In the

Supreme Court of the United States

MURRAY TILLMAN, et al.,

Petitioners,

v.

WHEATON-HAVEN RECREATION ASSOCIATION, INC., et al.,

Respondents.

No. 71-1136

Washington, D. C.
November 15, 1972

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Wednesday, November 15, 1972.

The above-entitled matter came on for argument at 1:59 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, 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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ALLISON W. BROWN, JR., ESQ., Suite 501, 1424 Sixteenth Street, N. W., Washington, D. C. 20036; for the Petitioners.

HENRY J. NOYES, ESQ., 22 South Perry Street, Rockville, Maryland; for the Respondents.

JOHN H. MUDD, ESQ., 10 Light Street, Baltimore, Maryland, 21202; for Respondent McIntyre.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 71-1136, Tillman against Wheaton-Haven.

Mr. Brown, you may proceed whenever you're ready.

ORAL ARGUMENT OF ALLISON W. BROWN, JR., ESQ.,

ON BEHALF OF THE PETITIONERS

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

This case is virtually indistinguishable from a case which this Court had before it three years ago, called Sullivan v. Little Hunting Park.

The issue here, as it was there, is whether a community recreation association may discriminate on grounds of race with respect to persons who are otherwise eligible to use its facilities.

Wheaton-Haven Recreation Association, the organization at issue here, is virtually a carbon copy of Little Hunting Park, the association which was at issue in the Sullivan case.

The principal characteristic of Wheaton-Haven Recreation Association is set by its bylaws, which state very unequivocally that membership shall be open to bona fide residents, whether or not homeowners of the area within a three-quarter mile radius of the pool.

The facility involved, which is the principal

function of Wheaton-Haven, is the swimming pool which it operates. The swimming pool is similar to those that are characteristic of many suburban areas in the United States, and most particularly in the Washington area, where in the Washington suburbs are some 100 to 150 of them that have been built by neighbors and people in the neighborhood on a cooperative basis.

They are principally predominant in areas where, of course, there are no public swimming facilities.

Wheaton-Haven has an initiation fee of $375, and, in addition, annual dues of $50 to $60 a year. I regret to say that on page 4 of the petitioner's brief there is a typographical error, where it says that the annual dues are $150 to $160 a year; it should be $50 to $60 a year.

QUESTION: What page was that, again?

MR. BROWN: That's page 4 of the petitioner's brief.

The annual dues are $50 to $60, not $150 to $160. That's the blue brief.

The bylaws provide that members can be taken from outside of the three-quarter-mile radius of the pool, provided that such members do not exceed 30 percent of the membership of the association.

Members who are brought into the association, who pay their dues, are subject to the approval of the board of directors or the membership of the association.

One of the features of membership in the pool is that a member may, upon selling his house, may transfer a first option to his vendee. Now, he does this by selling his membership back to the association and that vendee then has a first option to buy that, and that gives him a preference over any persons who are on a waiting list. Their maximum number of members being permitted in the pool being 325 families.

Wheaton-Haven was constructed in 1958 under the terms of a special ordinance adopted by the Montgomery County, Maryland, Council, which was adopted and designed to facilitate the construction of these community swimming pools. The Montgomery County Council stated that it wished to promote the building and construction of these pools because it served an important community function by providing recreation facilities which were not otherwise available in the area.

As a condition of getting zoning approval, the Wheaton-Haven was required by the zoning authority to show, demonstrate that 60 percent of its construction costs were subscribed. That is, in other words, that it was in fact meeting a need of the community.

As a means of creating its initial membership, the association conducted a door-to-door solicitation campaign in the area. It distributed an advertising circular, and charter memberships were made available on the payment of a

$20 pledge. Its original organizational meeting was a public meeting held -- or I should say its original promotional meeting was a public meeting held in the auditorium of the Maryland-National Capital Park and Planning Commission, a government agency which has a public auditorium.

Wheaton-Haven has always had a sign posted on its premises, which is visible from the street in front, which states the name and telephone number of the membership chairman. In more recent years, since this litigation has transpired, that sign has -- the name of the chairman and the telephone number has been removed.

At the hearing before the zoning authority in 1958, when Wheaton-Haven sought permission to build its facility, its swimming pool, its representatives testified that the pool would serve the needs of the community as a whole, and that it was needed as a deterrent to juvenile delinquency in the neighborhood.

And it was specified that the pool would not be used for private, social functions.

The construction of the pool was performed by a contractor from outside the State of Maryland, and the pool utilizes pumps and filters and other mechanical devices which originate from outside the State.

Now, in the spring of 1968, to get down to the facts of the discrimination here, Dr. and Mrs. Harry Press sought

membership in the pool. They are a black family who live in the neighborhood, within a three-quarter-mile radius of the pool.

The membership, they were told, was unavailable to them because of their race or color.

Similarly in 1968, in July of that year, Mr. and Mrs. Murray Tillman, white members of the association, brought a black guest, Mrs. Grace Rosner, to the pool and, although she was admitted on the first occasion, she was later denied admission under the guise of a new rule which the pool adopted after her first entry, stating that henceforth only relatives of members would be admitted.

It is undisputed on the record that the pool has and enforces a discriminatory policy with respect to memberships and guests.

The suit in here, in this case, was initiated in Federal District Court in Baltimore on the basis of the Civil Rights Act of 1866 and the Civil Rights Act of 1964.

The district court held against the plaintiffs, and, upon appeal, the Court of Appeals held against the plaintiffs. The basis for their decisions in both instances was that this case was distinguishable from Sullivan vs. Little Hunting Park.

It is the petitioners' position that both courts violated the principle of stare decisis. This case is on all-four with Sullivan vs. Little Hunting Park. There are

seldom two cases with facts more similar.

The Court of Appeals -- or both courts constructed grounds for distinguishing the two cases. I will deal principally, of course, with the Court of Appeals decision.

The Court of Appeals committed two basic errors. First of all, it misconstrued the Civil Rights Act of 1866, which had been the basis for this Court's holding in Sullivan vs. Little Hunting Park.

Secondly, the Court of Appeals relied on insubstantial and, indeed, in some instances, wholly false grounds for distinguishing this case from Sullivan vs. Little Hunting Park, and concluded that Wheaton-Haven Recreation Association was a private club and, hence, exempt from both the Civil Rights Acts of 1866 and of 1964.

I will get to the question of whether or not Wheaton-Haven is a private club in a moment, since that bears on whether or not it is, indeed, covered by the 1866 law and the 1964 Act.

But I would like to first point out the manner in which we believe the court basically misconstrued the Civil Rights Act of 1866.

That Act, the Court will recall, was the basis of this Court's decision, first, in Jones vs. Mayer Company. In Jones vs. Mayer Company, the Court held that the Thirteenth Amendment and the Civil Rights Act of 1866 applied to private

discrimination, and that the Act of 1866 was intended to abolish all badges and incidents of slavery, and that the Act was to be broadly construed.

The 1866 Act has since been incorporated in -- that is, since its adoption -- has been incorporated in and is now part of 42 USC 1981 and 42 USC 1982. 1981 guarantees black persons the same right as white persons, to make and enforce contracts. And 1982 provides that black persons shall have the same right as white persons, quote, "to inherit, purchase, lease, sell, hold, and convey real and personal property."

In Jones v. Mayer, and indeed in Sullivan vs. Little Hunting Park, there were some members of this Court who dissented and in effect doubted the wisdom of applying the 1866 law to private discrimination in housing and, in the case of the Sullivan case, to a membership in a swimming pool association, because they felt that more emphasis should be given to the court -- or more significance should be given by the court, should be placed by the court upon the more recent enactment by Congress of the Civil Rights Act of 1964 and the Fair Housing Act, or the Fair Housing Provisions of the Civil Rights Act of 1968.

In other words, the dissenting members in those cases felt that those laws, the more recent laws, should be given -- should be made applicable; and they questioned the wisdom of resurrecting the old 1866 law.

However, since that time, since the Jones decision and since the Sullivan decision, numerous court decisions have now applied both 42 USC 1981 and 1982 to a variety of kinds of racial discrimination. These provisions have been applied in cases of employment discrimination, in cases of housing discrimination, in cases of discrimination with respect to public accommodations, schools, cemetery plots, and so forth.

And most recently a significant development occurred which, unfortunately, we failed to be aware of in time to cover in our brief, and that is that Congress has now, in effect, ratified this Court's decision in Jones v. Mayer.

On February 8 and 9 of this year, during the debates on the Equal Employment Opportunity law, and the question of whether enforcement powers should be given to the Equal Employment Opportunity Commission, an amendment was introduced by Senator Hruska which would have withdrawn any right of an individual to seek relief in the federal courts on the basis of 42 USC 1981. It would have limited one's right of redress to the -- to Title 7 of the 1964 Civil Rights Act, namely the Fair Employment Provisions of that Act.

The provision -- the Hruska amendment was debated, it was criticized by the floor leaders for the bill, the legislation that was under consideration, Senator Williams of New Jersey and Senator Javits of New York. Those Senators hailed this Court's decision in Jones v. Mayer, and

specifically expressed approval of the construction, the judicial gloss which has accrued, which, in effect, holds that Title 7 of the 1964 Civil Rights Act and the Act of 1866 provided alternative means to redress individual's grievances.

The result was that the Hruska amendment was defeated.

So, therefore, it seems apparent that there was no longer any basis for holding back, shall we say, on the meaning or the construction to be given to the 1866 law. It applies here to this case, and the Court of Appeals and, indeed, the district court, it seems to me, engaged in a very serious error by failing to follow this Court's admonition that the plain words of the 1866 law should be broadly construed and complied with.

Now, the plaintiffs base their suit, as I indicated, on both the 1866 law and the 1964 law. Essentially, under the 1866 law, they claim that there were contract and property interests of theirs which had been impaired by the discrimination committed by the association. The plaintiffs, the Presses, who had sought to purchase a swimming pool membership, claimed, asserted in the complaint that their contract and property interests had been denied them, denied them on -- which were otherwise -- interests which would have been availabe to them had they been of the Caucasian race.

The Tillman plaintiffs, the white plaintiffs, had

contract and property interests involved in the swimming pool membership. Their allegation, their position in this case was similar to that of the plaintiff Sullivan in the case of Sullivan v. Little Hunting Park. Not only were their own interests being impinged or impaired by -- on the basis of racial considerations, but, in addition, they were in the position of asserting the rights of the Negro guest that they had brought to the pool, Mrs. Rosner.

Mrs. Rosner's interests arose from the fact that as a guest of the Tillmans, she had a license or an easement that was enforcible and recognizable as a property or contract interest.

Now, the other ground, aside from its misconstruction of the 1866 law, which we claim the Court of Appeals seriously departed from this Court's precedent on was the issue of the private club.

The Court held that because, in its view, Wheaton-Haven was a private club, it fell within the private club exemption of the 1964 Act. This exemption exempts from the public accommodations provision of that Act any private club or other establishment not in fact open to the public.

Now, the Court of Appeals committed additional error, in our view, by -- it's quite clear -- by reading that exemption as a limitation on the 1866 Act.

Now, this Court, both in the case of Jones v. Mayer

and in the case of Sullivan v. Little Hunting Park, had specifically held that the later enactments of Congress were not -- did not in any way limit or qualify the earlier enactments, and, indeed, that is the effect now of many other Court opinions, decisions which we have cited in our brief; and, as I just indicated, it's certainly the effect also of the Congress's rejection of an amendment which would have constituted a limitation on the 1866 Act.

Now, the question then arises: What kind of a limitation, if any, is there on the 1866 Act, so far as the matter of a private club is concerned?

We would submit that the only limitation is a constitutional limitation. There is, we would agree, a constitutional right of privacy or freedom of association.

This Court has never defined that in very explicit terms, in circumstances comparable to these. The right of privacy received its fullest discussion, I suppose, as far as I know, in the case of Griswold v. Connecticut, which involved, of course, the matter of birth control devices; and the Court held that there was a constitutional right of privacy which was part of the penumbra of the Bill of Rights.

That has not been expanded upon to any great degree, as far as I know, in subsequent decisions of the Court.

There has also been, of course, this -- there have been holdings that there is a constitutional right of free

association, which flows from -- is based on the First Amendment, and that, as a result, associations may not be interfered, unduly interfered with as a result of State action, or infringement of their constitutional right of association, of their free association.

However, that issue is not really -- those issues are not really involved here, to the extent that they need to be the outer -- the outer limits of privacy need to be explored or delineated by this Court.

The real question here was resolved in Sullivan vs. Little Hunting Creek, where the Court held very clearly that Little Hunting Park was not a private club because it had no program, no plan or program of exclusiveness; no plan or purpose of exclusiveness, and that it had no criteria for excluding people from its facilities other than race.

Now, we submit that exactly the same thing is true of Wheaton-Haven, as indicated by the bylaws and as indicated by the record here, there has never been a basis, any grounds -- there have never been any grounds for excluding people that have been -- in any way reflected in the record. There is indication that one person in this association's ten-year history was excluded, but the record doesn't indicate why. It doesn't indicate the person's race, it doesn't indicate where the person lived, whether he might have been outside the geographic area; and, indeed,

it doesn't indicate whether he might have been afflicted with some dread disease which would make his presence in the swimming pool undesirable.

So there is no record of excluding people, there are no criteria anywhere to indicate that the association had intended to exclude people so long as they lived within the prescribed geographic area.

With respect to the 1964 Act there has been some question as to just what meaning should be given to this private club exemption in the 1964 Act.

Well, it would seem to me that as a practical matter, although the -- that as a practical matter the exemption in the 1964, from the 1964 Act should be read to be co-extensive with the constitutional limitation which, as I say, I would concede applies to the 1866 Act.

I say that on the basis of the statutory history, the congressional history which we've alluded to in our reply brief, where Senator Humphrey, who was the floor manager for the 1964 Civil Rights Act, in explaining the exemption for private clubs, stated that it was intended to protect only the genuine privacy of private clubs, whose membership is genuinely selective.

Well, that language certainly parallels very closely the language of this Court in Sullivan vs. Little Hunting Park, and it would seem to be -- it would seem that there would be

no basis for creating different criteria or a different right of privacy. The only difference is that the Court of Appeals made this error of reading the statutory provision as a limitation on the 1866 law.

There have been references made in the briefs and of course the question naturally arises in anyone's mind as to the difference between this case and the famous Moose Lodge case, which was decided by this Court quite recently. And of course the difference between this case and the Moose Lodge, between Wheaton-Haven and the Moose Lodge, is like the difference between day and night.

The constitution of the Moose organization specifically states that membership is restricted to male persons of the Caucasion or white race above the age of 21 years, and not married to someone of any other than the Caucasian or white race, who are of good moral character, physically and mentally normal, who shall profess a belief in a Supreme Being.

Moose, by its own definition, by its own -- is exclusionary, it's a traditional fraternal organization.

QUESTION: You're not claiming here that the Constitution prevents the respondent from doing what it did, you're relying on statutes, aren't you?

MR. BROWN: Yes, sir.

QUESTION: Well, isn't that another distinction

between Moose Lodge and your case?

MR. BROWN: Of course.

QUESTION: Yes.

MR. BROWN: Of course. Obviously, that case involved State action, and I didn't -- I only cited it because it has been relied on by the respondents here, that is to suggest that because the Court in dictum, or I guess really assumed -- I didn't mean dictum; the basic assumption in that case was that the Moose Lodge was a private organization. And I am simply saying that, so be it; but this Wheaton-Haven is wholly distinguishable as an organization, simply because Wheaton-Haven has no exclusionary criteria of the sort that exists in the Moose Lodge.

QUESTION: Well, you said that it has an exclusionary criteria, a parameter of three-quarters of a mile.

MR. BROWN: That's the only one.

QUESTION: And none other?

MR. BROWN: None other. No, sir. And it's open specifically, by its own bylaws, to everyone else within that parameter.

QUESTION: Mr. Brown, going back to your property right argument, on what specifically do you base this, on the option?

MR. BROWN: Well, no, not specifically, sir. The

option is merely one of the aspects of the property interest that is involved, --

QUESTION: So that your case would be the same whether --

MR. BROWN: -- the option -- excuse me.

QUESTION: -- or not the option existed?

MR. BROWN: Essentially, although the option -- well, I don't mean to say it would be the same, but the option is one of the indicia of the fact that the pool membership here is an incident of real property in that neighborhood.

QUESTION: And this is so, despite the fact that there must be membership approval even for the purchaser of a former member's property?

MR. BROWN: Yes. Yes. But that membership approval is no evidence that it's ever been utilized other than in the one instance that we referred to.

But certainly, by making that option, putting that option in there, it adds to the inducement of persons to buy a membership, and it increases the attraction in value of homes in the neighborhood.

QUESTION: What kind of reasons could be properly used under their voting power to pass on members? Could they say, for example, they won't take in a chronic alcoholic, or a drug addict? What would be the areas?

MR. BROWN: I would think that they could utilize,

yes, the kinds of reasons that you're discussing. A chronic alcoholic, a person with a dread skin disease, or a person who lives outside the geographic area. But those are criteria which are comparable to those which the proprietor -- I say comparable to those that a proprietor of any business might use.

He can exclude persons -- not that this is a business but it's an accommodation; the proprietor of any accommodation, public accommodation, can exclude persons who are going to be disruptive, who perhaps don't wear a necktie, if you go to a restaurant. There are reasons why a place can draw lines as to the kind of patrons it wants, but that doesn't indicate that it has an absolute right of privacy which exempts it from the operation of the Civil Rights Acts.

QUESTION: Incidentally, is the three-quarter-mile rule absolute? Am I correct in my impression that one living beyond three-quarters of a mile from the pool may still become a member upon being accepted?

MR. BROWN: He can become a member if the membership rolls are open, that is not having exceeded the limit, and so long as the number of persons from outside the three-quarter-mile limit do not exceed 30 percent of the total membership.

QUESTION: Thirty percent.

And usually the membership rolls were not full, am I correct in that?

MR. BROWN: Well, usually they were not, although, at the time of the events herein they were full. They were at the 325 limit.

I'd like to reserve any time I have.

MR. CHIEF JUSTICE BURGER: All right.

Mr. Noyes.

ORAL ARGUMENT OF HENRY J. NOYES, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

This case was decided in the district court on cross motions for a summary judgment. Counsel for the petitioners, who has argued today, and counsel and myself stipulated as to all the facts, and that is the basis upon which the lower court made its decision.

Now, those stipulations are contained in the transcript that we have provided in this case. I might say, in spite of the fact that the petitioners, in the record in this case, advise this Court that such transcript was not available.

That transcript, as we see it, in fact as a matter of certainty, was the way in which the Fourth Circuit decided this case.

Matters have now crept into the case and, indeed, in the argument today, which can nowhere be found in the record.

The matter such as alleged door-to-door solicitation, and the matters of the Montgomery County Council hearings are not contained in the record in this case. There are matters, indeed, that have crept in as late as the reply brief of the petitioners.

Now, when we analyze the case as it appeared down below, and it was argued in the Fourth Circuit, really the only contention that the petitioners make is that there is no distinction between this case and Sullivan v. Little Hunting Park. That is their real issue; that is their real argument.

And we -- of course the Fourth Circuit rejected that, rejected it for very good reasons, after having this case under advisement for over a year. And the points of distinction are substantial and several, between Little Hunting Park and this case.

First of all, and most important, Little Hunting Park turned on the fact that there was an attempted assignment of a membership incident to the sale or lease of real property. You do not have that in this case.

In Little Hunting Park, Freeman moved into the neighborhood and leased his home from Sullivan for $129 a month, and this honorable Court found that at least a portion of the $129 was for the pool membership, because in Sullivan the member had an absolute right to assign his membership.

In this case, Press moved into this neighborhood in

1967, at least a year before he ever had an idea to attempt to join this pool. There is no contention that Press ever attempted to obtain an assignment from an existing member, there is no contention that an existing member ever attempted to assign a membership and that such attempted assignment was aborted.

All Press says is that he wants to join.

Now, Press did this: Press made an informal request to one of the members, or one or two members for an application. The directors had a meeting and they voted against Press. And that was as far as it went.

Then Press --

QUESTION: Did they specifically do it on race or not?

MR. NOYES: In Press's case, the record was stipulated, and we don't deny it, we stipulated, to get this case decided on summary judgment, that Press was denied a membership because of his race. That's in the record.

QUESTION: Right.

MR. NOYES: We don't deny that.

And now, --

QUESTION: That has at least the same posture as a finding of fact of the district court, based on substantial evidence, then, doesn't it?

MR. NOYES: At that point.

Now, Press, however -- this is where we distinguish Little Hunting Park. In Little Hunting Park, first of all, the board of directors has the sole control over its membership. In Wheaton-Haven, Press asked for an application and they wouldn't give him an application. This was a board of directors' vote.

However, the bylaws of Wheaton-Haven provide that any member, at any meeting, can propose a member, and a majority of the members can elect in a member. Now, you don't have that, or did not have that in Sullivan v. Little Hunting Park.

So, rather than have Tillman, the plaintiff in this case, who was a member, propose him at the next annual meeting of members for membership, he didn't even bother attempting to follow that route, because the board refused to give him an application he immediately went to the courts.

Now, we say that there's a distinction that there frankly is a substantial body, substantial group in Wheaton-Haven who would admit Press and vote to admit Press. But he didn't even attempt that route, he didn't even attempt to poll the membership by having Mr. Tillman propose him at a meeting.

Now, special meetings can be called by members, and it's -- 20 percent of the membership can call a special meeting at any time, and 10 percent of the membership con-

stitutes a quorum.

Therefore, as few as -- even if the membership was filled, as few as 10 percent of 325 would constitute a quorum which could, presumably, lead to Mr. Press, or Dr. Press being voted in by the members.

Now, what we think is very important, there never was an attempted assignment. All Press is saying, and all Rosner is saying is this, in its simplest form: They ask the Court to adopt their proposition as follows:

Because of our race, because of our race we are entitled to a membership and we are entitled to be guests when similarly situated white citizens do not enjoy such right.

Those facts are admitted in the record before the district court. When counsel, in answer to the question posed by the district court, conceded that white citizens would not have the same right that Press and Rosner now press before this Court.

QUESTION: I thought all he was asking for was an application in blank.

MR. NOYES: Well, --

QUESTION: Am I right or wrong?

MR. NOYES: He asked to have an application to -- well, in asking for an application, he indicated he wanted to join.

QUESTION: And he was denied the application?

MR. NOYES: He was denied the application, but he, in effect, was told, formally or informally, that at that time, even if an application was given, it would not be approved. We don't dispute that.

QUESTION: Well, what about all this other business you're talking about? He can go here and he can go there, and he can hold a meeting here and he can do this. What has that to do with this case?

MR. NOYES: It's a point of distinction between Sullivan v. Little Hunting Park and this case. The petitioners are relying almost solely on Sullivan v. Little Hunting Park, which was a transfer of --

QUESTION: I didn't know that -- Sullivan, as I remember it, I don't know anything about appealing to the membership and getting one-third of the votes; I didn't think that was in the case at all.

MR. NOYES: It wasn't in that case, but it's in this case. It wasn't in that case because --

QUESTION: Oh, I see.

MR. NOYES: -- in Sullivan, the sole way a person could get a membership was through the board of directors. In this particular case the members can vote the person in. This is the point of distinction that we raise, although we don't say that it's the most substantial point. The most

substantial point, we say, is that this was not an attempted assignment incident to the sale or lease of real property. That's the difference, it was an attempted direct application to the membership by Dr. and Mrs. Press. It was a direct attempt by Rosner, saying she is entitled to be a guest even though the uniformly applied bylaws limit guest privileges to relatives of members. There's never been any contention that those aren't uniformly applied.

Now, this first opteion statement was rejected in the Fourth Circuit, and, reading the bylaws of Little Hunting Park, which we have cited in our brief, as compared to the bylaws in Wheaton-Haven, there is no first option.

At all relevant times in these proceedings, the membership has not been filled. That's a matter of fact in this record.

Now, if the membership is filled, the Wheaton-Haven bylaws say that the club shall -- shall -- buy back the membership at 90 percent of the initiation fee, and then a person who was buying a home of that resigning member would have the first opteion to buy that, subject to approval of the board of directors.

But in cases when the membership is not filled, which is what we have here, and have had at all relevant times in these proceedings, the club may, the bylaws say "may", buy back this membership, strictly whether they want to

do it or not, it's strictly up to the club. They are not required to buy it back.

Now, in Sullivan v. Little Hunting Park, you had an absolute right to assign or transfer a membership. You do not have that in Wheaton-Haven.

In Wheaton-Haven, when a person desires to resign, he has to submit a written resignation, and if the club is not filled as we have it now, the club may or may not buy it back.

You had no such provision in Sullivan v. Little Hunting Park. If a member attempted to assign his membership and the club would not approve it, that meant he had no way of disposing or getting any money out of his membership.

There is no situation in Wheaton-Haven where a contractual relationship could arise, no way, between an existing member and a prospective member. There is no way that a contract could arise under the bylaws.

Now, there is significance in the attempt to be laid on the fact that supposedly during the entire history of this club that only -- the record only indicates one rejection of one person, and I believe the record indicates that person was a white person. Some great significance is laid upon this.

The Fourth Circuit dealt with this, and the district court dealt with this, in stating the more subtle ways that

private clubs operate. Once a person gets an application, the approval is usually a pro forma type of thing. We don't keep a rate of rejections of members. The petitioners would have us believe, or would have the Court believe, that throughout the history of this club there has been a long record of exclusiveness of Negroes and no exclusiveness of white persons, yet the record shows no prior exclusions of Negroes or white people. It shows one rejection, and that was a situation which is unusual, where the application has been filed and then rejected.

But we don't generally reach that point.

Now, we therefore say, Your Honors, that in this case it really boils down to whether or not the Court would pigeonhole Wheaton-Haven into Little Hunting Park, and the briefs and the facts that I have stated indicates that it's entirely different.

Now, as to 2000a, this Public Accommodations law, the record will indicate that counsel in the district court substantially, if not totally, abandoned his argument under t hat concept.

At one point counsel said that the only issue is whether there is a link between the association and interstate commerce. That was on page 61.

At another point he stated that if Wheaton-Haven is a private club, we concede that neither Sections 1981 nor

1982, nor 2000a apply.

He said, of course we believe that this is not a private club, but if it is a private club, then we're out on all three statutes. And of course if it's a private club, they'd be out under Little Hunting Park, too, because Little Hunting Park was decided under Section 1982.

In regard to counsel's statement that this honorable Court found Little Hunting Park to be a private club or a public operation, we do not read the case that way. The Court did, in one paragraph, state that there is no plan or purpose of exclusiveness; but the Court didn't say it was a public accommodation.

That case was decided on the transfer or attempted transfer of membership incident to the sale or lease of real property.

Now, as to membership at this time, the way the bylaws are structured, anybody in the United States who we deem, we want to admit, can be a member, we're not restricted to a three-quarter-mile area until, unless the membership is filled.

In closing, I would simply point this out to the Court, as far as exclusiveness is concerned: Again, the petitioners attempt to lay heavy stress on the fact that allegedly one person was turned down over the years.

However, this club is situated in the Wheaton area,

which is about some 12 to 13 miles above the District Line. Homes from the District Line out, for many, many miles, are as thick as they can be placed. There is practically no available land.

At this time we can take members because our membership is not filled, we can take memberships from anywhere in Montgomery County, the District of Columbia, Prince George's County, and the surrounding Virginia areas, and, indeed, California. Yet our membership remains below the maximum of 325.

It would seem axiomatic that if we desire to fill this membership by running an ad in the newspaper, or if we were in fact such a public operation, we would fill the thing tomorrow.

My people prefer to keep their club at the present amount of some 260 or 265, in spite of the fact that they've got the potential membership, or Potential Area to draw members of, at some rough guess, some five million people.

We say that this is not a public accommodation. The record shows it is not. The record, in the well-reasoned opinion of the Fourth Circuit, shows that Little Hunting Park does not apply. We respectfully urge upon Your Honors to sustain the opinions of both lower courts.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Noyes.

Mr. Mudd.

ORAL ARGUMENT OF JOHN H. MUDD, ESQ.,

ON BEHALF OF RESPONDENT McINTYRE

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

I appear on behalf of Mr. Ernest McIntyre, one of the respondents in this case, who previously was a member of the board, who at this time finds himself somewhat in an anomalous situation.

The record, including his deposition, which is in the transcript, in the Appendix, shows that he, Mr. McIntyre, was one of the members mentioned by Mr. Noyes who favored integration of the pool or admission of Negroes to the pool; and, in fact, first met Dr. Press when he was coaching his youngster on a Little League or softball/baseball team, and it was he who inquired about application to the club.

However, we find now that he is a defendant and nowhere below has the court ruled that he, since he was sued only as a director, should not have a part in these proceedings and should have been dismissed; because the lower courts have not gotten to that.

I will pass this point quickly, because I want to get to the other points mentioned by Mr. Noyes. But I say that Mr. McIntyre has no place in these proceedings, and to keep an individual in a case like this, with his demonstrated concern, as a matter of social philosophy, if you will, would

discourage any individual from serving in any community activity whatsoever.

But we come now to the point as to whether the verdict or judgments below should be affirmed, and I think we come to the one point which has been the issue running through the briefs, and that is whether Wheaton-Haven is not a place of public accommodation but a private club or other establishment not in fact open to the public.

Now, I don't have the time, nor do I think the point necessitates taking time, to demonstrate that in fact this swimming pool was not open to the public.

It was created, formed, controlled, financed by members. The applications were voted on by members, either at a board meeting or at a membership of the whole.

It was not a type of membership as in Little Hunting Park that followed the real estate.

We had 60 -- 70 percent within this three-mile area, three-mile radius; 30 percent could be outside of the area.

The sale of a house did not, ipso facto, mean that the purchaser became a member of the pool. The seller of the house turned his membership in, yes, he did have an option, the buyer; but the membership flowed back through the corporation, which had the obligation to buy it at 90 or 80 percent, depending on whether the membership was full.

Now, we come to one thing that I think is most important, apropos the oral arguments, and I do not wish to repeat the points that have been made in the briefs. Below, in the district court, when this case started, Mr. Brown, and I quote from the transcript at page 18:

But of course the question of whether it's a private club, we will also concede for this, for any purpose would, is also relevant to section 2000 as well as sections 1981 and 1982. We don't think it is a private club, but if it is a private club, then neither 1981, -2, nor 2000 would apply.

I think the same principles would be applicable.

Now, we find in the reply brief of Mr. Brown, at page 9:

"Accordingly, Wheaton-Haven, at least, falls within that category of associations which, even though private," -- "which, even though private" -- "are not immune from judicial interference to remedy injury resulting from arbitrary or discriminatory exclusion."

So we have a complete reversal of his position, with no authority cited other than the Medical Society case, and a labor union case, which we submit is different, that is an economic unit, a professional unit, such as a bar exam. It is not a place of pleasure, it is not a recreational activity, it is not a social club, such as Wheaton-Haven.

Thank you.

MR. CHIEF JUSTICE BURGER: You have a minute left, if you need it, Mr. Brown.

REBUTTAL ARGUMENT OF ALLISON W. BROWN, JR., ESQ.,
ON BEHALF OF THE PETITIONERS

MR. BROWN: I would just like to say very briefly that the important thing here to consider, and which has been stressed in the plaintiffs' briefs and has been stressed in the brief that was filed by the Justice Department in this case, is that these community recreation facilities, of the type that is involved here, are not country clubs or fraternal organizations or sororities, they are organizations established, as the record shows here, to serve the community.

And I submit that in this day, where there is a governmental policy attempting to foster free and open housing, for example, there can be no more significance and detrimental poignant badge of slavery than to have a situation where everyone in the neighborhood is eligible to use the local community swimming pool except the black family that happens to move into that neighborhood. And that's exactly what has happened here.

We submit --

QUESTION: Mr. Brown, were there any facilities other than the swimming pool?

MR. BROWN: At the time, in the early days, at the

time Wheaton-Haven was first organized, the record shows that there were no public pools and, indeed, the organizers had asked the county authorities about that, to build a public pool in that area, and they were told: We can't afford to, we're too busy building schools.

Consequently, they went ahead and built this pool in the local community, that is --

QUESTION: If this club had owned any facilities there, was there any clubhouse?

MR. BROWN: Yes, there was a -- well, a cinderblock, partly frame building, which is where they keep their facilities, I guess, or keep their tools and equipment, pumping equipment and filters and so on. They have some vending machines there. I don't know what else is there.

That isn't reflected in the record, sir. But there's no clubhouse for social activities on the premises.

QUESTION: Does the record show whether they serve food or soft drinks?

MR. BROWN: Yes. The record shows that there was service of food from these vending machines for people who were admitted, of course, to the premises. And this is the whole basis, or one of the bases for our assertion that they are covered by the 1964 Public Accommodations Act, which, if you recall, hinges on the service of food where the existence of other kinds of equipment which are passed on in interstate

commerce. And that's why the asserted jurisdiction under the 1964 Act.

I would just like to say in closing that the association here, as the record will show, made a commitment to the people who had originally solicited to join, it made a commitment to the public authorities in Montgomery County that it would provide a public community service facility and we submit that now those same, the people who are in charge of this facility are attempting to convert it from a community facility into a haven for whites.

QUESTION: Well, Mr. Brown, is that in this stipulation, the representation that was made to the zoning board, the county board?

MR. BROWN: That is, sir, in the decision of a -- the Montgomery County Commission on Human Relations --

QUESTION: That's in the record?

MR. BROWN: That's right. -- which is in the record, was submitted in the Court of Appeals, and the Court of Appeals in fact received it and considered it.

So there are certain findings which were made by that human relations commission which are included in the record, are in the record of the Court of Appeals, and in a number of those findings, as we point out in our reply brief, were in fact stipulated -- not stipulated to, but they were brought out in the course of discovery in the

interrogatories and admissions. So there really is no -- they are in the record in that way, if not through the Human Relations Commission decision.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:53 o'clock, p.m., the case in the above-entitled matter was submitted.]