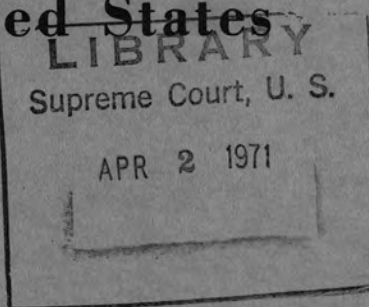


Supreme Court of the United States

OCTOBER TERM, 1970



In the Matter of:

Docket No. 89

----- X
ALTON J. LEMON, ET AL.,

Appellants,

VS.

DAVID H. KURTZMAN, AS SUPERINTENDENT
OF PUBLIC INSTRUCTION OF THE
COMMONWEALTH OF PENNSYLVANIA, ET AL.

Appellees.
----- X

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Date March 3, 1971

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C O N T E N T S

	<u>ORAL ARGUMENT OF:</u>	<u>P A G E</u>
1		
2	Henry W. Sawyer, III, ESq.,	
3	on behalf of Appellants	3
4	J. Shane Creamer, Attorney General,	
5	State of Pennsylvania, on behalf	
6	of appellees	25
7	William B. Ball, Esq., on behalf	
8	of Appellees	26
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10	*****	
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1971

ALTON J. LEMON, ET AL.,

Appellants

vs

No. 89

DAVID H. KURTZMAN, AS SUPERIN-
TENDENT OF PUBLIC INSTRUCTION OF
THE COMMONWEALTH OF PENNSYLVANIA,
ET AL.,

Appellees

The above-entitled matter came on for argument
at 10:43 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:

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Harrisburg, Pennsylvania
On behalf of Appellees

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3 Harrisburg, Pennsylvania 17101
4 On behalf of Appellee Schools
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The Court:

This is an appeal
complaint of three individual
tions, challenging the constitution-
statute: Act 103, which provided
to nonpublic schools, to submit
teaching mathematics, modern
science and physical education

The complaint alleges
Amendment's religious clause
of the 14th Amendment. A three-
plaint on the First Amendment
to state a cause of action
no record, and the 14th Amend-
in all parties.

When this act was
in the United States. Its effect

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Number 89: Lemon against Kurtzman and others.

Mr. Sawyer, you may proceed whenever you are ready.

ORAL ARGUMENT BY HENRY W. SAWYER, III, ESQ.

ON BEHALF OF APPELLANTS

MR. SAWYER: Mr. Chief Justice and may it please the Court:

This is an appeal from the dismissal of a complaint of three individual taxpayers and several organizations, challenging the constitutionality, with a Pennsylvania statute: Act 109, which provides for the payment of tax money to nonpublic schools, to reimburse them for the costs of teaching mathematics, modern foreign languages, physical science and physical education.

The complaint alleged a violation of the First Amendment's religious clause and of the Equal Protection Clause of the 14th Amendment. A three-judge court dismissed the complaint on the First Amendment grounds on the basis of a failure to state a cause of action: no answer, no discovery, no trial, no record; and the 14th Amendment ground for a lack of standing in all parties.

When this act was passed it was without precedent in the United States. Its scheme is simply this: any public

1 school has a month to fill out a form -- excuse me -- any
2 nonpublic school has but to fill out a form and submit it,
3 setting forth its costs in these subjects, the teachers'
4 salaries, teaching materials and for textbooks and the state
5 forthwith pays that amount over to the school. The trans-
6 action is labeled: Purchase of Services Contract.

7 As Judge Hasty, dissenting below, said, neverthe-
8 less, and I quote: "The State buys no services and the school
9 sells none." There are no new children involved; there is no
10 new teaching. The pedagogical status quo in Pennsylvania is
11 precisely the same as it was before the act; the only difference
12 is economic.

13 The act provides for considerable new state
14 regulations of the schools, the nonpublic schools, and when I
15 say "nonpublic" it's to be understood, of course, that these
16 are largely church-affiliated schools; 97 percent.

17 Q And primarily Roman Catholic?

18 A And 97 percent of that 97 percent is
19 Roman Catholic.

20 The act calls for inspection of textbooks for
21 testing of pupils and for certain levels of performance and
22 that's new. For the certification of teachers after a passage
23 of time, and that's new --

24 Q The State doesn't prescribe textbooks,
25 does it?

1 A No, sir, for any procedures and for
2 regulating of teaching content and those provisions of the act
3 are in the record at page 20; 20 to 24.

4 There were 17 and a half million under the act
5 this year. The first year it was five and that's in the
6 record, but since then 17 and a half million.

7 Now, the complaint alleged particular violations
8 of the establishment and freedom of exercise clause, although
9 there is no question raised about its adequacy as a pleading --

10 Q Would you mind here? I'm not quite clear
11 as to the details of how this scheme works. I know you said
12 there was a contract, but what's involved? Does the state
13 authority accept the representation from the institution?

14 A They make out a form, Your Honor, that says
15 that the cost for teachers' salaries and teacher materials and
16 textbooks is such and such, for teaching, let's say, mathe-
17 matics, and then they submit that to the state and the state
18 pays them the money.

19 Q Well, is there any order to pay --

20 A Oh, yes; there is an order. There is an
21 order of whether or not they --

22 Q Well, before the money is paid what check
23 is made of it?

24 A You see, we don't know, Your Honor.

25 Q I see.

1 A We can only glean this from the statute,
2 because there is no record. So we never found out how the
3 state goes about these procedures. Of course, the -- of my
4 appeal is that there should have been a -- although I'm here,
5 an appeal from a motion to dismiss, and I would be unable to
6 inform you on a number of things because there isn't any
7 record.

8 Q The motion to dismiss what?

9 A Sir, the motion was made to dismiss the
10 complaint for fair and steady cause of action for lack of a
11 substantial Federal question.

12 Q It wasn't a summary judgment; was it?

13 A No, sir. It's not an Allen situation where
14 both sides cross-moved for summary judgment after -- and it
15 wouldn't have happened in this case except the complaint was
16 filed in a complaint for dismissal, almost.

17 Q And you said that the schools submit costs
18 for these courses teaching and materials and what not?

19 A Yes, sir.

20 Q And the state then just pays the money,
21 so far as the complaint shows; I mean so far as we now know?

22 A Yes, sir.

23 Q Pay 100 percent of it or --

24 A Well, no, because that depends on how much
25 is available. Now, the first year it was only \$200 million so

1 that it was a pro rata --

2 Q Available in what? In legislative
3 appropriations?

4 Q It was from horse racing---

5 A A horse-racing tax. Yes, that's right.
6 The 17 and a half and if I understand the schedule -- Mr.
7 Shane Creamer can tell us -- I understand it will go to \$38
8 million in the forthcoming year, although on Sunday night at
9 midnight the State of Pennsylvania officially went bankrupt,
10 according to the Governor. And so all of these bills are
11 probably in limbo.

12 Q This case hasn't become moot as a result
13 of that?

14 A No, sir --

15 (Laughter)

16 May it please the Court, Act 109 is Pennsylvania's
17 assessment bill, and after 200 years the Pennsylvania Assembly
18 attempts what the Virginia Assembly attempted and which Madison
19 and Jefferson defeated. The similarities are striking.

20 Q All you are really asking us for is that
21 you have a chance to try this case; isn't it?

22 A Yes, sir, but you could facially declare
23 this constitutional and I do want to address myself to that.
24 There are several grounds on which this Court could find --
25 we must be realistic about it; it presents problems on many

1 levels. They are at the legal level, the traditional level.
2 There is no question that the traditional church-state docu-
3 ments avowed by this Court would appear to require the invali-
4 dation of this act.

5 I discern eight grounds on which church-state
6 cases have been -- by this Court and I venture to say this is
7 the first piece of legislation ever before this Court that
8 violates school aid and I will come to that in a moment, sirs.

9 Q Could I ask you a preliminary question?
10 Is it of any consequence that the general taxing power of the
11 state or the general revenue of the state are not involved here;
12 this is a special tax derived from horse racing?

13 A The Court below thought not. That question
14 was raised as tax money and one of my claimants went to the
15 horse race and paid the tax and he was the only one found to
16 have an issue(?) and I think the Court's wrong on that. A tax
17 is a tax and public money is public money, for this purpose.
18 There might be other cases where you have a great deal of
19 question of what the source is.

20 But when you get to the fundamentals of the First
21 Amendment, Mr. Justice Harlan, I think public money is public
22 money. And it makes no difference whether it's a special tax;
23 you can't isolate it.

24 The controversy here is pregnant with other issues.
25 As they say in their brief and as they said in Harrisburg,

1 that unless relief -- unless subsidy is forthcoming the
2 parochial school system will wither and decline. On the other
3 hand, the attackers of the bill will point out at a different
4 level that the effect of this would be to perpetuate de facto
5 racial degregation that's exemplified by the nonpublic school
6 system; or at still another level the proponents say, having
7 predicted the demise of the nonpublic school system that the
8 resulting exclusively public system will be deleterious to
9 a -- society and we would -- I suppose, that what you are
10 heading for here is a dual school system. If this act is
11 sustained: the one primarily affluent and suburban and white
12 and at least typically white suburban and it leads to the other
13 poor, inferior, practically custodial and Black.

14 And there are nations that have dual school
15 systems and this is what we are heading for.

16 If we are talking about the traditional document,
17 there is no precedent for it -- there is no precedent for
18 legislation. The cases are discussed; they lead, it seems to
19 me to the conclusion that unless the law is to be changed the
20 establishment(?) must go down.

21 I do want to mention Bradfield, however, since it
22 has come up, Mr. Justice Blackmun. Now, Bradfield has a
23 precedent, I think, Your Honors. I'm not speaking about the
24 situation in Bradfield, because I will talk about that, too.
25 As a precedent, I think Bradfield doesn't need to trouble us,

1 because, rightly or wrongly -- I have a footnote which covers
2 Bradfield in my brief at some length at page 19. And there,
3 the Supreme Court, rightly or wrongly, just didn't reach the
4 First Amendment issue because they simply said: the fact that
5 this corporation -- the hospital corporation's members are
6 composed of religious people and they happen to be Catholics,
7 doesn't make it sectarian any more than it would if they were
8 Methodists and they concluded finally, "We are not able to
9 say," and I'm quoting: we are not able to say that the complaint
10 in this bill shows that the corporation is of the kind des-
11 cribed. On the contrary he has clearly shown it is not.

12 Now, that doesn't get us away from the question.
13 The question is: how about hospitals, because hospitals are in
14 a relationship with the state and that's true in Pennsylvania
15 today. They are paid so much per diem for indigent patients
16 collected by the state and sent to them for treatment.

17 Q Well, don't they receive direct Federal
18 grants under Hill-Burton?

19 A Yes, sir, but not if they are sectarian.

20 Q Pardon?

21 A Not if they are sectarian. That's my
22 understanding and here again, we are without a record. So,
23 Your Honors asked me. I was on the board of an Episcopal
24 Hospital in Philadelphia and we added nonEpiscopalians to the
25 board; we did a number of things of that kind. We detached

1 ourselves from the archdiocese in order to get Hill-Burton
2 funds.

3 Now, I think that's what happens in hospital
4 cases. I am speaking of the kind of thing that might be
5 analogous to our situation; that is: you treat a patient and
6 you get paid so much. My rationale is this, and these are the
7 differences and I think they probably all have to exist for
8 the hospital situation to prevail constitutionally.

9 First of all, to recognize that it is not a
10 church and that care of the sick is not a mandated -- now,
11 mandated where they just function; it's part of the good will
12 ethics of almost all religions.

13 It doesn't, therefore, teach or proselytize.
14 It does not prefer -- I don't think exclusion is necessary --
15 I think any distinct preference is sufficient to make it un-
16 constitutional and finally, and most important: this is true
17 purchase of services. Here the purchase of services is not a
18 subterfuge; here the status quo is not the same after as before,
19 because new specific individuals who are discernable and could
20 be tracked or treated would not be treated if it were not for
21 the use of this facility.

22 So, I think that all those differences are
23 important to the situation and I don't for one minute agree,
24 if Mr. Pfeffer did -- I'm not quite sure he did -- that the
25 state can subsidize a church to carry on a secular function.

1 I think it can only do that under very special circumstances
2 and the hospital one is one of the very few that I can
3 imagine.

4 Q Mr. Sawyer, you seem to distinguish the
5 hospital situation even though it maintains a chaplaincy
6 staff, for instance?

7 A Yes. I think the mere maintenance -- all
8 of these other qualifications, the mere maintenance of a chapel
9 somewhere on the premises would not be sufficient, but I think,
10 as somebody said, I don't think you can be made to go through
11 the chapel either on your way to be cured or in thanks for
12 having been cured on your way out.

13 Q Well, what about what I was mentioning,
14 a chaplaincy staff: four or five chaplains of a particular
15 denomination maintained by the hospital; does this make a
16 difference?

17 A Your Honor, I think you keep adding things
18 and I think you will finally we get to the point. By itself I
19 would say no; not if there is not an importuning of the chari-
20 table patients in any way. The mere availability of the staff,
21 I would say no. But I think you could keep adding until it
22 begins to be a permeation of the jury function with a religious
23 function.

24 Now, I do want to mention Allen because the
25 briefs in Allen -- all the briefs in Allen misstate Allen's

1 facts, and I must say that -- I have to say that that mis-
2 statement is based on a misapprehension, I think, of Allen's
3 facts in the Walz opinion.

4 I'm referring to the -- and it's alleged that the
5 Court in Allen sustained a New York book law even though the
6 effect was to relieve the schools of, Walz said, "the enormous
7 cost for those books."

8 Now, actually the footnote in the Allen case,
9 Footnote six, makes it clear that the parents previously bought
10 the books; not the schools, so that there was no relieving of
11 the burden that the school previously carried.

12 Now, there is another point in Allen, a factual
13 point, that I haven't seen commented on at all and that is this:
14 that prior to the 1965 amendment in New York the State didn't
15 pay for public school children's books; they could be paid for
16 by special provisions, 703 of the local tax. But, you see that
17 means that there the New York Legislature was conferring a
18 benefit: namely, free books on all children that had not pre-
19 viously existed. It's quite clear; you will see that in the
20 footnote in the Allen case in the very beginning of Justice
21 White's opinion.

22 Now, before 1965, and I am quoting from the
23 second paragraph: "The State purchased books and so and so, to
24 rent or sell the books to the public school children." Now,
25 the preamble there that they were doing something for education

1 took on some plausibility and it was applying to all children
2 something they didn't have before and indeed, could this Court
3 have said in Allen that the New York statute was unconstitu-
4 tional unless, in the process of giving books to all children,
5 the New York Legislature said, "But, Catholic children can't
6 have them."

7 Now, the analogy in Pennsylvania, you see, would
8 be if Pennsylvania, in order to fulfill a lack of teaching in
9 mathematics or physical sciences, et cetera -- a lack of teach-
10 ing, had set up somewhere, either tutoring or some facility
11 to teach these four subjects. And then they would have that
12 kind of situation and then when we come in and say: "Well, the
13 Pennsylvania Act is unconstitutional because it doesn't ex-
14 clude Catholic children from these facilities." But, of
15 course, nothing like that happened.

16 Now, in that sense, Allen, it seems to me,--

17 Q What if, having a shortage of mathematics
18 teachers, the State had set up a center to teach teachers in
19 these subjects, including the sisters of Roman Catholic orders?

20 A Teach them free?

21 Q With tax money; to --

22 A That's a hypothetical situation, Your Honor,
23 that I would think would be constitutional. If you could offer
24 free education to anybody, even if the free educationas to how
25 to educate in Catholic schools; yes, sir.

1 Q With this hypothetical and while you are
2 stopped, let me ask you another. Suppose the Board of Public
3 Education of the State provided panels of public school
4 teachers, hired on public school standards to teach all these
5 nonsectarian subjects and provided by the act that any private
6 school meeting certain other scholastic standards of law could
7 have one of these teachers to teach mathematics or chemistry
8 in their school under the direction of the state.

9 Do you see an involvement there?

10 A I see a lot of problems with that kind of
11 legislation, Your Honor and of course, it's been talked about.
12 I don't know how this Court would resolve that problem; I think
13 it's difficult. There is entanglement and an involvement in
14 problems.

15 That is, I really am not trying to evade it; I've
16 thought about it and I'm not at all sure, Your Honor, how I
17 could brief that question to this Court. I think it's a very,
18 very close case.

19 Q It isn't our case, anyway.

20 Q It would be the same way with a voucher
21 grant.

22 A Yes, sir; the voucher grant, I think
23 presents problems, but there I think I could say with confidence
24 that the constitutional magnitude of the problems of the voucher
25 plan are fairly insignificant compared to this Pennsylvania

1 situation.

2 Now, I want to mention just this about Walz:
3 Walz certainly made one important purely negative point.
4 Quite clearly Walz refused to validate the exemption there on
5 the ground that churches, by good works, by welfare and chari-
6 table works, perform a secular function which otherwise would
7 have to be performed at public expense.

8 Our Chief Justice _____ who announced this
9 opinion for the court clearly announced that rationale. That
10 seems to me to pretty well jeopardize the argument of the
11 Appellees that the main reason that this is constitutional is
12 because this is a secular function and that the facts -- before
13 my church, makes no difference.

14 The rather critical thing is the concept in Walz
15 of both interdependence and entanglement. I think they are
16 somewhat different. Here, interdependence is, on the face of
17 this act, the legislature has said: "We are now dependent on
18 the church school system to carry out our mandated constitution-
19 al duty to educate children."

20 And in the brief filed here the church has now
21 said: "We are dependent upon the state subsidy to carry on our
22 church-mandated function of educating adherents to our faith."

23 As to entanglement, and I think the very core of
24 Walz was entanglement, because it seems quite clear that the
25 concern of the Court that taxation would mean more entanglement

1 than exemption(?)

2 As to entanglement, this act has a great deal of
3 it, far more than I think any of the other legislation involved
4 in this series of cases; not only these inspections of these
5 teacher grades and all those new rules, but very, very impor-
6 tant is Section 3, Act 109 --- and I quote: "Any subject matter
7 expressly religious teaching or the morals or forms of worship
8 of any sect" to enter into the teaching of these subjects.

9 Now, does this not require a state to conduct a
10 very continuing surveillance, to use the Chief Justice's words,
11 which the Chief Justice said but a hallmark of entanglement,
12 impermissible entanglement.

13 Now, we don't share that there is going to be a
14 wholesale invasion of this by, let's say, the Catholic schools.
15 But, we do say that it's only a part of separatism to insist
16 on the immutable secularity of any subject, particularly
17 something like physical science. I mean, after all, it was
18 astronomy, not theology which got Gallileo in trouble.

19 The physical sciences are fraught, it seems to me,
20 with the temptation and likelihood, in fact, I think we could
21 prove if we had discovered that a cleric should not and would
22 not teach astronomy without making it God-oriented in a
23 religious group.

24 Now, I think the State has got to, therefore,
25 police this and I don't think that any gumshoe from the

1 Department of Education should be walking around to see if
2 Sister Mary is using _____ French to teach the French
3 language instead of Voltaire. I don't think that is constitu-
4 tional and it's the worst kind of entanglement and --

5 Now, as for the purpose and effect test, those
6 statistics -- due to the fact that we have no record. As
7 -- they took the Act's preamble; they took the Act's self-
8 serving declarations of secularity --

9 Q Is there an issue as to the difference between
10 the purpose and effect test?

11 A Yes, sir.

12 Q There is. Do you think they are separate
13 tests?

14 A Well, there are two aspects to one of the
15 tests and I don't think -- we said it; yes. I think as it was
16 articulated, both by Chief Justice Warren in McGowan and by
17 Your Honor in Schempp, that both requirements had to be
18 satisfied, therefore, in essence, they would be separate.
19 Because if either of the --

20 Q I thought what I said in the concurrence
21 in Schempp was after joining the Court's purpose and effect
22 test, that mine was simply an elaboration of the purpose and
23 effect test.

24 A Yes, sir. In other words --

25 Q I don't think that concurrence regarded to

1 a separate, did it?

2 A You think you did not separate the purpose
3 and effect as two facets?

4 Q No; I don't suggest that; I say that
5 was a purpose and effect test and some other test, entangle-
6 ment or involvement.

7 A Well, I think, Your Honor -- I really
8 think that all of these tests, and I think there are eight --
9 are seen as threats; I think every one affects every other one,
10 and fascinatingly enough, every single one can be found in the
11 the -- not one single one of the tests of the Court's rules
12 that I do not find somewhere in the language of that document.

13 But, as to the purpose, the District Court simply
14 said -- it refused to look at the legislative history, and
15 this of course, is the official legislative history, because
16 Pennsylvania takes it all, apparently on the mistaken notion
17 that I was trying to get them to examine the modus of the
18 legislators. Well, I wasn't talking about the modus; I was
19 talking about the committee reports and the -- the significance
20 is this: the Appellees say the purpose here is to provide
21 children in the State of Pennsylvania with instruction in at
22 least four subjects, as the preamble said.

23 But when you look at the legislative history you
24 will find that nobody ever suggested that there was any such
25 problem. Nobody ever suggested there were any children in

1 Pennsylvania then not being instructed in these subjects.

2 If that had been researched the Committee would have explored
3 presumably, alternative means of teaching these subjects.

4 What they explored was all the alternate means of giving aid
5 to parochial schools, from shared time and all of that through
6 the list of -- they finally adopted.

7 Now, to me it seems that there is only one
8 question, and that is whether or not the supposed exigencies,
9 economic exigencies of the subjects, the overwhelming socio-
10 logical considerations are such as to persuade this Court to
11 assure strict construction in submission of what are said to
12 be the practical realities.

13 And you are asked to do this, by the way, without
14 a record. Now, there is a contention of fact made here, and
15 that is that if the aid isn't forthcoming this school system
16 will wither and die, I would think is relevant; it is relevant
17 and must be pleaded; it must be proved that I'm entitled
18 certainly to extensive discovery on the question. Because,
19 here the Appellees, in effect, are asking this Court to take
20 judicial notice of a point of economics and sociology and not
21 the school system, which by the way, the known statistical
22 data is -- which is quite equivocal at this point --

23 Q You say you -- are there legislative
24 findings on that, Mr. Sawyer?

25 A Well, sir, the finding was that there is a

1 financial crisis; that's all. And of course I know of no
2 institution in our society except perhaps the military, that
3 hasn't been through a financial crisis and I am sure the
4 schools are -- the public schools are, and I accept that, but
5 there is no finding in the sense that so many schools --

6 Q Suppose it is true; suppose the record
7 showed conclusively that this was true; how does that bear on
8 the constitutional question, in your view?

9 A In my view, Your Honor, it doesn't bear at
10 all and there no practice that says if something is more ex-
11 pensive to be done constitutionally, that that's a ground for
12 doing it unconstitutionally.

13 But, you cannot be unaware, Your Honor, --
14 There is a mass of matter in these briefs -- that this issue
15 has certainly not treated itself very much -- in this case and
16 it is raised by the Appellees in the brief of this Court. And
17 it's there; and they say it's there. I'm skeptical that there
18 has been a grievance there and I would like to have discovery
19 on the facts to restore a vast principle of constitutional law
20 that has to be decided by this Court on the supposition that
21 there is this kind of practical problem, and to speak very
22 freely it has been raised by a church where the treatment would
23 show that the capital assets of the church vastly exceed that
24 of every other denomination in the United States combined, and
25 I don't, for one, believe that because of financial difficulty

1 that the Catholic Church is going to give up a mandated
2 function for which they fought, and indeed in Philadelphia in
3 1941, died for a principle in the condition of affluence in
4 which everyone in society now finds themselves.

5 Now, I must get, if I may, to the 14th Amendment.
6 Leupp(?), there the Court said no standing in any of my plaints.
7 The charge was that the nonpublic schools are de facto racially
8 segregated, whether by reason of policy or tradition or prac-
9 tice or cost or residential pattern, that they are. Basically
10 it is a white school system. The figures that are available
11 from public sources are in the brief; again we have no record.

12 The complaint idea is this: that with this amount
13 of tax money going to these schools they are sufficiently
14 quasi public so that if they discriminate and segregate that
15 is state action reachable by the Equal Protection Clause of the
16 14th Amendment.

17 As for standing, I think it's a case where, to
18 find out whether or not Mr. Lemon/^{who} is a Negro parent with Negro
19 children in the public school and who alleges in his complaint
20 a deleterious effect upon his children's schools by reason of
21 a subsidy to the others. Whether he has a sufficient personal
22 stake in the outcome, which has been the touchstone of standing
23 in these matters -- he is a taxpayer -- would be illuminated
24 by discovery.

25 I think the two are interchangeable because it may

1 depend, indeed, on how pervasive the segregation is and how
2 much discrimination there is and we can't find out any of that
3 without discovery in the matter.

4 Now, I mentioned that -- well, one point more on
5 the 14th Amendment point. Mr. Douglas said not so long ago
6 in Jones against Mayer(?) -- he said: "The contrivances which
7 some states have concocted to abort the command of our decision
8 in Brown versus Board of Education are by now legendary."

9 Now, I for one, can't for the life of me see how,
10 if you validate a purchase of services contract scheme where,
11 in fact, no new educational benefit is being conferred; it's
12 merely a method of channeling funds, how that device is not
13 going to be available to the formerly de jure states still
14 resisting Brown v. Board of Education. Maybe

15 Maybe possible to cut it; I, for one, would think
16 difficult.

17 Now, I said in the beginning that I thought there
18 were eight tests used by the Court and that this act violated
19 all of them. Just in a sentence, first of all the general flat
20 principle: no tax money to churches coming down from -- a
21 remonstrance right straight through the language of many, many
22 of these cases, and that's on the face of the act.

23 Then the primary purpose if that's one, and primary
24 effect. The primary purpose, it seems clear from the legis-
25 lative history; the primary effect we do need to discover. I

1 think one can discern that there is some primary effect.

2 Then the concept of sponsorship, which is in
3 McCollum; it was certainly in Engle. Mr. Justice Brennan
4 distinguished the Zorach and Clauson situation from the
5 McCollum situation on that basis. It was in Schempp; that is
6 the state must not sponsor or even appear to sponsor a
7 religion, which is one of the points of Schempp.

8 Then preference, the fact that this act manifestly
9 prefers one religion over all others and prefers at very most,
10 two or three religions over all others and affirmatively dis-
11 criminate against those religions too poor, too scattered, to
12 even think about running a school system: Black store front
13 mission types of churches, for instance.

14 Then, interdependence, and that's on the basis of
15 the act because the act says it's dependent.

16 Entanglement, and that's shown by Section 3,
17 (3) -- excuse me, Your Honor; I didn't see the red light.

18 MR. CHIEF JUSTICE BURGER: You may finish your
19 points and we will enlarge --

20 MR. SAWYER: Thank you, sir; I have one more.

21 Entanglement, and finally point 8: if it's secular,
22 the act, nonetheless does use religious means to accomplish a
23 secular end. And in my research I find no matter before this
24 Court in which alleight of those tests would appear, and some
25 facially -- three facially, to be violated by the Pennsylvania

1 Act.

2 I thank you for your indulgence, Your Honor.

3 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Sawyer.

4 STATEMENT BY J. SHANE CREAMER, ATTORNEY GENERAL,

5 ON BEHALF OF APPELLEES

6 MR. CREAMER: Mr. Chief Justice and may it please
7 the Court:

8 I am Shane Creamer, the new Attorney General of
9 Pennsylvania. As I informed the Court by letter, I took
10 office in late January and since my entry into office is very
11 recent and my findings in this case are very late, I will not
12 be arguing this case today.

13 However, it is my desire to emphasize to the
14 Court that the Commonwealth has filed a brief in this case;
15 that I have studied that brief and I concur fully in its
16 arguments.

17 I would likewise say the brief of Appellee schools
18 and fully concur in that brief.

19 I shall now turn the argument in this case over
20 to my associate, the Attorney for the Appellee schools,
21 William B. Ball, desiring, however, merely to conclude with
22 this one statement: The Commonwealth, as Mr. Sawyer has indi-
23 cated, is and has been in a deep financial crisis. The public
24 schools of Philadelphia, Pittsburgh, Scranton and the coal
25 regions are faced with bankruptcy. One of every four children,

1 close to 600,000 presently attend some 1181 nonpublic schools
2 in Pennsylvania.

3 In Pittsburgh our nonpublic school population is
4 29 percent of the total school population; in Philadelphia it
5 is 34 percent. The public schools of Pennsylvania could not
6 begin to take on the burden of any substantial nonpublic school
7 population.

8 It is not a question of being more expensive; it's
9 a question of impossibility. The act under question today is
10 Pennsylvania's solution to an educational crisis. We, there-
11 fore, urge this Court not to upset this act which our state
12 needs so vitally.

13 MR. CHIEF JUSTICE BURGER: Then you tend to agree
14 with Mr. Sawyer's point, that this act -- the orientation, the
15 genesis of this act was to aid a distressed situation in the
16 private schools in Pennsylvania?

17 MR. CREAMER: A crisis in education and paying for
18 education, Your Honor; yes.

19 Thank you very much.

20 ORAL ARGUMENT BY WILLIAM B. BALL, ESQ.

21 ON BEHALF OF APPELLEES

22 MR. CHIEF JUSTICE BURGER: Mr. Ball.

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

25 I'm speaking here today for seven Catholic,

1 Protestant and Jewish named defendant schools who are the
2 Appellees in this case.

3 I think, Mr. Chief Justice, I should begin by
4 trying to clear up a point which hangs over the case at this
5 moment -- a preliminary point, which relates to the question of
6 whether the court below improperly denied discovery in trial to
7 the Appellants.

8 It is our contention that what the Appellants have
9 brought to this Court today, Your Honor, is an attack limited
10 to the facial constitutionality of this act. Their complaint
11 recited that they attack the act both on its face and as applied

12 Now, let me come to the "applied" constitutionality
13 point for a moment. Their complaint in paragraph 7 says that
14 they attack, they sue these seven schools as representative of
15 all sectarian institutions in the Commonwealth, the defendant
16 class action.

17 We then brought a motion under Rule 23(c) to test
18 this application. WE wanted, in other words, to afford due
19 process to the seven schools which have a great deal of varia-
20 tion among themselves, for all the remaining 1174 schools in the
21 Commonwealth which are under contract, and finally, even to the
22 plaintiffs so that they would have an opportunity to come in
23 and prove classes and subclasses and whether one or more or
24 any of these schools belong to any of these particular classes.

25 Now, the plaintiffs at this point, withdrew that

1 class action. They filed an answer which is confined to the
2 appendix, A-42. Plaintiff agrees that the action will not be
3 maintained as a class action under Rule 23(c). This was fol-
4 lowed promptly by the pretrial order of the lower court, which
5 said: "The action shall not be maintained as a class action."

6 Therefore, the issue of representativeness of these
7 schools went out of the case. This is the first wing of their
8 application attack. Coming to their second wing: did they
9 attack the seven schools, the application of the act as applied
10 to just the seven? ~~grades? Did they~~

11 The lower court asked that all parties submit a
12 memorandum on the propriety of convening a three-judge court.
13 Did the plaintiffs want a three-judge court or not? They
14 insisted upon a three-judge court and in their memorandum,
15 thinking now of whether they attacked the application of this
16 act to these seven schools.

17 In their memorandum of the propriety of a three-
18 judge court A-60 in the Appendix, they said: "Certainly it
19 would be a strained misreading of the complaint to in any way
20 construe it as limited to a particular branch, to a particular
21 school or class of schools or to anything less than an attack
22 on the entire statutory scheme."

23 And my friend here, on oral argument, nailed this
24 down if it weren't nailed down sufficiently, by saying A-66 in
25 the record: "I am not saying, and I think I have made this

1 clear, that this act is only unconstitutional as to these
2 defendant schools; I am talking about its being unconstitutional
3 in its entire purpose, thrust and effect in 67 counties in the
4 State of Pennsylvania."

5 I think therefore we have to face the question of
6 what is left in this case, plainly an attack of the facial
7 constitutionality of the act and in that event, what would be
8 uncovered by the discovery and trial by which the plaintiffs
9 so eagerly seeks?

10 Well, let's ask: that tax money is involved? It's
11 on the face of the act; the act calls for the expenditures of
12 tax funds. The payments are made to sectarian institutions;
13 the act calls for payments to be made to sectarian institutions.
14 The act defines a nonpublic school, the payee in this act, a
15 nonpublic school as any school in which the requirements of the
16 compulsory attendance law may be met. "Any school" plainly
17 includes sectarian schools. That sectarian schools have sec-
18 tarian purposes, would this be brought out upon discovery at
19 trial? This Court has taken judicial notice of this; this
20 Court stated in Board of Education versus Allen that parochial,
21 religious, sectarian schools, church-related schools, serve two
22 goals: secular and sectarian; therefore there would be nothing
23 to be discovered upon trial with respect to that; or that a
24 high percentage of the nonpublic schools in Pennsylvania are
25 under Catholic auspices. Indeed, the Court must be deemed to

1 have known that in Allen. This is indeed a fact of which this
2 Court can take judicial notice.

3 That the seven schools blend sectarian and
4 secular instruction or if they do, and they may, but if they
5 do, this is in violation of the plain terms of the act, as
6 contained in Section 3, Subsection 3, which provides that: "In
7 the teaching rendered, if the school is to be paid there shall
8 not be included any religious teaching or the morals or forms
9 of worship of any sect," and I will come back to that provision
10 of the act in a moment, Your Honors, because it's one that I
11 would like to discuss under the discussion of the act itself.

12 Now, only this Court can say whether the lower
13 court was right or wrong in its estimation of whether this act
14 stands up under the establishment clause. But, if the lower
15 court believed that this act was constitutional under the
16 establishment clause, certainly the lower court was not merely
17 within propriety but mandated to grant our motion under Rule
18 12(b)(6). And this was with complete propriety and with com-
19 plete due process as to the plaintiffs.

20 It is perfectly evident that -- this case has been
21 down here for a long time and it's perfectly evident, it seems
22 to us, that this case is ripe, if not overripe, for a decision
23 by this Court as to the facial constitutionality of this act
24 under the establishment clause.

25 And I would like now to come to the terms of the

1 act itself, because I think, with all due respect to Mr. Sawyer
2 that he and I have read different Acts 109.

3 Q Where is it published?

4 A Pardon me, sir?

5 Q Where is it printed?

6 A The act is printed, Your Honor, at Appendix
7 A-18.

8 Q That's all of it; is it?

9 A Pardon me, sir?

10 Q That's all of it?

11 A Yes, sir; that's all of the act, except for
12 the cigarette tax amendment, Your Honor, to which our brief
13 refers on page -- on footnote two, which simply changed the
14 basis of the funding.

15 Q You mean they are making the cigarette
16 smokers pay for this?

17 A Yes, Your Honor; that's right; that's right.

18 Q In addition to the horse racing fund?

19 A No, Your Honor; in substitution for the
20 horse racing fund.

21 This act represents one state's effort to grapple
22 with a serious social problem with which it's faced, like a
23 number of other states have faced the same problem. The act
24 covers all nonpublic schools and it's cast in the familiar
25 purchase of service form, which is well-established in the field

1 of hospital care, child care; as a traditional means of
2 providing limited and partial support to the achieving of
3 publicly needed functions by bodies capable of doing it.

4 It takes a fixed percent -- speaking now in terms of
5 limitation in this act -- it takes a fixed percent from a
6 single set tax source as the fund. It does not take any money
7 from the general fund of the state; it does not take any money
8 from the public school fund.

9 Section 5 of the Act contains a specific stricture
10 saying that: no funds raised for the support of the public
11 schools shall be used for even the administrative purposes of
12 this act.

13 Q Would that affect its constitutionality?

14 A It would in Pennsylvania, Your Honor; it
15 would in Pennsylvania.

16 Q The Federal Constitution.

17 A I do not think so. But this is a question
18 that could be answered. However, under the Pennsylvania Con-
19 stitution there is a specific stricture against use of the public
20 school fund.

21 Now, it takes this money and it pays it by reim-
22 bursement. The first payment under this act is not made by the
23 state; the first payment is made by the school. The school
24 pays for certain services rendered in four subjects, four prime,
25 national public interest subjects: mathematics, modern foreign

1 languages, physical science and physical education.

2 When the state has ascertained that the school
3 has paid for such instruction then, and then only --

4 Q "When the state has ascertained that the
5 school has paid for such instruction;" what does that mean?

6 A That means that the schools will have
7 presented to the State, Your Honor, a claim containing three
8 elements of cost: state-approved textbooks -- by the way, these
9 are not textbooks that the school submits to the state; they
10 are textbooks that the state must approve as specifically pro-
11 vided for in the act.-- state approved textbooks, state-approved
12 instruction materials in the four subjects, and finally that
13 part of a teacher's salary which is allocable to the teaching
14 of math or modern foreign languages or physical science or
15 physical education.

16 That claim is submitted in a form which is con-
17 tained in the regulations and after audit --

18 Q Now, what does audit mean?

19 A That means that the state uses the proce-
20 dures it would use in the case of the public schools and it
21 audits the accounts that relates to these three items of ex-
22 pense. In other words, to prove out --

23 Q Well, what inquiry is made whether in fact,
24 the items -- these three items of expense do or do not, involve
25 any religious instruction?

1 A The audit doesn't relate to this, Your
2 Honor. The audit does not relate to any inspection of the
3 performance of the teacher, which would be the only item we are
4 talking about, because the textbook itself and the instruction
5 material itself are already state-approved.

6 Now, as far as the teacher's role goes, there is
7 no inspection or monitoring of the teacher's performance.

8 Q Now, teachers include whom?

9 A Teachers include persons who are employed
10 by the schools to teach in the schools.

11 Q And may they be nuns?

12 A Indeed they may, Your Honor.

13 Q They may be nuns?

14 A Indeed, Your Honor; yes, indeed.

15 Q And do these inspections contemplate any
16 inquiry as to whether --

17 A Well, there is no inspection provided for
18 in that act, Your Honor, other than audit. The control -- the
19 secularity --

20 Q Would you be concerned --

21 A Would I be concerned?

22 Q -- if there were an inquiry as to what
23 a particular nun did for whose expense, reimbursement is
24 sought?

25 A I would be concerned with respect to her

1 performance; concerned with quality.

2 Q Well, I'm wondering if you would be con-
3 cerned as to that kind of inspection of religious --

4 A Yes; I think I would be; certainly.

5 Q In what schools?

6 A I would be concerned with it in a public
7 school as well as in a private school. In public schools, Your
8 Honor, we have people of intense religious commitment. We have
9 teaching in the public schools in Pennsylvania, ministers. We
10 have girls in Mennonite bonnets. I have been defending some
11 Mennonite people in Virginia recently, and I can tell you that
12 they are as religiously committed as human beings can be, but
13 we trust -- we trust these people, having made a commitment
14 under a state contract, we trust these people to observe the
15 law.

16 Q Well, suppose you found, in fact, that they
17 did not, from whatever source you learn that. Then what?
18 What happens?

19 A If the state found that this neutrality
20 was not observed, that the provision of the act, which says that
21 there may be no introduction of religious teaching within the
22 four relatively not value-related courses in question --

23 Q Well, doesn't that --

24 A If I could finish that sentence, Your Honor.

25 Q Yes.

1 A Then the State would not be able to pay.
2 The State would not be able to make the payment.

3 Q Well, doesn't -- hasn't that kind of inspec-
4 tion, that kind of inquiry -- doesn't that get government
5 officials into inquiries into religion that --

6 A Well, Your Honor, the problem I have with
7 your question is that I do not know of any inspection, any
8 monitoring that takesplace of the instruction. The safeguards
9 that this act contains are like the safeguards found in Board
10 of Education versus Allen, where indeed the New York Civil
11 Liberties Union's main brief, the main brief in the case, said
12 that there can be no secular instruction in a sectarian school
13 and if you put the textbook, the state-furnished textbook into
14 the hands of a sectarian teacher, in particular, a religiously
15 committed person, then it was inescapable that that person
16 would, perforce, introduce, whether dishonestly or out of the
17 misplaced idealism, would perforce introduce religious values
18 into that teaching, a matter of which, by the way, is peda-
19 gogical nonsense.

20 But, what this Court said was that: "We cannot
21 presume that public school administrators and the people ad-
22 ministrating the New York Act, Section 701 of the New York Act,
23 will not act with honesty. And indeed, we cannot. In the
24 public school system today there are many people who doubtless
25 would wish to introduce their own religious value concept in the

1 teaching, particularly of the social sciences, and who might
2 want to engage in Bible reading, prayer and other religious
3 practices which the law of this Court, the law of the land, says
4 they may not do. We trust them to observe this. We do not
5 have a religious monitor placed in the public school classroom;
6 neither do we, neither should we in the case of the four subjects,
7 merely because they are taught by nonpublic school teachers who
8 may, indeed, be that part of our community, a girl from this
9 neighborhood or from that who makes her religious profession no
10 less a profession than many other people make.

11 Q Who employs these teachers?

12 A The nonpublic school employs these teachers.
13 The nonpublic schools in Pennsylvania are Catholic; they are
14 protestant; they are Jewish; they are nonsectarian --

15 Q Who employs the teachers for these par-
16 ticular students?

17 A The school employs the teachers --

18 Q The nuns?

19 A The school --

20 Q Who runs the schools?

21 A It depends upon the school in question,
22 Your Honor.

23 Q What?

24 A It depends upon the school in question.

25 Since there has been no application attack on this act, we don't

1 have -- though there could be made an application attack on
2 this act, we do not have a particular instance of a particular
3 school. For example, Akiba --

4 Q I suppose that they are controlled by the
5 church that runs the school and --

6 A They may be, and indeed, many schools are.

7 Q I would suppose they are; not a maybe.

8 A No; I represent, for example, Akiba Academy.
9 Akiba Academy is not controlled by any church, so far as I
10 know. It's a Jewish school.

11 Q The Catholic schools?

12 A If we're speaking of Catholic schools they
13 are controlled by the church; yes.

14 Q And the contribution goes to the Catholic
15 schools?

16 A There is not a contribution, Your Honor, if
17 I may say --

18 Q Whatever you call it.

19 A Well, I do call it something different,
20 Your Honor.

21 The payment that is made is the payment that is
22 made to reimburse an actual cost after that cost has been en-
23 countered; has been encountered in the performance of the sec-
24 ular function; it has been encountered in the performance of the
25 secular function which is evidently needed to be performed in

1 Pennsylvania, and which does not depend, by the way, upon
2 whether, in answer to Mr. Sawyer's point, whether this function
3 was being rendered before. Because, if the test of the con-
4 stitutionality of any purchase of service is made depends on
5 whether a new service is brought into being, some expansional
6 service. Thi

7 This wouldn't make any sense at all, the test
8 laid down by this Court in Allen was not whether new services
9 were being rendered, but whether indeed a valid secular function
10 was being performed, a public matter, a public interest service
11 that the state needs to have performed. And in Pennsylvania
12 today this is badly needed. One-fourth of all the children of
13 the state are in parochial schools and they have been for
14 decades. This enormous burden is borne by these schools and if
15 we say that they cannot -- if we are to say they do not perform
16 secular functions, a thing we passed, I believe, in Allen two
17 years ago -- if we say they do not form secular functions then
18 we are really saying that there is no reason for the compulsory
19 attendance laws of Pennsylvania and in fact, everything wrong
20 with using the compulsory criminal sanctions of the state to
21 require children to go to those schools, to require children to
22 go to those schools if, in conscience their parents say they
23 prefer to have them there rather than to be in a public school.

24 Q Mr. Ball, help me along at this point. I
25 don't know whether you are making an argument that need gets

1 you over a constitutional hurdle or not, but this isn't really
2 what I'm concerned about.

3 When the State, in the phraseology of the act pur-
4 chases the functions -- I don't know whether this is a
5 euphemism for the grant or not -- doesn't it free the institu-
6 tion to use the dollars it does have for religious purposes?

7 A Well, I have two answers for that, Your
8 Honor: first of all, if it does, then also this happens in
9 Medicare with Methodist, Catholic, Jewish hospitals and so on.

10 Secondly, because these are run by religious in-
11 stitutions. But, secondly, however, I tried to say a few
12 moments ago, Mr. Justice Blackmun that the payor, the initial
13 payor under the Pennsylvania act is the school itself. It has
14 to spend before the fund is replaced.

15 It is not as though it got a bounty on top of what
16 it already had. You see, one of the things when this act was
17 being drawn that I recall very well, was the Auditor General's
18 insistence, and the Attorney General's insistence, Mr. Creamer's
19 predecessor insisted that it be shown that the amount blamed
20 had been actually expended. This is a quality provision in the
21 act, like the standardized testing and so on, to make sure that
22 the school plowed into this act -- plowed into this service,
23 rather, plowed into child education, its own money before this
24 would be replaced.

25 Q But to what extent is it powered in if it

1 knows it's going to be reimbursed?

2 A If it knows it's going to be reimbursed, if
3 it's going to meet the test that the state has required it
4 will have satisfied the standardized testing requirements and
5 the audit requirement. Yes, it may, just as a sectarian hos-
6 pital knows that it can count on this money coming in and in-
7 deed, it should. This is one of the purposes of this act,
8 there is no doubt about, there is no concealment on our part,
9 heaven knows, Your Honor, of the fact that one of the purposes
10 of this act is to keep one-quarter of Pennsylvania's educational
11 plant going. We make no bones about that. These schools are
12 doing a tremendous job in the public service and the question
13 is then: are they in the educational field? Do they serve the
14 public? And if so, can they be aided in any way? Can they be
15 aided in any way? And this very limited form of supporting the
16 services they render, seems to us to be a way which has no
17 primary effect of advancing religion. There is no Catholic
18 doctrine; there is no Lutheran logarithms or Jewish gymnastics.

19 We're talking about aiding them to perform a
20 service that everybody has to have.

21 Q It's a problem of rather large dimensions.
22 We have indicated that in some of the cases in the south where
23 the state finances a private school and this private school
24 becomes a state agency.

25 Are these state agencies? This raises the question

1 of Brown versus the Board of Education.

2 A Yes, Your Honor.

3 Q Now applying to these schools.

4 A Yes, sir.

5 Q Well, you don't address yourself to that in
6 your brief, as I read it, except to say that the persons
7 present here didn't have the standing to raise it.

8 A Well, Your Honor, if it -- it was up to
9 the plaintiffs, of course, to frame their complaint as they
10 would, bring to bear the parties whom they would and ~~and~~ they
11 had equal protection standards, had they a single plaintiff,
12 one individual or anybody who had equal protection standing in-
13 deed we would be prepared to argue the equal protection issue
14 here today.

15 But, since you inquire, Your Honor, with respect
16 to state action and whether these schools would be anticipa-
17 ting state action by virtue of the fact that they have received
18 some funding from the state, I think it would be a question of
19 degree. I would say it's a question. I was thinking of the
20 case of Powell(?) versus Miles and Judge Friendly's decision on
21 the issue of state action.

22 It certainly is true that there is a vast dif-
23 ference between receiving say, ten percent of your income from
24 the state and a larger percent and where other things may be
25 involved in creating the state action situation.

1 In the proper case we will be happy to brief and
2 argue that point very thoroughly.

3 Q Well, a Black could get into one of these
4 Catholic schools even if he wasn't a Catholic?

5 A Well, indeed, a Black could get into one
6 of these schools if he wasn't a Catholic. We have schools
7 in the inner city of Philadelphia --

8 Q Even an agnostic --

9 A Oh, heaven's yes. We have schools in the
10 inner --

11 Q Any Black could get in then?

12 A A Black agnostic, a Black protestant, a
13 Black Catholic -- we have schools, Your Honor, in the inner
14 city of Philadelphia, which have been the tie together of
15 racially-mixed neighborhoods over the decades, and which are, to
16 a substantial extent, made up of protestant Blacks who, after
17 graduation, become alumni Black protestants.

18 Q I know I'm a Presbyterian and our Pres-
19 byterian schools always welcomed a chance to get a Catholic in
20 and work him over.

21 (Laughter)

22 Q Mr. Ball, let me get back to one question
23 and I'll stop. What difference in the ultimate result is there
24 under the Pennsylvania plan and if it provided X-dollars for
25 the purchase of religious instruction; is there any difference

1 in the ultimate result?

2 A Every difference, Your Honor.

3 Q How? If the schools end up exactly the
4 same way.

5 A Well, to begin with, under this act the
6 state cannot pay for a religious textbook and under the con-
7 stitution and they cannot pay for religious instruction
8 materials, and under the constitution. And thirdly, this act
9 prohibits any teacher from teaching or introducing any reli-
10 gious matter into mathematics, modern foreign languages, et
11 cetera.

12 Now, if the state provided money for the teaching
13 of religion to support a religious course, which is patently
14 unconstitutional, yes the school might get -- certainly the
15 school might get the same income but the constitutional result
16 would be 180 degrees different.

17 If a given school, religiously-affiliated school
18 today were to claim \$800 for the teaching of math during that
19 year and under the act you're speaking of, the unconstitutional
20 act of which you speak, Your Honor, it would get \$800 for the
21 teaching of religion; not a financial difference, but the
22 constitutional difference would be totally different.

23 Q Well, except that the school is using its
24 other dollars for what is not replaced by the state act, the
25 net result is identically the same; is it not so?

1 A If the state were to pay the school \$800
2 for the teaching of religion the financial result would be the
3 same; yes, Your Honor. The financial result would be the
4 same.

5 But, this of course would have been true of the
6 financial result in Allen. This Court said, as to Allen, that
7 in effect, the effect of the New York Textbook Act was to save
8 the schools, the parochial schools an aggregate sum of millions
9 of dollars. This didn't seem, in the view of the Court in
10 Walz, May 1970, to be, to render the act in New York uncon-
11 stitutional.

12 Q Mr. Sawyer there, however, said that the
13 difference in Allen was that the parents theretofore had been
14 paying for the books.

15 A This is what he said. I don't think this
16 is true on the record in Allen; I think some - in some situations
17 they were and insome situations they were not.

18 I should like to conclude, Your Honors --

19 Q May I ask you one question?

20 A Yes, Your Honor.

21 Q I asked you something along that line a
22 while ago that I think is relevant -- it may not be relevant.
23 In these schools -- are there any of these schools in which
24 of those who control the schools -- the Catholics, or the Jews
25 or any other religious organizations, both hire and discharge

1 the teachers?

2 A If I understand your question correctly:
3 are there religious schools in which the -- those who control
4 the schools, hire and discharge the people?

5 Q That's right; not the state. He has
6 nothing to do with it.

7 A Yes; undeniably so. I cannot say as to
8 these seven schools, which are the only defendants in this
9 case, but looking to -- your question perhaps relates to facial
10 constitutionality -- yes, I would be sure that would be so.

11 May I conclude, Your Honors?

12 We stated in page 13 of our brief the following:
13 "in our now heavily-oriented welfare society massive governmen-
14 tal spending is dominant and individual men and women, even
15 when banded together in associations and institutions, spending
16 is dominant, and individual men and women, even when banded to-
17 gether in associations and institutions no longer possess the
18 economic resources with which to maintain diverse, nonstate
19 endeavors in education and welfare."

20 Your Honors, education is certainly the most
21 precious aspect of voluntarism that we have. The most meaning-
22 ful in terms of a free society. The economic and financial
23 data which we have set forth in our brief, shows the obvious:
24 that taxes and inflation are simply going to render it im-
25 possible for schools such as those that we are

1 describing to continue to render services and to give indivi-
2 dual parents the opportunity for a conscientious choice in
3 education.

4 I think it's very clear that this act on its
5 face is general legislation. It contains no religious classi-
6 fication or gerrymander; it is nonpreferential; it employs
7 essentially religious means to attempt essentially secular ends
8 without any primary effect of advancing religion, inhibiting
9 religion, and I must refer you there to our brief on entangle-
10 ment, because we have had an inadequate opportunity to discuss
11 the question of entanglement.

12 But, we are up against the facts of life in Penn-
13 sylvania, not figments of fine-spun documents which never pro-
14 ceeded from the minds of Madison or Jefferson; we are up
15 against such facts as Mr. Creamer has described. There is no
16 reasonable alternative to this act. Pennsylvania and her pub-
17 lic schools are bankrupt. Millions of parents and children
18 will be irreparably harmed if this program which is now in its
19 third year of operation and going into its fourth year of opera-
20 tion, should be terminated.

21 I thank Your Honors.

22 MR. CHIEF JUSTICE BURGER: Thank you Mr. Ball.
23 Thank you, Mr. Sawyer. Thank you, Mr. Attorney General. The
24 case is submitted.

25 (Whereupon, at 11:49 o'clock a.m. the argument in
the above-entitled matter was concluded)