

Supreme Court of the United States

OCTOBER TERM, 1970

Supreme Court, U. S.

APR 2 1971

In the Matter of:

Docket No. 569

----- X
JOHN R. EARLEY, ET AL., :
Appellants :
vs. :
JOAN DICENSO, ET AL., :
Appellees :
----- X

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

JOHN R. EARLEY, ET AL.,

Appellants

vs

No. 569

JOAN DICENSO, ET AL.,

Appellees

AND

WILLIAM P. ROBINSON, JR.,
COMMISSIONER OF EDUCATION OF THE
STATE OF RHODE ISLAND, ET AL.,

Appellants

vs

No. 570

JOAN DICENSO, ET AL.,

Appellees

The above-entitled matter came on for argument at
11:49 o'clock a.m. on Wednesday, March 3, 1971.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES (Cont'd):

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On behalf of Appellees

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Number 569: Earley against DiCenso.

Mr. Cottam.

ORAL ARGUMENT BY CHARLES F. COTTAM, ESQ.

ON BEHALF OF APPELLANTS ROBINSON, ET AL.

MR. COTTAM: Mr. Chief Justice and Members of this Honorable Court:

If it please the Court, I will open and present case Number 570 and will be followed by Mr. Williams, who will present Number 569. I expect to take approximately 15 minutes in presenting 570.

If Your Honors please, this matter, Number 570 is before you on appeal from the three-judge District Court in Rhode Island, declaring one of the public laws of 1969 which is commonly referred to as the salary supplement act, unconstitutional on the grounds that it violates the First Amendment of the Constitution of the United States by reason of the entanglement that is inherent in the act.

The case comes before this Court with rather a substantial record. There is substantial documentary evidence: depositions, and there is oral testimony below.

I would like for just a moment to analyze the act, which is very brief. Section I of the act sets forth the legislative findings and in essence, it sets forth much of the

1 crisis which you have heard testimony about this morning,
2 involving these other cases that have been before you.
3 Particularizing in Rhode Island the nonpublic schools are
4 facing a crisis at the elementary school level. At this level
5 45,000 or 25 percent of these children are educated in non-
6 public schools.

7 The crisis arises by reason of the financial
8 difficulties of the schools in their ability to offer a sub-
9 stantial or a competing salary for qualified teachers that are
10 qualified and are teaching in the public schools of the state.

11 They point out that in 1960 this crisis was recog-
12 nized by the state on behalf of the cities and towns in which
13 the State of Rhode Island participates now rather heavily in
14 the cost of the education of the public school students.

15 Section II of the act pertains to definitions and
16 under the act the nonpublic school is a nonprofit school and
17 it is one where the per student cost of education does not
18 equal or exceed the cost per student cost of education for a
19 public school student.

20 Now, a nonpublic school teacher is defined as a
21 teacher in a nonpublic school and one who teaches only subjects
22 which are required to be taught in the public schools of the
23 state.

24 Now, those nonpublic school teachers who become
25 eligible for what we call the "salary supplement," which is

1 roughly 15 percent of their salary, must satisfy certain
2 requirements that are set forth in the act. That is: number
3 one, the teacher must request the supplement. Number two --

4 Q That is the individual teacher?

5 A The individual teacher, Your Honor. Now,
6 the teacher must also teach secular subjects to the same
7 extent as those subjects are taught in the public schools of
8 the state. And that teacher must also use materials, that is
9 textbooks and the like, which are used in the public schools
10 of the state and in addition to this, the teacher must promise
11 that he will not teach a course in religion so long as he was
12 receiving a salary supplement.

13 Now, the regulations that are set forth or the
14 power to make regulations that are given in Section V of the
15 act, make it very clear that the payment is to be made directly
16 to the teacher and not to the school. It's a mandatory re-
17 quirement to be put in the regulations.

18 Q What check is made on the teacher's represen-
19 tations?

20 A There is no check. There is a statement
21 signed, Your Honor.

22 Q And just on the basis of the signed state-
23 ment, if the signed statement contains the information which
24 satisfies the reason for the statute, then the --

25 A That's all that's required.

1 Q On that basis then --

2 A Just the promise of the teacher, which is
3 on a form developed by our Commissioner of Education.

4 Q And what is the amount? You say 15 percent
5 of what?

6 A It's 15 percent of the salary that the
7 teachers has contracted for, and there is a limitation: that
8 salary then, including the supplement, must not exceed the
9 average maximum paid to a teacher in the public school system
10 of our state.

11 Q For teaching that grade and that subject?

12 A Yes, Your Honor.

13 Q Does your state have a statute comparable
14 to that of Section 1001, the Federal Statute on presenting a
15 false certificate to secure payment from the state?

16 A No, sir, Your Honor; it does not.

17 Q Would it be an offense of any kind to
18 present a false certificate under other statutes?

19 A As I recall it is not a sworn statement.
20 It is a direct misrepresentation and because in the presence
21 of evidence to the contrary you would lose the supplement.

22 Q That would be the only sanction?

23 A Yes, Your Honor. Unless the state itself
24 could prove for the damage claim for a misrepresentation;
25 which, under Rhode Island law, would mean you would have to

1 prove a preexisting intent.

2 Now, Your Honor, the complaint that was filed in
3 this case alleged, in substance, that this act which I just
4 highlighted to you, provides direct aid to parochial schools.
5 And I think, in addition to that, alleges that the purpose and
6 primary effect of the act is to advance religion.

7 The answers that were filed amount to a general
8 denial. As far as the evidence is concerned, which I think
9 should be of great interest to the Court, and was in the Court
10 below, is the handbook of the school regulations issued by the
11 Roman Catholic Diocese of Providence. It's referred to in the
12 opposition brief. And, the depositions and the oral testi-
13 mony that was presented.

14 Now, the testimony itself is, I think, of great
15 importance, because it highlights the difference that I think
16 this Court has indicated in their past decisions between so-
17 called "atmosphere" and "permeation." The evidence clearly
18 shows that these are parochial schools that are principally
19 affected under this Rhode Island Act. That there are --

20 Q May only a lay teacher --

21 A No; there is no restriction at all. We do
22 have the deposition of one religious teacher who was on leave
23 from her order, who was in. But, it's pretty difficult to
24 believe that to qualify under the act, because her life is
25 dedicated to the propagation of religion, and under this act

1 you are immediately disqualified if you teach religion --

2 Q This is the case, isn't it, where one
3 instructor stopped saying the Lord's Prayer at the opening of
4 school or something?

5 A Yes, Your Honor.

6 Q After making the application; this is the
7 case; isn't it?

8 A Yes, it is, Your Honor.

9 Now, before I leave the act --

10 Q How many of the schools involved in Rhode
11 Island are parochial schools?

12 A I think there are some 90-odd -- parochial
13 or elementary, Your Honor?

14 Q No, no; I meant the beneficiaries under this
15 act.

16 A Well, there are some 29,000, almost 30,000
17 elementary school children that are affected by this act, Your
18 Honor.

19 Q Out of how many?

20 A Out of approximately 45,000 -- roughly 66
21 percent. That comes from, you will notice in the legislative
22 findings they refer to roughly 45,000 as being educated in
23 nonpublic schools, but the testimony of the superintendent of
24 schools for the Diocese of Providence, Father Mullen, indicated
25 that there were roughly 29,340, with maybe a couple over.

1 Now, Your Honors, as far as the testimony is
2 concerned, there is just no question about the proximity
3 usually of these schools to a church; the presence of statues,
4 the presence of crucifixes. But I do think that what is of
5 paramount importance is the absolute, unrebutted, unequivocal
6 and the uncontradicted testimony by deponent and every witness
7 that religion or religious content was not injected into the
8 teaching of a secular subject.

9 In other words --

10 Q That's at the expense of the nun-teacher,
11 who, in order to get her salary supplemented, has to obligate
12 herself not to engage in religious teaching, which if left
13 free, she might wish to do?

14 A You're referring now to a religious person,
15 a nun?

16 Q Yes --

17 A Oh, yes; you couldn't qualify under this
18 unless you gave up; yes.

19 That testimony, as I indicated, is just unrebutted
20 and it's just unequivocal.

21 Q Mr. Cottam, when is the payment made to the
22 teacher as her salary is paid?

23 A No, Your Honor; it's made twice a year: in
24 February and in June, under the regulations --

25 Q And directly to the teacher?

1 A Directly; that's in the statute, and I
2 think it's Section V that requires it; that the salary must
3 be paid directly to the teacher.

4 MR. CHIEF JUSTICE BURGER: I think we will suspend
5 now for lunch.

6 (Whereupon, at 12:00 o'clock p.m. the argument in
7 the above-entitled matter was recessed to be resumed at 1:00
8 o'clock p.m. this day)

1 1:00 o'clock p.m.

2 MR. CHIEF JUSTICE BURGER: Mr. Cottam.

3 MR. COTTAM: Mr. Chief Justice and may it please
4 the Court:

5 I'd like to correct an impression I made left with
6 this Court thismorning, Your Honor, when you asked me the
7 question: was there a false document statute. I thought Your
8 Honor was referring to the act in question, that is the Salary
9 Supplement Act when I responded "no." There is such a --

10 Q A general statute.

11 A Yes, there is, Your Honor; and there is also
12 a larceny statute where a document is filed with false intent.

13 Q Yes.

14 A With the few minutes remaining, Your Honor,
15 I think I will not get into an analysis of the decision of the
16 Court below, but rather I would like to take a moment again to
17 call your attention to the evidence that was submitted to the
18 Court below and the findings.

19 And I would like to make the observation that we
20 have no quarrel with the findings as made by the Court below.
21 The question we have and the disagreement we have, is with the
22 Court's analysis of the Schempp, Allen and Walz test and the
23 present existence and effect of Walz on Shempp-Allen, and this
24 will be covered by Mr. Williams.

25 Going back into the evidence that was submitted by

1 the Court to the Court below. The evidence, as I indicated,
2 is overwhelming and uncontradicted and unrebutted; that there
3 is absolutely no sign of permeation, or existence.

4 As far as the act itself is concerned, the State
5 feels that one of the great features of the act is its volun-
6 tary provisions. No school is required to tailor its curri-
7 culum to come within the provisions of this act. No teacher
8 is required to teach in a parochial school and no teacher who
9 teaches in a parochial or nonpublic school is required to come
10 within the provisions of the Salary Supplement Act.

11 As far as this being a restraint on the individual
12 teaching, my response to that is that it is voluntary. There
13 is nothing in the act which requires either the school or the
14 teacher to conform to the act.

15 In summation, Your Honors, it's the position of the
16 State that the evidence submitted in the court below indicated
17 very clearly that this act is designed to remove a crisis in
18 the State of Rhode Island at the parochial school level.

19 It's also designed to provide the quality education
20 that the State feels is necessary. The Court found that the
21 evidence supports the findings; that the purpose of the act is
22 entirely secular. The evidence introduced below indicates a
23 total absence of permeation within the meaning of the Allen
24 decision. So that all that remains to be done is to test the
25 continuing existence and the applicability of this Court's

1 prior decision to this statute.

2 Thank you very much, Your Honor.

3 MR. CHIEF JUSTICE BURGER: Thank you Mr. Cottam.

4 Q May I ask one question: do you regard the
5 District Court decision here as basically inconsistent with
6 that in the Pennsylvania case?

7 A With what decision, Your Honor?

8 Q In the Pennsylvania case; the one that was
9 argued just before this one.

10 A Well, I think it's entirely -- no; it is
11 not entirely different. I would disagree with their finding
12 on entanglement because there was no evidence presented in the
13 Court below; there is no record in the Pennsylvania case, Your
14 Honor.

15 Did this Court, in Rhode Island, the three-judge
16 Court sitting in Rhode Island went off on the grounds that
17 this statute engendered excessive entanglement that was
18 referred to in the Walz decision, because they felt that there
19 was an inhibition of teachers and that the continuing sur-
20 veillance that would be -- that the act would require to
21 determine what part of the school's budget is religious and
22 what is secular -- this was too extensive an entanglement.

23 Q You are making the same crisis argument that
24 Mr. Ball made in the other case.

25 A Yes, Your Honor.

1 Q And I infer from that that because these
2 acts were enacted during a crisis that they are, therefore,
3 constitutional, is your argument?

4 A No, Your Honor; I don't argue constitution-
5 ality based on crisis, but in one of the questions you asked
6 Mr. Ball this morning I would like to respond. The essence of
7 the question was: if the monies were paid to the schools
8 didn't that just supply the school with additional funds for
9 other purposes?

10 My answer is: these schools are closing, Your
11 Honor; there are no other funds for these purposes.

12 Q Of course, in your case the replacement
13 dollar argument is not available to the other side because
14 this is a supplement. To this extent your act is different
15 from the Pennsylvania one?

16 A Well, it's not substantially different,
17 Your Honor. The arguments presented in the Court below is
18 let the parishoners (?) pay And there was no showing that they
19 couldn't; there was no showing that they could; the fact of
20 the matter is that the schools are closing, which I think,
21 speaks for itself.

22 Thank you very much.

23 MR. CHIEF JUSTICE BURGER: Very well, Mr. Cottam.
24 Mr. Williams.

25 ORAL ARGUMENT BY EDWARD BENNETT WILLIAMS, ESQ.

1 ON BEHALF OF APPELLANTS EARLY, ET AL.

2 MR. WILLIAMS. Mr. Chief Justice and may it please
3 the Court:

4 I would like to take just a few moments, if I
5 may, and say a word about the statutory scheme that's under
6 scrutiny here in this decision.

7 When Allen made the judgment some years ago as to
8 the Federal Government that it was difficult to get quality
9 teachers for the elementary school grades and so it enacted a
10 law granting a subsidy or a bonus to teachers in the elementary
11 public schools of the State of Rhode Island. It gave that
12 bonus directly to the teacher.

13 Subsequently, in 1960 it escalated that bonus to
14 30 percent of the supplement, but it immersed it in other
15 kinds of aid that it provided to the cities and towns of the
16 State of Rhode Island. It picked up 30 percent of the costs
17 of elementary school education at the public school level in
18 Rhode Island.

19 So, when this statute was passed in 1969 what the
20 State Legislature was doing was simply including within the
21 penumbra of the general welfare statute applicable to elemen-
22 tary school teachers in the State of Rhode Island, those
23 teachers who were in nonpublic, nonprofit schools.

24 Now, there are 98 parochial schools in the State
25 of Rhode Island. There are about 1,000 parochial school

1 teachers the record shows. There are about 176 teachers in
2 nonparochial, nonpublic or independent private schools. How
3 many of those teachers are eligible and qualified? How many
4 have been declared eligible and have qualified under this
5 act? Only 161. Why? Because the act is so tailored as to
6 exclude those independent schools whose per pupil expenditure
7 exceeds that of the public schools of the State of Rhode
8 Island because, indeed, they don't need that kind of aid.

9 Now, how many of the parochial school teachers are
10 qualified for this kind of aid? Two-hundred and forty-two, the
11 record shows. Why? Because the balance of them are nuns and
12 nuns don't qualify under this because the statute requires
13 that the teacher receive the minimum standards applicable to
14 the public school system before a teacher can qualify for the
15 aid and the statutes of Rhode Island show us that \$4,000 is the
16 minimum salary paid to the public school teacher in the State
17 of Rhode Island and the record shows us that the nuns who
18 teach in the parochial schools of the State of Rhode Island
19 receive \$1,800 a year if they have a Bachelor's Degree and
20 \$1,900 a year if they have a Master's Degree.

21 So, we come down to 161 teachers receiving a
22 supplement of 15 percent of the salary that's given to them.
23 What effect did this have? In 1968 the parochial schools of
24 the State of Rhode Island were able to offer, the record shows,
25 \$5,000 as a starting salary to their teachers, while the

1 public schools were offering \$6,000. By virtue of the salary
2 supplement herein provided for, the parochial schools could
3 offer \$6,000 by raising its contribution from five to fifty-
4 one hundred and the State would then contribute \$900 directly
5 to the teacher under some very sharply defined and circum-
6 scribed conditions.

7 Number one: that the teacher did not teach
8 religion; number two: that the teacher was certified by the
9 State of Rhode Island; number three: that the teachers used
10 only those materials and textbooks used in the public schools
11 for subjects being taught and required to be taught in the
12 public schools of Rhode Island. Number five: that the teacher
13 received a minimum salary provided for in the public schools of
14 Rhode Island and number six: that the salary plus the supple-
15 ment, not equal or exceed -- not exceed the maximum average for
16 the public school counterpart teacher.

17 That's what this act did. In other words, it
18 provided to certain teachers under carefully circumscribed
19 conditions, a possible parity of income for teaching the same
20 subjects with the same materials, with the same certification
21 in nonpublic schools, substandard public schools, because their
22 per pupil expenditure was below the public school expenditure.

23 Now, if the Court please: what did the lower court
24 say with respect to this act? Because, I submit to the Court
25 that the statutory scheme here in the State of Rhode Island,

1 is no different from a situation where the State would offer
2 \$500 grant or an \$800 grant to all elementary school teachers
3 across the board to nonprofit schools, so long as they did not
4 teach religion.

5 I don't think that kind of statute would be sub-
6 ject successfully to constitutional attack under the test that
7 has been laid down here. That's precisely what we have done
8 here. What did the lower court say? It purported to apply
9 the purpose and primary effect test and what did it say about
10 the purpose? It said that the first part of the test, ~~the~~
11 examining the statute's purpose, presents little difficulty.
12 The Salary Supplement Act, in our opinion, is not intended to
13 advance in the field of religion. The statute recites its
14 purpose is to provide quality education for all the Rhode
15 Island youth, those in public and nonpublic schools. ~~the~~ The
16 quality of education in the nonpublic schools, a legitimate
17 legislative concern, we find nothing in the history and struc-
18 ture of law to suggest that the legislative purpose was other
19 than as declared.

20 It then goes on to say that it certainly fulfills
21 a secular purpose while the statutes ~~to~~ have been limited to
22 teachers in schools whose per pupil expenditure does not equal
23 or exceed the public school expenditure, because in that way
24 this aid is directed to teachers who are teaching in sub-
25 standard economic schools which cannot afford to pay them.

1 on a partiy for the same service with the public schools in
2 the state.

3 Now, what does it say about the purpose? And
4 this is where, we submit, the lower court went awry. It says
5 this, and this is at page 37 of the joint opinion: "On the
6 one hand we find the statute will have the secular effect of
7 adding the quality of secular education in the State of Rhode
8 Island,"precisely what it was intended to do; precisely what
9 the purpose of the legislature was. It finds that it did have
10 that effect, but it goes on to say: "But, on the other hand,
11 we think it equally clear that the act gives significant aid
12 to a religious enterprise."

13 At page 40 it repeats and it says: "The second part
14 of the Schempp test determining the statute's primary effect,
15 presents a little more difficult problem of definition and
16 application." Plaintiffs have argued that primary means
17 essential or fundamental. Defendants say that leaders have
18 taken a more literal position, claiming that primary means
19 first in order of importance. The problem of definition is
20 critical in this case because, as we have noted, the act has
21 two significant effects: on the one hand it aids the quality
22 of secular education; on the other it provides support to a
23 religious enterprise.

24 This Court, since it began the revolution of the
25 purpose and primary test, has found in four instances that the

1 mere fact that an effect of a statute may be of aid or
2 benefit to religion, does not constitute a barrier to its
3 passing constitutional muster. It said it in Everson; it
4 said it in McGowan; it said it in Allen and it said it in
5 Walz.

6 Furthermore, this Court has found that in
7 focusing on the nature of the primary effect you look at the
8 functions subsidized, not the institution benefiting. It
9 said this in Everson; it said it in McCollum, it said it in
10 Allen and it found both in Pierce against the Society of
11 Sisters, 43 years ago and Board of Education against Allen
12 three years ago, that these schools can provide a secular
13 function.

14 Now, what would be the effect -- what would be the
15 effect of following the lower court's concept of the primary
16 effect test? It would be as follows: we would roll back the
17 law of church and state 25 years if we found that because a
18 secular statute that had a secular example, gave incidental
19 aid to religion; that it failed to pass constitutional muster,
20 then we must, of necessity, reverse Everson; we must reverse
21 McGowan; we must reverse Allen and we must reverse Walz.

22 And if we consider the nature of the word "signi-
23 ficant", "significant aid" to a secular enterprise, then we
24 had better focus on how significant the aid is here. The aid
25 here: 161 teachers from 98 schools, or one-and-a-half teachers

1 per school, receiving \$900 salary supplements pales into
2 insignificance compared to the significance of the aid in
3 Everson in 1947 when a whole school-load of children were
4 bused to and from schools.

5 Simple arithmetic will tell you that if you paid
6 ten cents a ride to take 300 little boys and girls to and from
7 school on 180 school days a year, twice a day, you are talk-
8 ing about \$12,000 or \$13,000.

9 In Board of Education against Allen we talked
10 about giving textbooks, of lending textbooks to the children
11 of the New York elementary schools. If they received their
12 textbook in mathematics, if they received their textbook in
13 science, if they received their textbook in a foreign language,
14 then we are talking about a per pupil expenditure or a per
15 school expenditure that dwarfs the expenditure that is coun-
16 tenanced in this particular stipend.

17 So, I suggest that when the Court writes down,
18 writes down the Rhode Island statute as daring to pass the
19 primary test facet of the test fashioned by this Court, that
20 because it is giving significant aid to these schools it is
21 running counter to the whole train of decisions of this Court.

22 Now, if the Court please --

23 Q Did I understand you to say that the --
24 outside of your argument, Mr. Williams, that the Catholic
25 Sisters, nuns, would not be eligible for this?

1 A They couldn't be, Mr. Justice, because the
2 record shows they are making \$1,800 a year. Obviously, if the
3 school, as the record shows, couldn't afford to pay an extra
4 thousand dollars to get quality lay teachers it couldn't
5 afford to escalate the nuns from \$1,800 to \$4,000 a year when
6 there were seven or eight nuns teaching in these schools and
7 one or two laymen. So that the nuns practically, as the
8 record shows, absolutely cannot qualify for this aid.

9 The record does show, if the Court please, that
10 one nun did, and she qualified because her mother was dying;
11 she had to leave the order; she had to go out and earn money
12 to support her mother and lived outside of the convent, and
13 she made application because she was teaching a wholly
14 secular subject.

15 But, other than that, there is no qualification of
16 "religious" under the statute. Only 342 lay teachers qualify,
17 of whom, only 161 came forward, because indeed -- indeed, the
18 teacher may not come forward and ask for the supplement unless
19 the school qualifies by filing what is known as an NPS, Non-
20 public School Form 31 showing that its per teacher expenditure
21 is less than a per pupil expenditure at the public schools.

22 Q That is per pupil expenditure for all pur-
23 poses; not just for teachers salaries?

24 A For secular education.

25 Q For all purposes?

1 A Yes, sir.

2 Q For secular education.

3 A Yes, sir.

4 Q Do nuns take a vow of poverty? Does it
5 depend upon the order --

6 A It depends upon the order to which they
7 belong. I think some nuns do take the vow of poverty and I
8 think some do not. I think it's entirely at the discretion
9 of the order to which they adhere.

10 Q I was wondering what these teaching sisters
11 did with the \$1,800.

12 A I guess the \$1,800 probably is just walking
13 around money these days, Mr. Justice.

14 Q Even in a convent?

15 A Well, I think they are allowed to leave
16 the convent, but I don't think they can go very far on \$1,800
17 a year. That's the maximum that they are paid under the Rhode
18 Island school system. And they get \$1,900 if they have a
19 Master's Degree.

20 Q In all these cases that you referred to, or
21 at least in all the recent ones, is it not correct that the
22 Court has expressed the view that this is a matter of degree,
23 the entanglement or the involvement or the potential for it?

24 A I think that this is expressed and arti-
25 culated clearly, perhaps for the first time in Walz against

1 the Tax Commission. And the question then becomes, because
2 this is the caveat of Walz, as I read it: it does not abrogate
3 the purpose and primary effect test at all; it simply adds
4 caveat to the primary effect test, the purpose and primary
5 effect test, and it says "if the program, if the statute,
6 creates an excessive entanglement between church and religion
7 then the statute must fail."

8 And then the Court made a calculated choice be-
9 tween the exemption of the ad valorem tax to churches and the
10 imposition of the ad valorem tax for churches and found that
11 there was a lesser degree of involvement resulting from the
12 exemption than from the imposition. Looking down the road,
13 and apparently shunning the prospect of foreclosing on a
14 church.

15 I suggest, if the Court please, that the same
16 rationale holds here, because this Court, in discussing this
17 problem, had this to say: "If the quality of teaching" -- this
18 is at page 37 of the record. -- falls too low, then not only
19 will Catholic parents be reluctant to enroll their children,
20 but that the parochial schools will run afoul of Rhode
21 Island's education laws."

22 Fifty years ago this Court said that parents could
23 satisfy the compulsory school attendance laws of this nation
24 by sending their children to these schools. The unspoken
25 corollary of that, of course, was that the State has a right

1 to regulate the secular facet of these schools, and indeed,
2 they have. They have regulated the number of days to which
3 children must go; they pick the holidays; they required cer-
4 tification of the teachers and they indeed, have insisted that
5 certain subjects be taught. Rhode Island has done the same.

6 Now, I say, if the Court please, that if the State
7 can compel then it may assist, and that's what it's doing
8 here. I say that the degree of involvement between the
9 operation of these schools and the compulsory school atten-
10 dance laws of Rhode Island and the rest of the country, in
11 fact, make the degree of involvement of paying \$900 to the
12 teacher de minimis.

13 I say also that if the legislative judgment has
14 been made by the State of Rhode Island that these schools
15 cannot attract and hold qualified teachers for secular sub-
16 jects, without those teachers being given a subsidy, then the
17 quality of secular education in those schools is going to
18 fall and when it becomes marginal -- when it becomes marginal
19 the only confrontation which this Court eschewed in Walz
20 against the Tax Commission becomes a reality. Because then
21 there comes the kind of entanglement, the kind of excessive
22 entanglement that this Court expressed its abhorrence for last
23 year in Walz against the Tax Commission.

24 Q Does this record show the extent of the
25 surveillance of private schools in Rhode Island to determine

1 whether the hours and the curriculum and the teachers meet
2 the standards prescribed by the State? How is that done?

3 A The statutes of Rhode Island cover this,
4 Mr. Chief Justice. There is a statute called "Compulsory
5 Attendance;" it is in Title XVI, Chapter 19 of the Rhode
6 Island general statutes and this tells what the State of
7 Rhode Island insists upon from all nonprofit, nonpublic
8 schools if they are to meet the standards.

9 Q How much surveillance is involved in
10 satisfying it -- is there inspection to see whether the
11 parochial schools keep up abreast of those standards?

12 A I suspect, Mr. Justice, that there is no
13 surveillance on that subject; I suspect there is none, but
14 the record is silent on it. I don't know of surveillance on
15 that and I suggest to the Court that when one of these 161
16 teachers signs a statement applying for a supplement --

17 Q No; I'm not thinking about that. You have
18 told us that parochial schools are already subject to a number
19 of minimum standards.

20 A Yes, sir.

21 Q Having nothing to do with this subsidy
22 statute.

23 A That's correct.

24 Q And that this is true in all 50 States.
25 Now, my question was: is there a degree of supervision of

1 compliance on the part of any --

2 A There is nothing in this record, Mr.
3 Justice, which would show a regular inspection. I am so sure
4 that if there was a charge that certain subjects were not
5 being taught, as demanded by the statutory scheme in the
6 State of Rhode Island, or that nonqualified, noncertified
7 teachers were purported to teach subjects that were required
8 to be taught, that there would be appropriate action taken by
9 the Rhode Island State Board of Education.

10 Q Well, are there any accreditation proceed-
11 ings there?

12 A For the schools?

13 Q Yes.

14 A Yes, sir. That is provided for in the
15 section to which I referred the Chief Justice: Chapter 16,
16 Title 19, that they must be approved by the Board of Education
17 by the township or the city. --

18 Q So to that extent, then, there is super-
19 vision?

20 A To that extent there is at all nonpublic
21 schools --

22 Q And I gather your point is if they can go
23 that far without offending the establishment clause, then
24 surely the contribution by way of supplement to a teacher's
25 salary isn't excessive?

1 A That is another way of expressing my
2 thought, Mr. Justice. I say that the degree of supervision
3 which satisfies the Salary Supplement Act is tremendous com-
4 pared to the supervision that is authorized as applied by the
5 statute to make sure that these schools fulfill the require-
6 ments of the compulsory school attendance laws of the State
7 of Rhode Island. And, indeed they have been found, these
8 schools, to fulfill the compulsory school attendance laws and
9 have provided a secular service to the state with the approval
10 of this Court and without challenge for some 50 years since
11 Pierce against the Society of Sisters.

12 Q Mr. Williams, if, as time goes by, assuming
13 this law is upheld, and as the financial pinch gets greater,
14 the supplement will be increased, and finally reaches the
15 point where the supplement is greater than the basic salary;
16 is your case any different?

17 A Is my case -- I think, Mr. Justice, that
18 the aid would be greater; I don't think that the principles
19 would be different, so long as the function being subsidized
20 is secularly segregable. I think that's why this Court sits,
21 to test that kind of situation in the event that it arises.
22 I think it's quite unlikely in the State of Rhode Island, that
23 the supplement that is granted to the nonpublic, nonprofit
24 schools will exceed that which is given to the public schools;
25 namely: 30 percent under the existing statute.

1 I would like to reserve whatever time I have for
2 rebuttal.

3 MR. CHIEF JUSTICE BURGER: Very well, Mr. Williams.
4 Mr. Pfeffer.

5 ORAL ARGUMENT BY LEO PFEFFER, ESQ.

6 ON BEHALF OF APPELLEES

7 MR. PFEFFER: Mr. Chief Justice and may it please
8 the Court:

9 I propose in the time that is reserved for myself,
10 to discuss what I believe to be the legal principles appli-
11 cable to this case.

12 Now, with the Court's permission I would like to
13 extend to my colleague, Mr. Stanzler, 15 minutes to apply
14 these principles to the specific facts of this case as dis-
15 closed by the record at the trial.

16 This case, unlike Lemon and unlike Allen, does
17 present a record on trial with documentary and live witnesses.
18 And I believe that this is a case upon which the Court can
19 get at least a realistic look as to what actually is the
20 effect of these statutes, because it's a primary effect of the
21 statute that the Court held unconstitutional.

22 This was a unanimous decision of the Court below.
23 Two of the three justices found it unconstitutional, both
24 because its effect and because it involved entanglement. The
25 third judge found it unconstitutional only because of en-

1 entanglement, but the Court below, the majority held it un-
2 constitutional on both grounds.

3 Q Suppose, Mr. Pfeffer, that if it can be
4 called "surveillance" that the supervision over the, or the
5 overseeing which every state exercises over all of the schools
6 in the state to see that they are meeting minimum standards,
7 it is always the factor that has been hovering over all private
8 of schools. Isn't that true?

9 A It is, indeed.

10 Q Do you think that the surveillance is
11 necessary to protect the compliance of a parochial school
12 under the Rhode Island statute is a greater degree of involve-
13 ment than determining whether the teachers are properly ac-
14 credited or all that sort of thing?

15 A I certainly do; moreover it transgresses.
16 It's greater in degree and in quantity and it could be un-
17 constitutionally different in quality.

18 Every institution is subject to a certain degree
19 of overseeing by the state for the protection of the people.
20 A church which does nothing but pray, has people praying,
21 participating in religious worship, is inspected by the fire
22 department, the sanitation department, and is subject to
23 tremendous surveillance that there may not be too many people
24 -- and that degree of surveillance, that degree of overseeing
25 cannot be viewed a justification for financing that

1 institution. This is a necessary police power of the state.

2 But, when the State goes in and does not look to
3 see if the ceilings are fixed or it does not even go to see,
4 or goes even beyond that, it looks to see the attendance
5 records, but when that State goes in and peers over the
6 shoulders of the teacher to see whether that teacher is
7 permeating or bringing in religion into her interpretation,
8 let us say, of the Reformation, the Protestant Reformation, or
9 of the creation of the earth or anything which has historical
10 application -- if, in a religious school when the State comes
11 in and says: We are going to pass judgment as to whether this
12 is or is or is not religious, then this is the very type of
13 censorship which this Court has expressed its opposition to
14 time and time again, from Watson against Jones in 1870, to
15 Cantwell against Connecticut where the Court said: "We will
16 not allow a state official to censor what is and what is not
17 religious." It was in Fowler against New Hampshire; in case
18 after case, for a state official.

19 Indeed, this was one of the statements made by
20 Madison in his opposition to the Virginia Code of Religious
21 Freedom, that it empowers a state official to determine what
22 is not and what is religious. Now, this is to us, a critical
23 difference between everything which has gone here and never
24 before, as far as I know, has any Court, State or Federal,
25 authorized a state official to pass judgment on the whether

1 a certain teaching is religious or not.

2 I want to speak --

3 Q Well, what about the public school laws
4 that say that religion shall not be taught in the public
5 schools?

6 A Mr. Justice White, the answer to that, the
7 one short answer to that, that the First Amendment does not
8 forbid a state to police its own schools. These are state
9 schools; they are public schools and nothing in the First
10 Amendment forbids a state to police its own schools any more
11 than --

12 Q Suppose the teacher says: "You are trans-
13 gressing my First Amendment rights and you are purporting to
14 say that I am teaching religion and you are supposed to keep
15 your nose out of that."

16 A That teacher is a public employee and must
17 abide by the Constitution of the United States, which says
18 that the public employee in the schools may not teach
19 religion; may not indoctrinate religion.

20 This is a public employee?

21 Q Well, you say it's inherent in the First
22 Amendment that the State must in all sorts of contexts, de-
23 cide what religion is.

24 A It must only to the extent of not allowing
25 a public's own employees to do it.

1 Q Well, anyway, the State does it all the
2 time -- I mean decides what religion is.

3 A It decides what religion is to the extent
4 only of forbidding transmission of religion into the public
5 schools, forbidding violation of the Constitution. It does
6 not, in the case -- does not allow the State to go and cen-
7 sor what's taught in the private schools because that private
8 school is religious. This is, indeed, the essence of reli-
9 gious liberty.

10 Q What does a Court do when it's called upon
11 in a case like this or like the others, when it makes the
12 judgment that the school is -- or the facility is sectarian
13 rather than secular? Does it not make a comparable decision?

14 A It makes a comparable decision only in
15 this sense: that it determine whether that teaching in the
16 public schools is fulfilling the secular program of the
17 school. The best example, I think, is Epperson, where the
18 Court said: you cannot forbid the teaching of evolution in a
19 public or publicly-financed school.

20 Now, the Court did -- it made a determination that
21 the teaching of evolution is a secular subject. But, the
22 Court did not, in any case I know, did not say that it's
23 permissible, that this doesn't involve the most gross en-
24 tanglement for state officials to go into a religious school,
25 created for the purpose of propagating religion and saying:

1 "We can, we will check and see whether, during the hours of
2 9:00 to 3:00 or 2:00 to 3:00 that this particular teacher is
3 teaching religion.

4 This is the most extreme form of entanglement.
5 This situation means that the teacher in the public schools
6 -- in the parochial school is a part employee of the parochial
7 school system, a part-employee of the state. The church
8 selects the teacher; the church appoints; the church will pay
9 for it; the teacher is subject to the discipline of the
10 church. The teacher is, if it's a member of a religious
11 order, a -- of the act. ~~Nothing forbids~~

12 Nothing in the act forbids members of a religious
13 order, as a matter of fact, there is a member of a religious
14 order who is a teacher -- nothing in the act forbids members
15 of a religious if a religious order decides to, which it has
16 every right, constitutional right, to increase their salaries
17 from \$1,800 to \$4,800, which they can do tomorrow. Nothing
18 in the statute, nothing in the constitution forbids a member
19 of a religious order who takes an oath of obedience and an
20 oath of poverty to qualify under the act.

21 This makes the State -- this makes the State and
22 the church paupers, and ever since that President Taft was
23 Governor-General of the Philippines after we took them over,
24 he required all public control of the parochial schools there
25 to be withdrawn because he said that the church and the state

1 may not be paupers under our system of government.

2 Now, I want to say a moment, bringing up about
3 purpose and about the fact that in this case, although frankly
4 I don't know whether my opponents are resting on this as a
5 critical distinction. The payment is made in this case to the
6 teacher; it doesn't go through, under the statute, through the
7 treasury of the parochial school. I submit that that is
8 hardly a critical distinction.

9 The legislative purpose of the act, the whole
10 discretion of the act, the fact that it's predicated upon a
11 crisis, not the teacher, but the parochial schools, it's
12 quite clear that this is a device to aid and to finance the
13 operations of the parochial schools.

14 Indeed, the very fact that in order for a school
15 to qualify the teachers there must receive a certain minimum
16 amount. This is the first time I've come across a situation
17 where a statute is enacted to benefit those who need it least
18 and deprive those who need it most. Indeed, if the purpose
19 of this statute was to aid and help the teacher the answer
20 would be to lower the teacher's salary, just as in anything
21 else. The lower the teacher's salary, the more aid to be
22 gotten, so a teacher could have a little salary. Here it
23 does not; ~~if the teacher does~~ not get a certain amount of
24 minimum, the teacher gets nothing from the State.

25 Why? Because the purpose of this statute is to

1 help the school finance its operations. This was agreed to
2 and testified to that the two protestant schools of the
3 Catholic Diocese here: "If the state doesn't pay them the
4 ~~non~~ money we will have to pay it." It's in the records and
5 it's in my brief. It comes out: "We" means the parish. The
6 Court said -- the superintendent said, "If this statute is
7 unconstitutional" and as to questions by the trial court: "If
8 this act is unconstitutional that money will have to come
9 from the parish."

10 Now, there is no question that this is a form of
11 subsidizing the church, helping it meet the crisis.

12 Q I take it that Rhode Island does not tax
13 with the ad valorem real estate tax the buildings of a paro-
14 chial school; is that correct?

15 A I would assume so; there is nothing in the
16 record, in fact, but I think that might be assumed.

17 Q Do not most of your arguments or many of
18 your arguments have the same force with respect to that exemp-
19 tion?

20 A No, sir, because --

21 Q Don't you --

22 A Because, as Your Honor pointed out in the --

23 Q I was speaking of your aid argument
24 particularly. It's very large aid, isn't it?

25 A I'm not basing my case on aid; I'm basing

1 my case on subsidy, on financing; not aid. Aid could be many
2 things. I am basing my case on the proposition that this is
3 financing the operations of a parochial school. It is a
4 subsidy. However it is disguised, the reality is that this
5 is a subsidy, just as much as in Lemon that the device used
6 to subsidize is the purchase of services contract, independent
7 contractor contract, purchase of services, but nobody is mis-
8 led by that. ~~Everybody knows~~

9 Everybody knows, and the legislative declarations
10 and legislative purpose says these schools are facing a
11 financial crisis. And this states too: "These schools are
12 facing a financial crisis and we've got to help them meet
13 their budget," and we'll do it this way or that way.

14 But, it would be, make a mockery of the First
15 Amendment if you call the thing a "purchase of services
16 contract," or call the thing "a salary supplement." It can be
17 used to blind the eyes to what actually is State subsidiza-
18 tion of parochial schools and nothing but that.

19 Q Mr. Pfeffer, suppose that Rhode Island
20 passed a law giving all schools ground and equipment to set
21 up playgrounds of 100,000 feet, period.

22 A And for the use of playgrounds and --

23 Q Set up the whole playground and pay for its
24 upkeep and everything.

25 A As part of a parochial school?

1 Q No -- the bill says: Be it enacted that
2 the schools are in such bad shape that we are going to give
3 a recreational center and a playground to every school in
4 Rhode Island that has more than 25 pupils.

5 A Irrespective of -- my answer would be that
6 I would deem that unconstitutional.

7 Q Why?

8 A Because the purchase of a parochial school,
9 and the record shows, is not to provide children with play-
10 grounds. The purpose of a parochial school is to provide
11 children with religious education, together with their secular
12 education, not --

13 Q Well, is there anything in Rhode Island
14 law that says that the public schools can't have recreational
15 facilities?

16 A The public schools cannot have it?

17 Q Yes.

18 A Of course --

19 Q That's right. So they just treat everybody
20 alike and give them a playground.

21 A Except, Mr. Justice Marshall --

22 Q Let's move the playground across the
23 street.

24 A Well, my answer to that is: is the play-
25 ground -- is it --

1 Q It's called: The St. Aloysius Catholic
2 School Playground, run by Rhode Island and the Plantation.

3 A Well, I would say in actual type aid ---
4 or absent the Fulton case, one of the critical factors would
5 be: would a nonCatholic child be barred from entering that
6 playground? If a nonCatholic child would be barred from en-
7 tering that playground, I would say that's unconstitutional.

8 Q A sign underneath: "We take everybody,
9 including those who never heard that there was such a word
10 as "religion."

11 A And into that playground, and they don't
12 have to be a student in the school? Then I would say it would
13 be constitutional.

14 Q But it's the St. Aloysius.

15 A The name doesn't -- a rose by any other
16 name --

17 Q Well, elementary school.

18 A I don't care -- it's not a playground; it's
19 a school.

20 Q Well, if you move it next to the building
21 you said I couldn't do it.

22 A No, I wouldn't say that, Mr. Justice
23 Marshall. I would say you can't limit it to only those that
24 are students in that school and to limit it to only those who
25 are of the faith and you require those students to --

1 Q Suppose it's limited to children in that
2 school and that school accepts every child from the most
3 devout christian to the child that never heard of what
4 religion was.

5 A And does not require that child to par-
6 ticipate in any religious teaching or any --

7 Q Right.

8 A I would say that this would not be uncon-
9 stitutional --

10 Q Why not?

11 A Beg your pardon?

12 Q Why not?

13 A Because it is not the teaching or practice
14 of religion. The State does not finance the teaching or
15 practice of religion. The State is providing a park for
16 every member of the community --

17 Q No; I said everybody in the school. This
18 is a part of the school and part of the school's recreational
19 facilities under Cause 836-B.

20 A And the school is one in which religion is
21 not required of the children --

22 Q That's right.

23 A Of all faiths and of no faith and they are
24 not subjecting them to religious propagation, religious prac-
25 tices?

1 Q Right.

2 A Then the mere fact, as I said yesterday,
3 the mere fact that the school is church-related does not
4 disqualify it.

5 Q Although its purpose remains still in part
6 religious education, most of the children are quite interested
7 in it and will take it?

8 A If that were so, then that would cast a
9 great doubt on the constitutionality. Yes, indeed, because
10 then the purpose of the statute is to promote the purchase of
11 the school. As the Court below said, and I think very
12 astutely: "This is a religious enterprise. It is simply un-
13 realistic and goes beyond everything that we know to provide
14 a schools" -- as this Court said in Walz so recently: "Whose
15 primary purpose is to control the complete education of the
16 children." It is simply beyond the realm of reality to say
17 you can divide that child up and say when he uses playgrounds
18 he's not subject to the religious influence of this school.
19 He is not there for the purpose of partaking in the religious
20 nor --

21 Q Mr. Pfeffer, you have such difficulty with
22 this athletic program. Would it interest you to know that a
23 New England school in the past two years has built a \$6
24 million gymnasium with a \$3 million library?

25 A I'm sorry; I dont --

1 Q Six million for gymnastics and \$3 million
2 for books. Some schools consider it a very important part
3 of their education.

4 A Yes, I would say --

5 Q Now, if you let me build my recreational
6 center, how about building a machine shop next to it?

7 A Well, I think the answer is --

8 Q I'm getting in trouble now --

9 A The answer is given and I would say this:
10 if your machine shop and the recreational center is an inte-
11 gral part of that institution, that educational institution --

12 Q Well, in my case the machine shop and the
13 recreation are on the same page of the catalog, which gives it
14 equal whatever you want to give it.

15 A To come back, Mr. Justice Marshall, to the
16 -- I want to know if a child is in any way required to par-
17 ticipate in religious instruction or religious practice or his
18 in any way his religion is relevant to his enjoyment of that
19 facility. If it is so, and in this case the record shows
20 specifically, then that is not constitutional.

21 As a matter of fact, I -- you cannot deprive a
22 person of a public welfare benefit because of his religion, and
23 if the child cannot enjoy a park because he's not of the right
24 religion, or that the child cannot park or the gymnasium unless
25 he partakes of the religious teaching, the -- that is a

1 violation of the constitution.

2 Now, on the purpose -- one word about the purpose.
3 I have said, in Tilton that under the principle of the
4 coordinate branch of the government the Court may not perhaps
5 examine it beyond the stated purpose of the legislation.
6 I do not think that applies to state statutes; I believe this
7 Court has said it in Adickes and it has said it in Wrightman
8 against Mulkey that in fulfilling its constitutional obliga-
9 tion the Court must examine the actual realities of the situa-
10 tion and may not be barred by a statement of the purpose.

11 The actual realities of this situation are that
12 parochial schools are in economic crisis. We have to help
13 them; we have to help them out by financing them --

14 This, I submit, is the purpose of this statute.
15 And if, as this case shows, a parochial school system is
16 established and created to maintain the religion of its ad-
17 herents, then I say that the statute whose purpose is to re-
18 lieve that church of financial responsibility by taking part
19 and that the purpose of that statute is to advance religion.

20 Now, I would like to conclude and leave the
21 balance to my associate, Mr. Stanzer, but I find it necessary
22 to point out the tremendous significance of these two cases
23 before the Court, as to the future of our public educational
24 system in this country.

25 The public school system is, to me, the most

1 -- one of the most, if not the most important contribution
2 which our democracy has made to civilization. It is the only
3 institution which has an open-door policy by law in which no
4 child can be denied entrance because of the child's color, the
5 child's wealth or lack of wealth, the child's religion or
6 lack of religion. It is universal.

7 Because it is universal; because every child can
8 come in it without questions -- the door will never close on
9 a child entering a public school -- because of that that
10 schools deserves and merits financial support and maintenance
11 by taxes levied against all of the community.

12 But, once an institution can close its doors and
13 say: Before you come in I want to know your faith; I want to
14 know your color; I want to know whether you have a correct
15 baptismal certificate; otherwise you don't come in. I say
16 the Constitution of the United States does not allow such an
17 institution to be supported by tax-raised funds.

18 Q What does the record show us as to the ad-
19 missions policies of these schools?

20 A Well, the record in this case shows that
21 -- I will read it to you specifically -- that preference is to
22 be given to -- and that's the factor that all children -- at
23 least 95 percent or more of the admissions procedures, the
24 record shows that in choosing, in selecting students, if
25 preference must be given it should be given to those --

1 Q Are you reading?

2 A -- those who participate and attend mass.

3 Q Mr. Pfeffer, do you have the page of that
4 for us?

5 A Yes. It's page 223 of the Joint Appendix.
6 I will read it. The record shows. This is the --

7 "Although wealth should not serve as a criterion
8 of acceptance of pupils into a Catholic school, all other
9 things being equal it would seem fair to give preference to
10 a child whose parents support the parish. Regular use of the
11 fact, rather than the size of the contribution, would appear
12 equitable." It indicates whether the parents regularly attend
13 mass.

14 This is, at the very least, preferential treatment
15 based upon religion and upon attendance at mass, from the
16 record.

17 Thank you.

18 Q Was that the finding?

19 A Beg your pardon, sir.

20 Q Was that a part of the Court's findings?

21 A This is not disputed. This was conceded
22 at the trial.

23 Q Conceded?

24 A It was conceded at the trial that this is,
25 in effect, that there were certain things we had which were

1 challenged, but those which were not challenged were conceded.
2 by the Superintendent of Schools of the Diocese of Providence
3 that this was conceded to be an effect, uncontroverted.

4 Q This has to do with some situation when
5 more than 40 apply for the first grade and its in the form of
6 suggestions and I guess suggestions from the Arch Diocese, is
7 it, or --

8 A Yes, Your Honor, indeed.

9 Q -- that they use the metropolitan reading
10 similar
11 readiness test or some other/test for preregistration, some-
time in March, April or May?

12 A Yes.

13 Q And then if still more applicants than can
14 be accepted, they prefer the oldest children?

15 A Right.

16 Q This is arbitrary, but it has one advan-
17 tage: the other children are not as likely to fail in the first
18 grade as the younger ones. You are reading from that whole
19 list, and that comes from the archdiocese; does it?

20 A It all comes from the archdiocese; yes.

21 Now, those are criteria which are perfectly con-
22 stitutional in a private institution. But, by deeming the
23 attendance of mass of the parents' attendance of mass as a
24 factor in determining the _____ is certainly not
25 consistent with the First Amendment of the United States

1 Constitution.

2 MR. CHIEF JUSTICE BURGER: Thank you, Mr.
3 Pfeffer.

4 Mr. Stanzler.

5 ORAL ARGUMENT BY MILTON STANZLER, ESQ.

6 ON BEHALF OF APPELLEES

7 MR. STANZLER: Mr. Chief Justice and may it please
8 the Court;

9 My role here is to relate the record to the laws
10 set forth by Mr. Pfeffer and to suggest to the Court that the
11 record in the case amply supports the findings of fact made
12 by the trial court below.

13 First, I would like to explain how the legislation
14 has implemented. The deputy commissioner of education testified
15 and related that he was appointed by the commissioner of
16 education by the laws, rules and regulations, and subsequently
17 after drawing up the rules and regulations they were considered
18 at a public hearing and they were adopted and the materials,
19 the rules and regulations, together with the application forms
20 for teachers, together with the NPS Number 31 that Mr. Williams
21 referred to, were sent to the nonpublic schools.

22 Thereafter, the nonpublic schools submitted the
23 accounting forms or the expenditure sheets and the data con-
24 tained therein, together with the application to the deputy
25 commissioner of education. And he then reviewed the forms

1 of some 250 teachers and approved all of them; all of them
2 coming from the Roman Catholic schools.

3 I think in answer to some of the questions that
4 might be pertinent, for just a moment to take a look at the
5 role that the commissioner of education must play here. He
6 must, as set forth in page 3 of the rules and regulations,
7 verify: "The Department of Education upon receipt of a salary
8 supplement, shall determine the applicant's eligibility by
9 verifying whether or not the applicant complies with the
10 regulations."

11 The expenditure form which is attached to it sets
12 forth a summary of all the current expenditures of the school.
13 It is not just the expenditures for secular education that are
14 set forth.

15 Q I take it you are making that point on the
16 entanglement aspect. Well, what if a new school, having
17 nothing to do with any church; Catholic, Jewish or Lutheran,
18 moves into a community to open up an elementary school for
19 children and wants to qualify. Is there any difference in
20 what they would have to do to get accreditation --

21 A Your Honor, they would have to submit the
22 form of expenditures, the same form, and provided a teacher
23 applies, as the commissioner of education testified, if the
24 expenditures exceed the per pupil expenditure for the grade
25 in the public schools, then he would go into the school and

1 conduct an audit, and as he testified, would make a determina-
2 tion as between the sectarian expenditures and the secular
3 expenditures. And this same thing would apply to new schools.
4 If a new school wanted to apply for the act and have its
5 teachers apply it would have to do the same thing.

6 Q I suppose we could judicially take notice
7 the reality that some state boards of education have dis-
8 qualified some private schools because of their failure to
9 maintain minimum standards, even though they had no religious
10 connection at all. Is that -- Could we take judicial --

11 A I think that you probably could, Your
12 Honor, and I think that under the circumstances of this case,
13 there was one school that didn't qualify because its expen-
14 dirues per pupil exceeded the expenditures per pupil that --

15 Q Doesn't this mean that state power exer-
16 cises a great deal of authority and surveillance over all
17 education, through the required years of compulsory education?

18 A Yes, Your Honor. I think that there is a
19 difference, however, with respect to, as my brother pointed
20 out -- my brother Pfeffer pointed out -- with respect to
21 reporting the number of students attending the schools. There
22 is a difference as to determining, making a determination as
23 to the sectarian expenditures and the secular expenditures as
24 required under this act and as the Commissioner of Education
25 says he's going to perform.

1 Q Well, I'm speaking now in the abstract of
2 the private schools, the private elementary schools and it
3 develops that instead of teaching history, which may be a
4 required course, and presumably is, they are teaching
5 religion, even though it's not a religious-connected or
6 religious-related school. Wouldn't the school authorities say:
7 You must teach history or we will cancel your accredited
8 standing, which means they go out of business.

9 A Well, I wouldn't -- I think in light of the
10 cases, for instance of Pierce against the Society of Sisters,
11 that the private schools can teach certain subjects. If they
12 do not teach, as in Rhode Island, there is a requirement to teach
13 history; if they do not teach history then I would believe
14 that they would lose their accreditation and the department
15 of education would have a right to say to them that you must
16 teach history --

17 Q This would have nothing to do with whether
18 they were church-related or whether they were agnostics --

19 A That is correct, Your Honor; that is a
20 minimum standard that they have to meet, but that does not, it
21 seems to me, does not seem to interfere with the religious
22 aspects of the schools itself. And with respect to making an
23 investigation. Now the commissioner of education is put in a
24 role of making an investigation to determine what is sectarian
25 and what is not sectarian in its determination as to whether

1 or not teachers who apply under this act must qualify.

2 To move on, Your Honor, I would like to point out
3 the nature of the school itself, the totality of the religious
4 atmosphere that is involved in the school. This is amply
5 supported by the record and I would suspect it's almost con-
6 ceded by my brothers, but to point out the guideline, which is
7 Exhibit 14 of the document that has been utilized in evidence
8 here, this handbook, is in effect,, has been modified in
9 certain forms and it has been viewed that it is binding upon
10 the administration and the operation of the schools and each
11 principal in each of the schools maintains his handbook.

12 In order to complete, to indicate to the Court the
13 religious atmosphere that is maintained, though not in the
14 record, but part of the evidence is an Exhibit 14-A which is
15 purported to be some modifications of the guidelines of the
16 school system. And this is related by Judge Coffin in his
17 decision below. It was a letter dated January 20, 1970 which
18 the Court considered and a letter from Father Mullen to the
19 elementary school principals where he pointed out there was a
20 question of whether or not in light of the problems that were
21 maintained by the schools with respect to the proportion of lay
22 teachers to teachers. Father offered his own opinion and
23 this is to the elementary school principals, that reducing
24 this proportion should not be done. Five sisters and four
25 lay teachers should be maintained at all times. The reasons

1 are: one, the obvious financial difficulty and two: the
2 delusion of the Catholic atmosphere of that school that might
3 result. And of course that is the financial considerations.

4 The schools that -- the schools all have religious
5 and lay teachers; fathers and priests do not teach but
6 occasionally will teach religion. There may be eight
7 elementary schools in the diocese; one school has all lay
8 teachers and two or three schools have religious teachers.

9 Ninety to 95 percent of the nonpublic school
10 students are enrolled in the Roman Catholic parochial
11 schools. The diocese averages two religious teachers to one
12 lay teacher. Religious teachers are sisters, and there are
13 approximately 29,000 students in the elementary schools from
14 grades one to eight. Substantially all of the children in
15 the schools are of the Roman Catholic faith.

16 A great majority of the 98 schools are all parish
17 schools; indeed, they are owned and operated by the parish.
18 Of the schools not owned by a single parish they are owned and
19 operated by two or three parishes together.

20 There are six schools which are private but these
21 are operated by a religious community of sisters who own and
22 operate the schools and there is one such which is operated by
23 the diocese. A majority of the principals are appointed by
24 the Mother Provincial of the order of sisters which staff this
25 school. The last two years Father Mullen has appointed a

1 principal of one of the schools of which there are 30.

2 In two cases the pastor appoints the principal and
3 one school -- in one school, which is autonomous, the principal
4 is appointed by the board of directors of the school. There
5 are two schools which have lay principals. The religious
6 teachers are appointed by the Mother Provincial. The recruit-
7 ing process of the lay teachers starts in the superintendent's
8 office and one of the assistants interviews all the applicants;
9 they fill out an application; they are interviewed by one of
10 the superintendent's assistants and she refers them to the
11 pastor who signs a contract with them.

12 It might be pointed out that with respect to the
13 contract the evidence was clear, and this was pointed out that
14 if the contractual obligation was less than \$6,000 that the
15 statute would only become constitutional; the parish would be
16 obligated to pay the total of the \$6,000.

17 Finally, the principal for a particular school
18 would interview the lay teacher after they refer her from the
19 superintendent's office and it would then to the pastor
20 and the lay teacher would sign upon agreement.

21 The majority of lay teachers in the Roman
22 Catholic schools are Catholics, with possibly 10 to 15
23 percent of them that are not Catholics. The schools usually
24 have the embellishment of the Roman Catholic school, as testi-
25 fied, brought out. When one visited such a school he knew he

1 was visiting a Roman Catholic parochial school. Each class
2 day starts with a prayer for each of the students. They are
3 usually said at the beginning of the day and sometimes at the
4 end of the day.

5 There are lay teachers or religious teachers of
6 the homerooms where those prayers are said. The beginning of
7 prayers are supervised; conducted either by lay teachers or
8 religious teachers. One-hundred and fifteen minutes a week
9 of school time is devoted to religious classes.

10 This curriculum is set out in the handbook or the
11 weekly time allotment that comes out each year in September.
12 The religious classes will deal with the study of the various
13 tenets of the Roman Catholic education.

14 Since the passage of the act, teachers who have
15 applied for the supplement do not teach religious courses, but
16 prior the lay teachers could if they wanted to and if they
17 felt competent. It would be up to the individual teacher to
18 determine if she wants to begin her class with a prayer.

19 One reason for the salary supplement act, or I
20 might point out that there are sometimes visiting missionaries
21 at least once a year and of course the handbook provides that
22 the vocations programs are conducted once a year.

23 There was testimony given by the one nun who did
24 apply and did qualify under the act and she was asked what her
25 view was of the role of a teacher of a parochial school; and

1 she said, on page 23 of the Joint Appendix: "According to
2 religious thinking of the Catholic today it is that as young
3 adults going into the community they should hold a Catholic
4 attitude toward different things they meet with and yet it is
5 not totally Catholic; it is a christian attitude."

6 "As teachers, we by our example, particularly and
7 our handling of the children, try to inculcate in them the
8 same christian attitudes. As we religiously are told to dis-
9 cipline, and we try to exert discipline with the children so
10 that they would be open to study and have the proper attitude
11 toward their work."

12 The religious atmosphere that permeates at the
13 school is that of the teachers themselves, though she does
14 not think that this is an overall religious atmosphere.

15 One of the principal functions of the parochial
16 schools, she said, is to have available formal religious train-
17 ing, because otherwise the children would not be reached ex-
18 cept in the catechismal classes after school and you do not
19 get that at an early age. You would do that if you handle them
20 right in the first grade.

21 Father Gino(?) one of the pastors of the parish
22 schools testified, and he testified that the pastors entered
23 into the contracts with the teachers under the salary -- it
24 was understood to mean that the salary is paid by the parish
25 and would be that must less; some of the burden would be taken

1 off the parish's shoulders. It is most fair to say that the
2 financial responsibility of the parish is to be lessened if
3 the supplement payments were made. The money saved would be
4 used to better the schools but it could be spent for parish
5 purposes.

6 The Father also testified that he would not hire
7 divorced teachers nor would he hire ex communicated Catholics
8 for teaching in the schools.

9 I might go on to point out that there are numer-
10 ous references in the handbook to Exhibit 14 which relate the
11 fairly religious atmosphere of the school which relate and
12 show and supplement and support the findings of the Court below.

13 I might, in conclusion, say that the Court below,
14 the record it found in making the findings that it did, was
15 amply supported by the record and we respectfully suggest
16 and urge the Court to affirm the findings of the Court below.

17 Thank you.

18 MR. CHIEF JUSTICE BURGER: Thank you, Mr.
19 Stanzler.

20 Mr. Williams, you have about five minutes left.

21 REBUTTAL ARGUMENT BY EDWARD BENNETT WILLIAMS, ESQ.

22 ON BEHALF OF APPELLANTS

23 MR. WILLIAMS: Mr. Chief Justice and may it
24 please the Court:

25 I would like to take these few minutes to just

1 correct two impressions that have been left with the Court in
2 the argument of counsel.

3 Mr. Pfeffer suggested to the Court that the
4 superintendent of schools for the parochial schools of Rhode
5 Island testified that if the statute were held unconstitu-
6 tional then the money would just continue to come from the
7 parish.

8 The record shows, first of all, that what the
9 superintendent testified to was that the contracts with his
10 teachers were signed after the statute was passed and that
11 because the individual schools were bound by those contracts
12 they would have to pay for that year the amount of money
13 called for in the contract because it had been executed. But,
14 it did not suggest -- he did not suggest; he did not say that
15 thereafter that the schools would be able to continue this
16 higher stipend.

17 Now, an issue has been injected in the last
18 moments of the argument here. The suggestion has been made
19 that there is some kind of exclusion policy in these schools,
20 either racially or religiously and I receive a comeuppance
21 this morning from Mr. Pfeffer when he said that I had mis-
22 stated Title VI of the 1964 Civil Rights Act.

23 Well, Title VI of the 1964 Civil Rights Act
24 specifically incorporated in the Rhode Island Salary Supple-
25 ment statute, precisely stated: "Such regulations shall ensure

1 that any nonpublic school, as that term is defined earlier in
2 this chapter, which employs teachers who receive salary sup-
3 plements as provided for in this chapter, shall comply with
4 the provisions contained in Title VI of the Civil Rights Act
5 of 1964."

6 And the suggestion was made this morning that
7 there was an exemption for religion. Well, there is an exemp-
8 tion for religion. There is a very narrow circumscribed
9 exemption for religion in Title 42, 2000 Section 1 in hiring
10 policies of institutions where the hiring is by a religious
11 institution for a religious activity. It is so that a
12 religious school does not have to hire somebody of a different
13 religion to teach religion, which would have no application
14 to this case, because religion teachers are excluded from the
15 benefits of the act, in any event.

16 There was no suggestion at any time until the
17 waning hours of the argument here in this Court that there was
18 ever any exclusion on the basis of race from any of these
19 schools; never, or any time in the lower court, and indeed the
20 record is diametrically to the contrary and I invite the Court
21 to read it.

22 And I suggest, likewise, there has been no
23 evidence produced in this record in the lower court where any-
24 one is excluded from these schools by virtue of religion for,
25 indeed, the record once again is diametrically opposite to the

1 suggestion that was made in the closing moments of counsel's
2 argument.

3 Q How about on page 223 of the appendix
4 to which Mr. Pfeffer referred.

5 A Page 223 of the --

6 Q What that is is part of Exhibit 14.

7 A Counsel said that that was a stipulation
8 between the parties. Nothing could be farther from the facts,
9 I suggest. If you read the record here from pages 120 to 127
10 you will see the long colloquy that went on between counsel
11 with respect to the provisions of this handbook in evidence.
12 And it was pointed out that many sections of the handbook
13 were superceded and never operative and were never put into
14 practice and counsel met and stipulated with respect to cer-
15 tain portions of the handbook and that whole dialogue is con-
16 tained between 120 and 127 and I suggest to the Court that
17 there never was an issue in this case -- there never was an
18 issue to which this particular section could be germane be-
19 cause there was no proof of exclusion on racial or religious
20 grounds.

21 For these reasons we ask that this Court uphold
22 the constitutionality of the Rhode Island Salary Supplement
23 Act as applied to the teachers of the nonprofit, nonpublic
24 schools.

25 Q What was the handbook?

1 A I'm sorry, Mr. Justice.

2 Q What was the handbook?

3 A The handbook was promulgated in 1965, Mr.

4 Justice.

5 Q By whom?

6 A And given by the superintendent of schools

7 the --

8 Q What schools?

9 A The parochial schools in Rhode Island, and

10 given to the principals of the various schools and all of the

11 teachers who testified in this record were thoroughly un0

12 familiar with it because none of them had even been asked to

13 follow it, nor was any one in possession of it, nor was

14 anyone, in fact --

15 Q What did he give it to them for?

16 A He gave it to the principals.

17 Q Why did he give it to them?

18 A He gave it to the principals because I

19 believe that it was an aspiration for the way that he wished

20 these schools to operate. But, in fact, they were not

21 operated and the testimony in the record is to the fact that

22 they were not operated under --

23 Q He gave it to the teachers. He --

24 A No; he didn't give it to the teachers, Mr.

25 Justice.

1 Q Did he give it to the superintendents?
2 A He gave it to the principals of the schools.
3 Q Gave it to the principals?
4 A Yes, sir.
5 Q Given by the superintendent of all the
6 schools?
7 A Yes, sir.
8 Q Who had power to hire and discharge?
9 A He had the power to hire and discharge.
10 Q And tell them that this was what they
11 wanted --
12 A He testified, Mr. Justice, that the hand-
13 book had been superceded by other directorates and that it was
14 inoperative and --
15 Q What page was it he testified it had been
16 superceded?
17 A The testimony of Father Mullen appears in
18 the record over many pages, beginning, if the Court please --
19 Q I mean which part shows where this had been
20 superceded?
21 A I direct the Court's attention to page 120
22 to 127 where those stipulations were worked out.
23 Q Does it say that this had been superceded;
24 were the principals told that?
25 A At page 68 the superintendent of schools was

1 asked about the handbook: Is that handbook now in effect?

2 "Yes," except insofar as it has been superceded
3 by later directives."

4 Now, if the Court please --

5 Q Well, now where is the place that shows it
6 was superceded by later directions?

7 A Pages 120 to 127.

8 Directing your attention, Mr. Justice, to page 121
9 it was stated that: They will be read into the record with
10 the understanding that if Father Mullen was called that he
11 would testify that although they had never been formally re-
12 pealed or superceded by a written document, nevertheless they
13 are not now in effect or not being carried out.

14 And then they go on to point out the various
15 sections, the various paragraphs and the various subdivisions
16 which have been inoperative or superceded.

17 Q Did it show they had been withdrawn from
18 the principals?

19 A It does not, sir.

20 MR. CHIEF JUSTICE BURGER: Thank you, Mr.
21 Williams. Thank you gentlemen.

22 The case is submitted.

23 (Whereupon, at 2:20 o'clock p.m. the above-
24 entitled argument was concluded)