Testimony of Peter N. Kirsanow
Before the Senate Judiciary Committee on the
Nomination of Elena Kagan to the United States Supreme Court

July 1, 2010

Chairman Leahy, Ranking Member Sessions, members of the Committee, I am Peter N. Kirsanow, a partner in the labor and employment practice group of the Cleveland, Ohio, law firm, Benesch, Friedlander, Coplan & Aronoff, and a member of the U.S. Commission on Civil Rights. I am here today in my individual capacity.

The Civil Rights Commission was established by the Civil Rights Act of 1957 to study and collect information related to discrimination or the denial of equal protection under the law on the basis of color, race, religion, sex, age, disability or national origin; to appraise the laws and policies of the federal government relating to discrimination or denials of equal protection; and to serve as a national clearinghouse of information relating to the same.

This confirmation hearing provides a critical opportunity for Senators—and the American people—to probe Ms. Kagan's views on what remain some of the most pressing and controversial issues of our day—issues related to race, equal treatment under the laws, and equality of opportunity. As part of my individual role in furthering the Commission's clearinghouse function and with the help of my special assistant, I have analyzed the available evidence regarding Solicitor General Kagan's views and actions on civil rights issues. Ms. Kagan's nomination differs from that of other nominations in the recent past in that she has no record of judicial opinions to indicate her approach towards civil rights issues, nor has civil rights been a focus of her academic pursuits. Her private practice experience, limited to two years, is similarly unrevealing. As such, my analysis focuses on the work she performed and the

views she expressed during her career as a law clerk, White House counsel and policy advisor, law school dean and Solicitor General.

Although Ms. Kagan's record on civil rights is not as fully developed as some might prefer for a nominee to the nation's highest court, it is not wholly without guidance as to how she might approach these important issues as an Associate Justice. For example, her views and comments in a number of key cases in which she has been involved during her career indicate that Ms. Kagan has an active interest in, and strong policy preferences regarding, the permissible uses of race in the education and employment contexts. Her views are out-of-step with both the color-blind values of the American people and with the views of at least four, and sometimes five, members of the current Supreme Court, whose jurisprudence in these areas continues to reflect a discomfort with divisive racial bean counting. Taken together with comments Ms. Kagan has made that appear to embrace a more activist judicial philosophy,[1] her approach in these cases raises serious questions about whether a Justice Kagan would sanction the use of race as a basis upon which to bestow benefits and burdens on Americans and whether she would allow her policy preferences on these matters to influence her judging.

During her time at the White House, Ms. Kagan had occasion to influence both the legal and policy landscapes surrounding the issue of affirmative action. Her White House records show that she was enthusiastic about the endeavor, at one point volunteering to take the lead for coordinating the Administration's positions on the issue. For example, in a 1995 email to Abner Mikva, her boss and White House counsel under President Clinton, Kagan lobbied to be put in

[1] For example, in a 1995 law journal article, Ms. Kagan wrote that Justices' experiences and "conceptions of value" play key roles in their decision-making. In her graduate thesis, she criticized suggestions that it is "wrong or invalid" for judges to "mold and steer the law in order to promote certain ethical values and achieve certain social ends." Her perception of the Court's institutional role is similarly troubling. In comments praising the approach of her former boss, Justice Thurgood Marshall, she suggested that rather than interpret and apply the law absent bias or preference for the litigants before it, the court's primary mission is to "safeguard the interests of people who had no other champion."

charge of affirmative action upon the departure of presidential race adviser Christopher Edley. "Is there a need for someone to keep on top of the affirmative action issue—for example, by working with Justice on its review of all affirmative action programs? *I know the issue well (because I teach it) and care about it a lot; if there's stuff to do here, I'd love to do it*."[2]

Her views on one particular case—*Piscataway Board of Education v. Taxman*[3]—should be of particular concern to this committee. The central issue in *Taxman*, one that has never been resolved by the Supreme Court, was whether Title VII of the Civil Rights Act of 1964 allows employment discrimination in the name of the nonremedial interest of promoting diversity in an educational environment. The case involved the Piscataway school board's decision to eliminate a position in the Business Department of its high school. Two teachers with the least seniority were candidates for the layoff—one black (Williams), the other white (Taxman). Williams was the only black teacher in that Department. Both had started the same year and thus had equal seniority. They also had similar qualifications and were considered equally qualified by the Board. While the Board had used random selection in the past to decide between its layoff candidates in such circumstances, this was the first time it had to decide between a white and a black employee. As a result, it invoked its voluntary affirmative action policy and used race as the deciding factor in laying off Taxman instead of Williams, citing a need to maintain racial diversity among the faculty of the Business Education Department.

Taxman filed a charge of employment discrimination with the Equal Employment Opportunity Commission, but attempts at conciliation were unsuccessful.[4] The United States under the Bush Administration sued the school district in federal court, alleging that Taxman had been discriminated against under Title VII on account of her race. The trial court granted

[2] E-mail from Elena Kagan to Abner Mikva (July 25, 1995) (on file in E-mails Box 010, Folder 001).
[3] 91 F.3d 1547 (3d Cir. 1996).
[4] *Id.* at 1552.

summary judgment finding the district liable under both Title VII and a New Jersey state anti-discrimination law. By the time the trial proceeded on the issue of damages, Taxman had already been rehired, so reinstatement was not an issue. She was awarded damages for full back-pay, fringe benefits and pre-judgment interest, and under the state statute, an additional $10,000 for emotional suffering. The Board appealed the district court's finding of liability and, in the alternative, its monetary award. At this point in the litigation, there was a change in presidential administrations. Though the previous administration had supported Taxman, the Clinton Administration subsequently sought leave to file an amicus brief in the case in support of the Board for reversal of the judgment, effectively switching sides. The Third Circuit denied the request, but permitted the United States to withdraw from the case.

Sitting en banc, the Third Circuit subsequently struck down the Board's action on the ground that to be legal under Title VII, an affirmative action plan must have a remedial purpose. For authority, it relied on the Supreme Court's decisions in *United Steelworkers v. Weber*,[5] which set forth the test for permissible private, voluntary affirmative action plans in employment and *Johnson v. Transportation Agency, Santa Clara County*,[6] which applied the *Weber* test to voluntary affirmative action plans undertaken by public entities where prior discrimination was based on gender, not race. Under those precedents, an affirmative action plan is legal if it mirrors the remedial purposes of Title VII to eradicate discrimination and its effects from the workplace, does not necessarily infringe upon the interests of non-minority employees and is used as a temporary measure only to eliminate a manifest racial imbalance, not to maintain racial balance.[7]

[5] 443 U.S. 193 (1979).
[6] 480 U.S. 616 (1987) (Stevens, J., concurring).
[7] *Weber*, 443 U.S. at 208.

The Third Circuit held that the Piscataway School Board's affirmative action plan failed the first-prong of the *Weber* test.[8] Specifically, it could not locate any "congressional recognition of diversity as a Title VII objective requiring accommodation."[9] Importing the Supreme Court's reasoning in its Equal Protection line of cases, which the Board claimed did recognize nonremedial uses of race, to the Title VII context would not help the Board, either, the Third Circuit reasoned. The circuit court read one of those cases—*Wygant v. Jackson Board of Education*,[10]—to stand for the proposition that societal discrimination alone could not justify the use of a racial classification. Instead, an employer must have a strong basis in evidence that these measures are necessary before employing such classifications.[11] Here, the Board admitted it was not acting to remedy the effects of past employment discrimination or any underrepresentation of black teachers that may have resulted from it. In fact, blacks were not underrepresented at all in the teaching workforce as a whole, or in Piscataway High School.[12] They were actually overrepresented.[13] The only stated justification for the plan was to obtain the educational benefits of a diverse faculty.[14]

The circuit court further found that the policy violated *Weber's* second prong because it would "unnecessarily trammel [nonminority] interests" given its lack of definition and structure, and lack of clarity over the circumstances in which it would apply. The court also found significant to the second prong analysis the fact that a firing decision (rather than a hiring decision) was at issue here, adopting the plurality in *Wygant's* position that "layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious

[8] *Taxman*, 91 F.3d at 1557.
[9] *Id.* at 1558.
[10] 476 U.S. 267 (1986).
[11] *Taxman*, 91 F.3d at 1560-61 (summarizing the reach of Court's opinion in *Wygant*, 476 U.S. at 270-78 (O'Connor, J., concurring in part and concurring in the Court's judgment)).
[12] *Id.* at 1563.
[13] *Id.* at 1550-51.
[14] *Id.* at 1563.

disruption to their lives. That burden is too intrusive."[15] It also upheld Taxman's monetary award.

The Board petitioned for a writ of certiorari and the Court asked the United States to express its views on whether the petition should be granted. The court granted certiorari over the United States' recommendation against doing so. The United States then found itself in the uncomfortable position of filing an amicus brief in the case. To members of the Clinton Administration, the case was the wrong vehicle for analyzing the critical question of whether Title VII permitted the voluntary use of race in employment decisions for nonremedial purposes, and they were concerned that Third Circuit's opinion stood a strong chance of being affirmed by at least five members of the Court.[16]

In a memo from Walter Dellinger to the Attorney General, reviewed by Ms. Kagan, among others in the White House and at the Department of Justice, Mr. Dellinger devised a strategy that involved filing a brief on the narrowest grounds possible—arguing that the monetary award to Taxman should be affirmed because the Board did not adequately defend or provide justification for its race-based layoff decision. Mr. Dellinger's hope was that the Court would sidestep the central question at issue in the case, but the Department would compose a brief that nonetheless argued strongly for the court to uphold the use of nonremedial racial preferences in employment.[17] The memo also shows that the strategy was coordinated with representatives of traditional civil rights litigation groups, who agreed that the Board's decision in this case could not be defended. In a hand-written note in the margin of the Dellinger memo,

[15] *Id.* at 1564 (citing *Wygant*, 476 U.S. at 283).
[16] Memorandum from Walter Dellinger to the Attorney General 2 (July 29, 1997) (on file in DPC Box 038, Folder 002 – Race – Affirmative Action).
[17] Id. at 3.

which Ms. Kagan forwarded to Bruce Reed, she writes of Dellinger's strategy, "I think this is exactly the right position—as a legal matter, as a policy matter and as a political matter."

Ms. Kagan's statement is prima facie evidence that she is a proponent of voluntary, nonremedial uses of race in the employment context. Recognizing the potentially damaging impact of an adverse decision on their ability to use race for social engineering purposes, members of prominent civil rights groups met and agreed on a strategy to raise the requisite amount of funding needed to settle the case. And settle it they did—to much criticism—only days before the Supreme Court was set to hear oral arguments in the case. Taxman received a settlement of $433,500, some $308,500 of which was raised by the civil rights groups.[18]

Ms. Kagan's position on *Taxman* is consistent with some troublesome views she advocated in an education case that came before the Court while Kagan served as a law clerk for Justice Thurgood Marshall. *Citizens for Better Educ. v. Goose Creek Consolidated Independent School District*[19] concerned the question of whether, absent a showing of prior de jure or de facto segregation, a school district could voluntarily adopt a race-based rezoning plan so as to achieve racial balancing of its two district high schools. In the weeks leading up to this hearing, I have heard this case described on a number of occasions as a "desegregation" case. But that label is highly misleading. At the time it adopted its plan, the Goose Creek school district was not under an order to desegregate; in fact, it had *never* operated legally segregated schools. Both parties in the case agreed that there was no discernable difference in its two high schools' facilities or resources, or in the quality of education both schools provided. In adopting the plan, the district was instead attempting to stay one step ahead of changing demographic and residential patterns

[18] Lisa Estrada, *Buying the Status Quo on Affirmative Action: The Piscataway Settlement and its Lessons About Interest Group Path Manipulation*, 9 GEO MAS. U. CIV. RTS. L.J. 207, 217 (1999).
[19] 719 S.W.2d 350 (Tex. Ct. App., 1st Dist., Aug. 28, 1986).

that were beginning to have an impact on the ethnic make-up of its schools. In other words, its sole purpose for adopting the plan was outright racial and ethnic balancing.

Rather than apply the strict scrutiny standard to the race-based actions of the public school district, the First District Court of Appeals of Texas applied only rational basis review in the case, defending its use of the less rigorous standard by noting that, "[t]hough race is generally considered a suspect classification, it was used in this case to promote integration, i.e., to extend benefits rather than to deny them."[20] The Texas court noted that even if it had applied strict scrutiny, the district's race-based rezoning plan would still be upheld because of the government's compelling interest in "providing an integrated education."[21] It cited as precedent *Brown v. Board of Education*,[22] and a number of the Supreme Court's other desegregation cases. In so doing, it failed to note the critical distinction between the Court's desegregation line of cases and the case at hand. The Court allowed the use of race-based remedies by state actors in the former set of cases to remedy the effects of those entities' own maintenance of a system of unlawful racial classification through their segregated schools. Goose Creek had no such history of state-enforced racial separation of its schools, nor could it be said to be segregated on the basis of race or ethnicity at the time the school board adopted its racial balancing plan.

In her recommendation to Justice Marshall regarding whether the Court should grant a petition for certiorari in this case, Ms. Kagan called the racial-balancing plan at issue "amazingly sensible" and praised the school district for its "good sense" for taking what she perceived to be proactive measures to prevent housing patterns from changing the existing racial and ethnic make-up of the district schools.[23] The Texas court's decision stemmed from its recognition of,

[20] *Id.* at 352.
[21] *Id*. at 353.
[22] 347 U .S. 483 (1954).
[23] Memo from Elena Kagan to Justice Thurgood Marshall (Aug. 6, 1987).

in Kagan's words, the "fairmindedness of the rezoning plan."[24] Such comments are probative of Ms. Kagan's willingness to permit highly suspect racial engineering to orchestrate a desired social outcome.

If some aspects of this 1987 case sound strikingly familiar, it may be because many of the same issues implicated in *Goose Creek* emerged in two cases decided jointly by the Supreme Court in 2007 in *Parents Involved in Community Schools v. Seattle School District No. 1*.[25] In those cases, two separate school districts—one which had never operated legally segregated schools, the other which had achieved unitary status years earlier—classified their K through 12 students by race and relied on those classifications to make school assignments. Like the school district in Goose Creek, the Seattle school district defended its plan on the grounds that its racial assignments system was necessary to address the consequences of racially-identifiable housing patterns. The Jefferson County, Kentucky, school district cited a desire to educate its students in a racially integrated environment. Both argued that they had a compelling interest in promoting the educational and social benefits that purportedly flow from racially diverse classrooms and in avoiding the harms that result from racially isolated schools.

Applying strict scrutiny analysis, the Court in a 5-4 decision found that the districts had not met their heavy burden of showing that their articulated interests justified discrimination in school assignments on the basis of race. Unlike the classification of applicants by race upheld by the Court in *Grutter v. Bollinger*,[26] where race was only a part of a "highly individualized, holistic review,"[27] in this case, race was "not simply one factor weighed with others in reaching

[24] Id.
[25] 551 U.S. 701 (2007).
[26] 539 U.S. 306 (2003).
[27] *Parents Involved*, 551 U.S. at 723(majority opinion of Roberts, C.J.) (citing *Grutter*, 539 U.S. at 337)).

a decision, . . . ; it [wa]s *the* factor."[28] Like the plan the Court struck in *Gratz v. Bollinger*,[29] the racial classifications here were relied upon by the districts in a "nonindividualized, mechanical way."[30] Importantly, Justice Roberts' majority opinion noted that the "present cases are not governed by *Grutter*."[31] In so doing, it limited the nonremedial state interest of diversity to the unique context of higher education.[32]

Contrast this approach with Ms. Kagan's views on *Taxman* and her endorsement of Goose Creek's racial rezoning plan. Her position in those cases signals clearly that she is not an adherent to the idea of the color-blind Constitution. Taken together, *Taxman* and *Goose Creek* permit a few other observations about Ms. Kagan's likely approach towards the propriety of using race-conscious measures generally, as well as in specific cases, that should concern members of this committee.

First, Ms. Kagan would expand the application of race-conscious measures to circumstances beyond those where there is evidence of past discrimination. This is a flat rejection of Chief Justice Roberts' admonition in *Parents Involved*, that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[33] Instead, *Taxman* and *Goose Creek* are reliable indicators that Ms. Kagan supports the notion that government (and likely private entities as well) can voluntarily utilize race-conscious means to pursue perhaps well-intentioned, but amorphous objectives such as promoting diversity and racial inclusion or as was the case in *Goose Creek*, even racial and ethnic balancing to remedy

[28] *Id.*
[29] 539 U.S. 244 (2003).
[30] *Parents Involved*, 551 U.S. at 723 (majority opinion of Roberts, C.J.) (citing *Gratz*, 539 U.S. at 275)).
[31] *Id.* at 725.
[32] *Id.*
[33] *Id*. at 748 (plurality opinion of Roberts, C.J.).

generalized societal discrimination.[34] Prior to the Supreme Court's decisions in *Grutter* and *Gratz*, only national security (including some elements of law enforcement) and the remediation of actual discrimination qualified as compelling state interests.

Relatedly, Ms. Kagan's opinion of the rezoning plan in *Goose Creek* suggests that she might blur the legally relevant distinction between segregation by state action and racial imbalance caused by other factors, a distinction that Chief Justice Roberts, in *Parents Involved*, called "central to our jurisprudence in this area for generations."[35] Assertions of the need to remedy the effects of generalized societal discrimination not traceable to the government's own actions, such as the consequences of racially-identifiable housing patterns Kagan found troublesome in *Goose Creek*, continue to be frowned upon by at least four members of the Court, who have held this rationale to be "plainly insufficient."[36] Yet Kagan's stance in *Goose Creek* indicates she might approve a rezoning plan motivated only by the desire to alleviate racial and ethnic imbalances in schools that result from private choices, such as housing patterns.

Second, where those racial classifications are deemed benign or for beneficent purposes, her recommendation regarding Goose Creek's zoning plan and her support of the posture in *Taxman* indicate that she, like Justice Breyer in his dissent in *Parents Involved*, might feel comfortable applying a less searching standard of review, despite the fact that the Court's cases "clearly reject the argument that motives affect the strict scrutiny analysis."[37] This view would

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[34] *Id.* at 732 ("The principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'").
[35] *Id.* at 736 (citing Milliken v. Bradley, 433 U.S. 267, 280, n.14 (1977) and Freeman v. Pitts, 503 U.S. 467, 495-96 (1992) ("Where segregation is not the product of state action, but of private choices, it does not have constitutional implications.")).
[36] *Id.* at 755 (citing Richmond v. J.A. Croson Co., 488 U.S. at 499 (1989); *Wygant*, 476 U.S. at 274).
[37] *Id.* at 741-42 (citing *Johnson*, 480 U.S. at 505 ("We have insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications"); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (rejecting idea that " 'benign' " racial classifications may be held to "different standard"); and *Croson*, 488 U.S. at 500 ("Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice")).

place the Court in the position of making policy judgments about which proffered motives are benign and which are not, which is beyond its constitutionally-mandated role and for which it is ill-equipped. As the Court has previously admonished, "[h]istory should teach greater humility."[38]

Finally, with respect to specific cases that might come before the Court, a Justice Kagan could provide a critical fifth vote that would expand the limited use of race the court permitted in *Grutter* in the higher education context to apply at other educational levels as well. In fact very recently, she signed off on a Department of Justice brief filed in the Fifth Circuit by the Obama Administration appealing the lower court's decision in *Fisher v. University of Texas,*[39] which deals with a change to the University's race-neutral admissions policy in the aftermath of *Grutter* that would allow each school in the system to decide whether to consider an applicant's race in admissions.[40] In its brief, the Administration pushed the boundaries of the Court's decision in *Grutter*, endorsing the use of racial preferences in all educational institutions—K through 12, undergraduate and graduate—to further the nonremedial goal of diversity as a compelling interest.

Ms. Kagan might also provide a crucial fifth vote on the question of whether voluntary, race-conscious drawing of school attendance boundaries by a school district that had never operated a discriminatory dual school system to achieve racial or ethnic balance is permissible

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[38] *Id.* at 742 (citing Metro Broadcasting, 497 U.S. at 609-10 (O'Connor, J., dissenting) ("The Court's emphasis on 'benign racial classifications' suggests confidence in its ability to distinguish good from harmful governmental uses of racial criteria. . . .'[B]enign' carries with it no independent meaning, but reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable.")).

[39] 645 F. Supp. 2d 587 (W.D. Tex. 2009).

[40] Pre-*Grutter*, the University operated a race-neutral "top ten percent" admissions policy, whereby every student who graduated in the top ten percent of a Texas high school was guaranteed admission at one of UT's campuses. The race-neutral policy had a positive effect on minority enrollment. Nonetheless, after the Court's decision in *Grutter*, which allowed race to be used as a criteria for admission as long as it was but one of many factors, the Regents of the UT system modified its admissions policy, authorizing each school to decide whether to consider an applicant's race.

under the Equal Protection Clause. Parents Involved expressly left this question open, [41] but Justice Kennedy indicated in his concurrence that he might permit it.[42] Additionally, the decisiveness of her comments regarding *Taxman* leave little room for interpretation regarding how a Justice Kagan might vote if the question presented there were to make its way back to the Supreme Court for adjudication.

Of course, the law has developed and changed in the years since Ms. Kagan served as a law clerk for Justice Marshall and as a domestic policy advisor in the White House, and no one can say with absolute certainty how a Justice Kagan will vote on the pressing issues of the day. But her record does afford us with the ability to make some educated guesses. Regrettably, that record points not forward in the battle against discrimination, but backwards, to the use of more racial preferences instead of less, and is out-of-step with the views of the American people. Ms. Kagan's does not appear to be the vision of a post-racial America that President Obama spoke so eloquently about when he burst onto the political scene with his 2004 speech at the Democratic National Convention and admonished that "there is not a black American and a white America and Latino America and Asian America—there is the United States of America."[43]

If the nation's past experience with matters of race teaches us one thing, it is that:

> [R]acial decisions by the state remain unique in their capacity to demean. To squeeze human beings of varying talents, interests, and backgrounds into an undifferentiated category of race is to submerge what should matter most about us under what should matter least. To seize upon this one proven odious criterion for

[41] *Id.* at 738-39 (. . .[R]ace-consciousness in drawing school attendance boundaries [is] an issue well beyond the scope of the question presented in these cases," albeit one in which even the dissent recognized must be decided under strict scrutiny and not rational basis review).
[42] *Id.* at 788-89 (opinion of Kennedy, J., concurring in part and concurring in judgment).
[43] Barack Obama, "The Audacity of Hope," Speech Delivered at the 2004 Democratic National Convention (July 27, 2004).

> judgment as the basis for preferential treatment of some and disfavor of others, and as a potential determinant of the destiny of all is, to commit this country to the perpetuation of means employed in the darkest hours of its history. From this, the Fourteenth Amendment was supposed to be the instrument of deliverance.[44]

Accordingly, it is respectfully submitted that Ms. Kagan's interpretive doctrine should be evaluated for whether it would be likely to produce results contrary to the color-blind ideal and thus produce a legal regime that—over 45 years after the passage of the Civil Rights Act—would increasingly subdivide and judge Americans on the basis of race.

[44] J. Harvie Wilkinson III, The Seattle and Louisville School Cases: There is No Other Way, 121 HARV. L. REV. 158, 163-64 (2007).