. App. 452-453. The MHTC provides garbage bags, safety vests, and caution flags for volunteers, picks up the bags after they are filled with litter, *ibid.*, and tells volunteers how often they must clean the highway, Pet.

App. 24a. The MHTC erects signs at each end of the adopted segment of highway to identify the highway adopters and strictly limits what it puts on the signs. *Ibid.*

2. On May 31, 1994, respondent Michael Cuffley, as a "Unit Recruiter" of respondent Knights of the Ku Klux Klan, Realm of Missouri (Klan), submitted an application, on behalf of the Klan, to adopt a portion of a state highway under Missouri's AAH program. Pet. App. 19a; C.A. App. 54. The Klan allows only white persons to be Klan members. C.A. App. 228, 351. An applicant must state on the Klan membership application form that he or she is of "non-Jewish, non-Negro, non-Mexican and non-Asian descent." *Id.* at 73. A person who adopts a child who is not white cannot remain a member of the Klan. *Id.* at 349-350. As discussed further below (pp. 12-13, *infra*), if the Klan were allowed to adopt a highway under petitioners' AAH program, nonwhite persons would be excluded from the AAH activities on that stretch of highway because respondent Cuffley testified that he would select five or six people from his den of the Klan to clean up the adopted stretch of highway.

3. a. After the Klan initially filed its AAH application, the MHTC filed suit in the United States District Court for the Eastern District of Missouri, seeking a declaratory judgment that it was not required to grant the Klan's AAH application. On June 11, 1996, the district court granted the Klan summary judgment and held that the MHTC's denial of the Klan's AAH application would unlawfully infringe the Klan's freedom of speech. *Missouri, ex rel., Mo. Highway & Transp. Comm'n* v. *Cuffley*, 927 F. Supp. 1248.

b. On May 7, 1997, the court of appeals vacated the district court judgment and remanded with instructions to dismiss the action for lack of jurisdiction, in part because the case was not ripe due to the MHTC's failure to act on the Klan's AAH application. *Missouri ex rel. Mo. Highway & Transp. Comm'n* v. *Cuffley*, 112 F.3d 1332, 1338.

4. On August 14, 1997, the Missouri Department of Transportation denied the Klan's AAH application. Pet. App. 21a. It provided five reasons for that denial: (1) that the Klan "does not adhere to all state and federal nondiscrimination laws in that it discriminates on the basis of race, religion, color and national origin"; (2) that the Klan "has a history of unlawfully violent and criminal behavior"; (3) that Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, "prohibits [the] Missouri Department of Transportation from conferring a benefit to the Knights of the Ku Klux Klan because of the Knights' discriminatory practices, and granting the application would confer such a benefit in contravention of federal law"; (4) that Missouri Executive Order No. 94-03 (1994) "prohibits state agencies from allowing discriminatory practices on state facilities and prohibits contracting with an organization that discriminates, and, therefore, prohibits the [Klan] from participating in this program"; and (5) that the St. Louis district of the Missouri Department of Transportation "has placed a moratorium on adoptions on interstate highways within the City of St. Louis."[1] C.A. App. 465.

5. Respondents then filed the instant suit in the United States District Court for the Eastern District of Missouri, under 42 U.S.C. 1983, alleging that petitioners' denial of their AAH application violated their rights to equal protection and due process and constituted viewpoint discrimination in violation of the First and Fourteenth Amendments. Pet. App. 21a. On April 13, 1999, the district court entered

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[1] Sometime between December 1994 and April 1997, the St. Louis Metro District of the Missouri Department of Transportation imposed a moratorium on all new AAH adoptions of interstate highways within the city limits of St. Louis. C.A. App. 556-557; Pet. App. 20a.

judgment, granting in part the Klan's motion for summary judgment. *Id.* at 18a-30a.[2]

The district court first ruled that participation in the AAH program constitutes speech protected by the First Amendment, that the speech involved in the AAH program is not the MHTC's speech, and that the MHTC had created the AAH program as a nonpublic forum. Pet. App. 22a-24a. The court then held that petitioners' regulation denying participation in the AAH program to applicants who discriminate on the basis of race, color, or national origin (Mo. Code Regs. Ann. tit. 7, § 10-14.030(2)(B) (1995)) is a reasonable regulation, in light of what it described as the regulation's purpose to avoid placing the MHTC at risk of forfeiting federal funding. Pet. App. 25a. But the court rejected the MHTC's argument that it had denied the application on the ground that the Klan's discriminatory policies violate Title VI, because it concluded that the Klan's activities could not give rise to a violation of Title VI (or of the state regulation or executive order). *Id.* at 25a-26a. It reached this conclusion by reasoning that the Klan does not control access to, and does not itself constitute, a program or activity as defined in Title VI. Because the court found no violation of relevant antidiscrimination law, and rejected petitioners' other state regulatory grounds for denying the application,[3] the court reasoned that the MHTC's rejection of the Klan's application was not based on the State's nondiscrimination policies, but rather was based on the Klan's beliefs, in violation of the First Amendment. *Id.* at 29a.

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[2] The district court rejected respondents' equal protection and due process claims, Pet. App. 21a-22a, and petitioners' collateral estoppel argument, *id.* at 22a n.2.

[3] The district court rejected petitioners' reliance on the regulation (Mo. Code Regs. Ann. tit. 7, § 10-14.030(2)(C) (1995)) that prohibits participation in the AAH program by an applicant with a history of unlawfully violent or criminal behavior, on the ground that the regulation is unreasonably vague. Pet. App. 26a-27a.

With respect to the MHTC's moratorium on AAH adoptions within the city limits of St. Louis, the court found that it constituted a reasonable and viewpoint-neutral regulation, Pet. App. 27a-28a, noting that "[t]he Klan may still adopt a highway in any location within the state not affected by the moratorium." *Id.* at 27a. Accordingly, the court held that the Klan's application to adopt the stretch of highway in St. Louis was properly denied based on the moratorium, but the court enjoined petitioners from denying the Klan's AAH application on the basis of its regulations relating to nondiscrimination and criminal history. *Id.* at 29a.

6. The court of appeals affirmed the judgment in favor of respondents. Pet. App. 1a-17a.[4]

The court concluded that petitioners initially had treated the Klan's application differently "from the vast majority of applicants based on the State's perception of the Klan's beliefs and advocacy." Pet. App. 8a. The court relied on a deposition of a state official that was taken in conjunction with petitioners' declaratory judgment action, *i.e.*, *before* the 1997 order of the court of appeals holding that the case was not ripe due to the State's failure to act on the application and the court's inability to "determine what reasons the State actually will choose to support its denial." 112 F.3d at 1338. The official had testified that the initial referral in 1994 of the Klan's application by an AAH district coordinator to the AAH statewide coordinator was a special situation that had to do with what the Klan believed and advocated.

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[4] The court agreed with the district court's rejection of petitioners' collateral estoppel argument, Pet. App. 4a n.2, and it indicated that the Klan's cross-appeal of the denial of its equal protection claim was resolved by its ruling on the First Amendment claim, *id.* at 4a-5a n.3. The court declined to determine whether the Klan's participation in the AAH program involved constitutionally protected speech by the Klan or whether the AAH program is a public forum, in light of its ruling that the MHTC could not deny access to the AAH program based on the Klan's expressed views. *Ibid.*

Pet. App. 5a-6a. That official believed that the MHTC could deny an AAH application based on the applicant's beliefs. *Id.* at 6a-7a.[5]

The court of appeals acknowledged that "a justification for further review of an application does not necessarily equate with the justification for denial of an application," but the court reasoned that, "absent a convincing and constitutional reason for the denial," the only conclusion left was that the MHTC relied on the same ground to deny the Klan's application, which was unconstitutional. Pet. App. 8a. The court of appeals recognized that the letter denying the Klan's application provided five viewpoint-neutral reasons to support the denial, but the court rejected each of them in turn.[6]

The court of appeals held that the regulation requiring AAH applicants to adhere to state and federal nondiscrimination laws (Mo. Code Regs. Ann. tit. 7, § 10-14.030(2)(B) (1995)) did not justify the denial, because petitioners had not identified any nondiscrimination law that the Klan was violating. Pet. App. 9a-12a.[7] And the court re-

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[5] The court of appeals noted that the state official filed an affidavit in 1998 that maintained that "the State does not consider the beliefs of the applicant, but simply applies Adopt-A-Highway program regulations to determine whether an applicant is eligible to adopt." Pet. App. 7a. That affidavit was filed after the MHTC lost the initial declaratory judgment action in the district court and had promulgated regulations to govern the AAH program. The court refused to credit the affidavit because the court did not believe that the earlier deposition "evinces the kind of mistake and confusion necessary to allow [the] contradictory affidavit to create an issue of fact on these points." *Id.* at 7a-8a.

[6] The court explained that the Klan had amended its AAH application to request adoption of a segment of highway outside the city limits of St. Louis, thereby rendering moot the question of the denial based on the citywide moratorium. Pet. App. 9a.

[7] The court further reasoned that, even if there were a law that required denial of respondents' AAH application on the basis of its discriminatory membership, application of such a law to the Klan would violate the Klan's freedom of political association because "requiring the Klan to accept non-'Aryans' would significantly interfere with the Klan's message of racial superiority and segregation," Pet. App. 10a, and place an

jected petitioners' argument that granting the Klan's AAH application would lead to unlawful discrimination by the State because of its relationship with the Klan. *Id.* at 11a.

The court held that petitioners' reliance on its regulation excluding applicants with a history of unlawfully violent or criminal behavior (Mo. Code Regs. Ann. tit. 7, § 10-14.030(2)(C) (1995)) was pretextual, Pet. App. 12a-13a, because the State did not have any criteria for enforcing the regulation and had never investigated whether any other applicants violated the regulation. *Id.* at 13a.

The court held that allowing the Klan to participate in the AAH program would not violate Title VI. Pet. App. 13a-15a. The court noted that Title VI "does not apply directly to prohibit the Klan's discriminatory membership criteria" because the Klan is not a recipient of federal funds. *Id.* at 14a. The court then concluded that Title VI does not bar petitioners from allowing the Klan to participate in the AAH program. The court concluded that the Klan's adoption of a highway would not mean that others could not clean up along that portion of the highway, *ibid.*, relying on a statement by petitioners' counsel at oral argument that, "subject to safety restrictions, anyone can pick up trash along Missouri highways, including highways adopted by others," *id.* at 11a-12a n.7. The court reasoned that the Klan would simply be a participant in the AAH program and is free to determine its own membership. *Id.* at 15a. So long as petitioners did not deny anyone an opportunity to adopt a highway on an impermissible basis, the court held, "the State does not violate Title VI." *Ibid.*

The court found that the State's Executive Order No. 94-03 does not prohibit allowing the Klan to adopt a highway because the State would not be promoting discrimination or discriminating in offering a service, and because the order

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unconstitutional condition on the Klan's participation in the AAH program, *id.* at 12a.

does not prohibit the Klan from discriminating in its membership. Pet. App. 15a. The court also asserted that petitioners' nondiscrimination-related reasons were pretextual. *Ibid.* The court emphasized that petitioners do not inquire about or investigate the membership criteria of other AAH applicants and have never denied the application of another group on that ground, although AAH participants include organizations whose memberships apparently are restricted on the basis of sex and religion. *Id.* at 16a.

The court ultimately concluded that, in light of the "unreasonable and pretextual reasons" provided by petitioners, the court was "left only with the admitted reason the State was motivated to carefully scrutinize the Klan's application as an explanation for the denial: that the State disagrees with the Klan's beliefs and advocacy." Pet. App. 16a. The court ruled that such viewpoint-based exclusion from a government program is an unconstitutional condition. *Ibid.* (citing *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972)).[8]

DISCUSSION

The petition for a writ of certiorari should be granted, limited to Question 1 as stated in this brief. The court of appeals has narrowly construed Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, in a way that substantially limits the nondiscrimination obligations imposed by that statute on federal fund recipients. That narrow construction not only limits the actions of the MHTC and other federal fund recipients seeking to ensure nondiscrimination under their operations, but also limits the ability of the United States to enforce the statutory ban on discrimination in the operations of federal fund recipients. The court's cramped reading of those obligations is inconsistent with this Court's decisions in *Gebser* v. *Lago Vista Independent*

[8] Petitioners' petition for rehearing en banc was denied, with two judges voting to grant the petition. Pet. App. 31a.

School District, 524 U.S. 274 (1998), and *Davis* v. *Monroe County Board of Education*, 526 U.S. 629 (1999), and with the plain language and purpose of the statute; it should be corrected in order to permit the statute to serve its intended purpose of ensuring that federal funds are not used in a manner that furthers or subsidizes racial discrimination.

The court of appeals erroneously held that Title VI is not violated so long as the state agency receiving federal financial assistance does not itself deny anyone participation in its covered operations on a racially discriminatory basis. Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. 2000d. That prohibition is violated not only when persons are entirely excluded from a program or activity on the basis of race, color, or national origin, but also when they are subjected to discrimination on such grounds under the program or activity. And this Court has made clear that Title VI is violated not only when a fund recipient directs and intends the exclusion or discrimination, but also when the fund recipient fails to ensure compliance by others with the nondiscrimination requirement under its operations. The MHTC is a state agency that receives federal funds (C.A. App. 64-65), and as such the MHTC must, in all of its operations, including its AAH program, ensure compliance with the nondiscrimination mandate of Title VI and its implementing regulations. 42 U.S.C. 2000d-4a(1)(A). Therefore, Title VI would have been violated if petitioners had granted the Klan's AAH application and the Klan excluded non-white persons from participating in AAH activities on the stretch of highway adopted by the Klan.

The court of appeals' erroneous interpretation of Title VI would prohibit petitioners and the United States from taking action necessary to avoid a Title VI violation. The rationale

of the decision could permit participants in a program receiving federal funds to be subjected to differential treatment within the program on the basis of race, color, or national origin, so long as they were not entirely excluded from the program. Indeed, that rationale would permit such fund recipients to avoid their nondiscrimination obligations by the simple expedient of entrusting the conduct of their operations to third parties and absolving the fund recipients of all responsibility for enforcing a ban on discrimination in those delegated operations. Congress did not write a ban that is so readily evaded. For these reasons, the ruling could substantially undermine enforcement of Title VI. We therefore believe that review by this Court is warranted.

We recommend, however, that the Court's grant of certiorari be limited to the Title VI question. Proper resolution of that question would mean that a lawful, nonspeech-based reason would justify petitioners' denial of respondents' AAH application. Because the court of appeals' analysis of the First Amendment issues was predicated on the erroneous belief that Title VI had no application here, the case should be remanded for reconsideration of the remaining issues in light of a correct interpretation of Title VI.

1. a. Section 601 of Title VI of the Civil Rights Act of 1964, provides that:

> [n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. 2000d. Congress intended that Title VI ensure that "public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination." *Lau* v. *Nichols*, 414 U.S. 563, 569 (1974) (quoting 110 Cong. Rec. 6543 (1964) (statement of Sen. Humphrey, quoting President

Kennedy's message to Congress)); see also *Cannon* v. *University of Chicago*, 441 U.S. 677, 704 & n.36 (1979) ("Title IX, like its model Title VI, sought to * * * avoid the use of federal resources to support discriminatory practices"). For purposes of Title VI, a "program or activity" means "all of the operations of" any "department, agency, * * * or other instrumentality of a State or of a local government," "any part of which is extended Federal financial assistance." 42 U.S.C. 2000d-4a(1)(A).

Under Section 602 of Title VI, federal agencies, such as the United States Department of Transportation, which are "empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract," were directed to issue "rules, regulations, or orders of general applicability," consistent with the objectives of the funding statute to effectuate Section 601's prohibition against discrimination. 42 U.S.C. 2000d-1. In 1970, the Department of Transportation promulgated such regulations, see 49 C.F.R. Pt. 21, which provide, *inter alia*, that a federal fund recipient

> may not, directly or through contractual or other arrangements, on the grounds of race, color, or national origin, * * * [d]eny a person an opportunity to participate in the program through the provision of services or otherwise or *afford him an opportunity to do so which is different from that afforded others under the program.*

49 C.F.R. 21.5(b)(1) (vi) (emphasis added).[9] See also 23 C.F.R. 200.5(p)(1) (Federal Highway Administration's

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[9] The Department of Transportation's 1970 regulations also include the regulation, 49 C.F.R. 21.5(b)(2), which is at issue in *Alexander* v. *Sandoval*, No. 99-1908 (argued Jan. 16, 2001). The parties in this case and the courts below, however, have not relied on that regulation. Moreover, this case does not involve an action to enforce Title VI against petitioners, either by the government or a private party. Therefore, there is no reason to hold this case pending the Court's disposition of *Sandoval*.

Title VI regulations incorporating United States Department of Transportation's Title VI regulations).

b. The MHTC is a state agency that receives federal funds. C.A. App. 64-65 (more than one-third of MHTC's funding for highway maintenance and construction was federal). As such, the MHTC must, in all of its operations, including its AAH program, ensure compliance with the nondiscrimination mandate of Title VI and its implementing regulations. 42 U.S.C. 2000d-4a(1)(A).

2. a. Allowing the Klan to adopt a Missouri highway under petitioner's AAH program would violate Title VI because the Klan, by selecting only its members to participate in AAH activities on its adopted stretch of highway, would be subjecting non-white persons to discrimination based on race, color, and national origin under that program. As an adopter of a highway under petitioners' AAH program, the Klan would have the authority to select the persons who would participate in the AAH activities on the adopted stretch of highway. Respondent Cuffley, the then-highest ranking member of respondent Missouri den of the Klan, testified about how he would exercise his control over selection of the persons to participate in the AAH activities on the Klan's adopted highway segment. Cuffley testified that there were thousands of members in his den of the Klan and, when asked "from what portion of that den would you choose to participate in the Adopt-a-Highway Program if that application were granted," he responded that he thought "we would only need maybe five or six people to clean up a half-mile stretch of a highway." C.A. App. 217. Cuffley testified that he had "no problem with the Highway Department coming down and giving a safety meeting if that's what they want to do." *Id.* at 216. He agreed that, if required by petitioners, the only participants from the Klan in the litter pick-up program would be those individuals who attended a safety meeting conducted by a state highway official. *Ibid.* When questioned about how the Klan would comply with a

requirement that the participants in the litter pick-up program attend such a safety meeting in light of the Klan's claim that the participation of its members in the Klan is confidential, respondent Cuffley testified that he "would pick the people that the Highway Department could give a safety meeting to, if they needed everybody present; yes, I would." *Ibid.*

Because the Klan excludes non-white persons from its membership based on race, color, and national origin (C.A. App. 73, 228, 251; see also *id.* at 349-350), Cuffley's selection of Klan members to perform the AAH activities would mean that non-white persons would, on the basis of race, color, and national origin, be excluded from AAH activities, and be subjected to discrimination, on the Klan's adopted portion of the highway. It would mean that the terms on which a person is allowed to participate in certain of petitioners' AAH activities would be based on race, color, and national origin. Such exclusion by the Klan of persons based on the prohibited grounds from certain AAH activities would subject persons to discrimination under those activities.[10]

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[10] The Department of Transportation's regulations confirm that MHTC's allowing the Klan to adopt a highway under its AAH program would have violated Title VI. Those regulations provide that a federal fund recipient may not, on the grounds of race, color, or national origin, "directly or through contractual or other arrangements," afford a person an opportunity to participate in a program "which is different from that afforded others under the program." 49 C.F.R. 21.5(b)(1)(vi). The AAH agreement which an adopter is required to complete, and which the Klan completed (C.A. App. 54), constitutes a "contractual or other arrangement[]" between the MHTC and the adopter to engage in litter abatement activities on a particular state highway right-of-way—a function that the MHTC would otherwise have to undertake itself in a nondiscriminatory fashion. Yet, under the court of appeals' reasoning, the MHTC was precluded from preventing or stopping discrimination by the Klan under the AAH program. The result would be that the participation of non-white persons in petitioners' AAH program would be limited, based on race, color, and national origin, to certain stretches of state highway. Accordingly, the MHTC would be compelled, through the arrangement and contrary to the regulation, to afford non-white persons, because of their

Contrary to respondent's claim (Br. in Opp. 2-3 n.1), enforcement of Title VI would not require the Klan to alter its membership requirements or its message, and would not, therefore, establish an unconstitutional condition. The Klan, like other participants in the AAH program, would simply be prohibited from engaging in discrimination on the basis of race, color, or national origin in the conduct of its participation in the operations of a program receiving federal financial assistance. Cf. *Rust* v. *Sullivan*, 500 U.S. 173, 196-199 (1991) (explaining this distinction).

b. The fact that the Klan, rather than the federal fund recipient itself, would initially exercise the authority to exclude persons from the AAH activities based on the prohibited grounds does not mean that no Title VI violation would occur. This Court has recognized, in the context of the analogous nondiscrimination provision of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, that a statutory violation under a funding-condition statute like Title VI may be premised on discrimination initiated by someone other than the federal fund recipient. *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).[11] In *Gebser*, the Court held that a recipient school district may be liable in a private action for money damages for the discriminatory conduct of one of its teachers that occurred under its school program, if the district knew about the conduct and was deliberately indifferent to it. The Court based that decision on the express remedial scheme in Title IX (20 U.S.C. 1682), which has a direct parallel in Title VI

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race, color, and national origin, an opportunity to participate in the AAH activities that is "different from that afforded others under the program," contrary to the Department of Transportation's regulation to which deference is due. *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 739-741 (1996).

[11] See *Cannon*, 441 U.S. at 694-696 (explaining that Title IX was patterned after Title VI and that Congress intended that the two statutes be interpreted and applied in similar manner).

(42 U.S.C. 2000d-1), governing federal administrative enforcement of the recipient's nondiscrimination obligations, which can include suspension or termination of funding. That provision requires "notice of the violation 'to the appropriate person' and an opportunity for voluntary compliance before administrative enforcement proceedings can commence." 524 U.S. at 288-290. The Court explained that "[t]he administrative enforcement scheme presupposes that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance. The premise, in other words, is an official decision by the recipient not to remedy the violation." *Id.* at 290. The Court reasoned that "the implied damages remedy should be fashioned along the same lines," and held that a governmental fund recipient could not be liable in a private action for money damages (which the Court noted could exceed the level of federal funding) unless it has received notice of the violation and responded with deliberate indifference. Thus, *Gebser* demonstrates that, once a recipient is aware of conduct that excludes persons from participation in, denies persons the benefits of, or subjects persons to discrimination under, the recipient's operations, the recipient would be liable for such a violation of Title VI if it failed to take action to stop that discriminatory conduct.

Moreover, a federal fund recipient's responsibilities for supervision of its operations is not limited to its agents. Thus it is no answer to the Title VI argument that the Klan may not be acting as an agent of the MHTC when it engages in the racially discriminatory exclusion of persons from AAH activities.[12] In *Davis* v. *Monroe County Board of Education*, 526 U.S. 629 (1999) (also involving Title IX), the Court held

[12] Of course, if the Klan were determined to be acting as an agent of the State for these purposes, as petitioners contend (Pet. 12-17), the discrimination would violate the Equal Protection Clause. Correct resolution of the Title VI statutory issue, however, would make it unnecessary to reach that constitutional question.

that a federal fund recipient may be liable under the *Gebser* standard in a private action for money damages to persons who are subjected to discrimination initiated by a non-agent (in *Davis*, a student), so long as the discrimination by the non-agent occurs in a context that is subject to the recipient's control and the recipient fails to respond. *Id.* at 643-644. The Court reasoned that, "whether viewed as 'discrimination' or 'subject[ing]' students to discrimination," Title IX "[u]nquestionably" places on recipients the duty not to permit in their schools sex discrimination that violates the terms of Title IX.

The same reasoning applies here. Title VI unquestionably places on the MHTC the duty not to permit race discrimination by participants, including volunteers (whether agents or non-agents), under any of its operations, including litter pick-up activities on state highway rights-of-way over which the MHTC exercises control and statutory authority. It would violate Title VI's plain terms if the Klan were allowed to perpetrate such discrimination under AAH activities.[13]

Finally, it is no answer to the Title VI argument that non-white persons could seek to adopt a different stretch of Missouri highway under the MHTC's AAH program, because such persons would still be subject to discrimination based on their race, color, or national origin, in the AAH activities occurring on the stretch of highway adopted by the Klan. Allowing a person to participate in a federal fund recipient's operations on terms less advantageous than those afforded to persons of another race constitutes unlawful discrimination under Title VI. Under the court of appeals' ruling, non-white persons would have fewer opportunities to participate in AAH activities, because of their exclusion

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[13] Because this case does not arise out of an action to enforce Title VI or its regulations, the case does not raise questions regarding what standards of notice would have to be met in order to obtain injunctive and/or monetary relief against the federal fund recipient in either an action brought by the federal government or by a private party.

based on prohibited grounds from the AAH activities on the highway adopted by the Klan. It cannot be that Title VI allows, for example, a student to be excluded from a program or activity of a recipient school (or any aspect of that program or activity) based on race, color, or national origin, so long as he or she can participate in all other aspects of the school's programs or activities. Moreover, even if the number of opportunities were the same, the segregation of white persons and non-white persons in AAH activities on particular stretches of highway itself would constitute impermissible race discrimination in violation of Title VI—a statute whose "immediate goal" was "an end to federal funding of 'separate but equal' facilities." *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 416 n.17 (1978) (Stevens, J., concurring in the judgment in part and dissenting in part).[14]

3. The court of appeals' erroneous analysis of Title VI warrants review and correction by this Court.[15] The court of

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[14] According to the court of appeals (Pet. App. 11a-12a n.7), petitioners' counsel suggested that non-white persons could clean along the highway area adopted by the Klan. That suggestion appears inconsistent with petitioners' position that, "if the Klan were granted AAH status, no one other than white, Anglo-Saxon Christians would be permitted to clean up litter on that portion of the highway adopted." C.A. App. 705. In any event, petitioners make each stretch of highway available to only one adopter. See *id.* at 305, 555-556, 574. Thus, if any persons apart from the assigned adopter were permitted to pick up litter on the highway segment adopted by the Klan, they would do so outside the AAH program, *i.e.*, the AAH program would not provide them with clean-up or safety materials, safety training, or a sign, as it does under the program. *Id.* at 54, 452-453. Such persons would therefore still be subjected to discrimination with regard to the AAH activities on the portion of the highway that the Klan adopted.

[15] It is unclear whether the court of appeals' assertion (Pet. App. 15a-16a) that "there is also evidence" that petitioners' "discrimination-related reasons" are "entirely pretextual," was intended as an independent basis for rejecting petitioners' Title VI argument. There is no foundation for the court of appeals' suggestion that the AAH program permits participation of other adopters that "have discriminatory membership criteria" (*id.* at 16a) because the record does not appear to contain evidence regarding membership practices of other adopters, or evidence as to

appeals' rationale is fundamentally at odds with the central purpose of Title VI that public funds "not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination." *Lau*, 414 U.S. at 569 (quoting 110 Cong. Rec. 6543 (1964) (statement of Sen. Humphrey, quoting President Kennedy's message to Congress)). That interest is especially pronounced where, as here, the discrimination would occur in activities that are under the "tight control" (Pet. App. 24a) of a state agency, are closely associated with the agency, involve duties that the agency is required to fulfill, and that would otherwise ordinarily be performed by the agency. The court of appeals' ruling that petitioners could not deny respondents' AAH application in order to prevent discrimination to be perpetuated under programs and activities that receive federal funds may adversely affect the federal government's (and private parties') ability to enforce Title VI and may confuse recipients and participants as to their respective obligations and rights. Although there is not an existing disagreement among the Circuits on the issue, it is clear, in light of the brief filed by more than 25 States as *amici curiae* in support of petitioners, that resolution of this issue would be of great significance to numerous jurisdictions. In light of the importance of Title VI's nondiscrimination mandate and the erroneous interpretation by the court of appeals of that mandate, the Title VI issue presented by this case should be resolved promptly.

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whether they select only their members to participate in AAH activities. Title VI (and 23 U.S.C. 324, which prohibits discrimination on the basis of sex in federally assisted highway programs) apply equally, of course, with regard to discrimination on prohibited grounds by all AAH adopters under petitioners' AAH program or its activities. In any event, any finding by the court of appeals that petitioners' reliance on Title VI was pretextual was premised in part on that court's incorrect view that the Title VI argument was without merit. Thus, any finding it may have made on that argument is not entitled to deference. See *Schneiderman* v. *United States*, 320 U.S. 118, 129-130 (1943).

We do not believe, however, that review of the other issues presented in this case would be appropriate at this time.[16] In light of the fact that Title VI would be violated by petitioners allowing the Klan to discriminate against participants in AAH activities on a highway the Klan adopts, the lower courts should be afforded an opportunity to reassess the case. For example, such a viewpoint-neutral basis for denial of an AAH application bears on the analysis of respondents' First Amendment claims and may render it unnecessary for a court to resolve such constitutional questions. See *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 284-287 (1977) (if employer had two motives for terminating employee and one reason was lawful but other was improperly based on constitutionally protected conduct, employee could not prevail if the lawful reason standing alone would have sufficed to justify the termination); cf. *Board of County Comm'rs, Wabaunsee County* v. *Umbehr*, 518 U.S. 668, 685 (1996) (applying *Pickering* v. *Board of Educ.*, 391 U.S. 563 (1968), and holding that, even if contractor makes showing that termination of its government contract was based on its speech on a matter of public concern, government has a valid defense if it shows that it would have terminated the contract regardless of the speech); see also Br. of *Amici Curiae* Virginia and 28 other States, in Supp. of Pet'rs. 10-15. The resultant Title VI violation also is relevant to any remedy ordered. *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 359-362 (1995) (evidence justifying termination of employee that was discovered after employee was actually terminated can limit damages award in age discrimination suit brought by

[16] In our view, the lower court rulings on other issues were mistaken in several respects. For example, petitioners' AAH program does not constitute a public forum or involve speech by highway adopters, nor would enforcement of Title VI's nondiscrimination mandate under the operations of petitioners' AAH program unconstitutionally interfere with respondents' associational rights.

employee and such evidence generally renders reinstatement and front pay inappropriate: "It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds.").

CONCLUSION

The petition for a writ of certiorari should be granted limited to Question 1 as stated in this brief regarding Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*

Respectfully submitted.

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