In the

Supreme Court of the United States

ALTON J. LEMON, et al.,

Appellants,

v. No. 71-1470

DAVID H. KURTZMAN, etc., et al.,

Appellees.

Washington, D. C.
November 8, 1972

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v.	:	No. 71-1470
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Washington, D. C.

Wednesday, November 8, 1972

The above-entitled matter came on for argument at 10:54 o'clock, a.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
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

DAVID. P. BRUTON, ESQ., 1100 PNB Building, Philadelphia, Pennsylvania, 19107; for the Appellants.

WILLIAM B. BALL, ESQ., 127 State Street, Harrisburg, Pennsylvania, 17101; for the Appellees.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 71-1470, Lemon against Kurtzman.

Mr. Bruton, you may proceed.

ORAL ARGUMENT OF DAVID P. BRUTON, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. BRUTON: Mr. Chief Justice, and Members of the Court, may it please the Court:

This litigation is now before this tribunal for the second time.

On the first occasion, this Court ruled in Lemon v. Kurtzman, that Pennsylvania Act 109, providing aid to non-public schools, was unconstitutional on its face under the religion clauses of the First Amendment.

The case has returned here again because there is a dispute as to the effect and purpose of that prior ruling.

And the question which is now presented is whether the Commonwealth can now disburse an additional $24 million, approximately, under the statute, which has been held unconstitutional, to Pennsylvania sectarian schools.

The relevant facts, I think, are these, and they fall into two categories.

First, with respect to Pennsylvania Act 109 itself. That statute provided a scheme for subsidy to the non-public schools in the form of reimbursement for certain so-called

secular educational services, as defined in the statute.

And the expenses, which could be reimbursed under the statute, included the cost of teachers' salaries, textbooks, instructional materials, for certain specified types of courses of instruction.

The areas of instruction which were included were mathematics, modern foreign languages, physical sciences and physical education.

The schools became eligible for reimbursement under this statute by entering into, in the scheme of the statute, certain agreements, purchase of service contracts.

And under these agreements, they were to be paid by the State in the subsequent school year for these so-called services which were rendered in the prior year.

Now, it was not, of course, necessary for any school to show that it had, in fact, added any new teachers, admitted any new pupils, hired any new textbooks, or otherwise really incurred any new expenses, in order to receive aid under the statute.

All that was required was that the school satisfy the State that the expenditures in question fell within the defined statutory categories and -- and this is a very vital and, I think -- that the services for which reimbursement was sought were, in fact, secular, and did not include any subject matter expressing religious teaching or the morals or beliefs

of any particular sect.

The Commonwealth was given extensive administrative powers in carrying out the purpose of this statute with the right to audit the performance of each school and its books and records, to make sure that the expenditures were properly made.

This, then, in brief summary, is the scheme of the statute.

I would like to turn now to the chronology of events here which I think is quite significant.

The statute was passed in June of 1968. Within one month, the plaintiffs announced publicly -- and this was in the news media -- that they intended to challenge the Constitutionality of this Act.

Of course, the suit itself could not be brought until it was clear that the statute was operational, that, in fact, funds were going to be disbursed under it. Otherwise, there was a possibility that the claim could be dismissed as premature.

And it was not until six months later, the end of 1968, that the State issued rules and regulations and forms, and so forth, which could be submitted by schools seeking subsidy under the Act.

Now, these so-called agreements were to be submitted by January 15th of 1969, with schedules identifying the classes,

the number of pupils, and so forth.

And then in June, at the end of the school year, additional schedules were to be submitted which detailed the precise items of expenditure that they were seeking reimbursement for.

Once it was clear that the statute was indeed operational, plaintiff's filed suit.

This was in July of 1969.

At that time, the defendants moved to dismiss the complaint.

And I may say, to the considerable surprise of the plaintiffs, the District Court panel in a two-one decision over the dissent of Chief Judge Hasty, granted that motion to dismiss.

Plaintiff's immediately appealled to this Court.

Within six weeks after the decision of the District Court, the schools again entered into these contracts which are annual in nature, on the 15th of January 1970.

And it is at this point, Your Honors, I would like to correct a factual error which is in the record, and it has been in the record, I am afraid, from the time this case was presented to the District Court on remand.

And I think that Mr. Ball and I are in agreement that we can now stipulate this change.

The change is this. It was stated below by the

defendants, that on January 15, 1970, the schools entered into contracts for services to be rendered in the subsequent school year, 1970-71.

We have repeated that statement in the briefs that we have filed here.

That is not correct.

The contracts that were signed on the 15th of January 1970, were applicable to services provided in that school year that was already half over, 1969-70. And it was, therefore, not until a year later, January 15, 1971, that agreements were entered into by the schools covering services for the 70-71 school year.

There is a one-year difference there. And although I frankly don't believe that it is critical to the plaintiff's case here, I think it does have a good deal to do with the arguments the defendants have made, as I will come to in a minute.

The fact that these agreements were not signed until the 15th of January 1971, means that a number of other intervening events had occurred.

Q Which are these agreements now?

MR. BRUTON: I am now referring to agreements covering the 1970-71 school year. That is the year and the only year which is at issue here.

Q And those are the contracts that were made on

January, something, 1971?

MR. BRUTON: That's right. Half-way through that year.

Q The year, I gather, begins September, does it?

MR. BRUTON: Yes, September 1, I think, is essentially the beginning.

Q No point is made as to '69-70, at all?

MR. BRUTON: That is correct, and I want to emphasize that the funds that the Commonwealth collected for those years have already been disbursed to the schools and the plaintiffs are not here seeking a return of any monies which have already been paid out. We are seeking only an order which would bar any further payment of funds which the Commonwealth still has.

Q What was the amount of the '69 year actually disbursed?

MR. BRUTON: I do not have that figure. I believe that it was something less than the sum that we now have, about $24 or $25 million, approximately.

Q Mr. Bruton, was that January date in which the contracts were entered just a random date or did it correspond to some appropriation or something like that?

MR. BRUTON: It is the date which was established, Mr. Justice Rehnquist, in the schedule which was put out by the State itself with its rules and regulations, when they were issued under the statute.

What they did was set a specific schedule for the '68-69 year and then said it is the same schedule every year thereafter. You just add a year.

Q Mr. Bruton, do I correctly have the impression that you did not seek a temporary restraining order or an injunction in this case?

MR. BRUTON: That is correct.

Q Is there any significance in that at all?

MR. BRUTON: I do not believe at this time that there is, Your Honor. I think we are now focussing on the question of whether the impact of this Court's decision in June of 1971, whatever the situation may have been before that, whether the impact of this Court's decision in June of 1971 was to prevent any further disbursements under the unconstitutional statute thereafter.

Q If you had sought an injunction, would it have been against disbursement or against entering these agreements?

MR. BRUTON: It would have been against the disbursements.

That is, of course, the ultimate nexus, the focus of the case.

Q Well, if these funds can't be disbursed now, as a Constitutional matter, then recovery of the amounts paid in prior years is in what status, in your view? Laying aside the intentions of the parties, constitutionally, could they be

recovered?

MR. BRUTON: Constitutionally, I would say yes, because I think that there is at least since the Tidal Oil case in 1924, it is clear that a judicial decision nullifying statute can have full retroactive operation.

We do not urge it. We do not urge it here, and whether on a less than constitutional plane, as a matter of policy, this Court would determine if it were presented that question, that it was appropriate to apply the decision that retroactively, I think is a different matter.

Q What kind of policy would you call that? What kind of policy would we be employing?

MR. BRUTON: I think in that --

Q Official policy?

MR. BRUTON: Yes, I think I have reference to the standards which have been suggested in Linkletter and certain other cases in which it has been indicated that when one is considering retroactive application one ought to look at the substance of the rule which is laid down and determine whether the policy that lies behind that rule will be offended or not if only a prospective application is given.

I think you would have to look at the question of whether you would be really remedying or preserving the integrity, if you will, of the rationale behind this Court's decision in Lemon, by ordering a return of those prior funds.

I suggest that there is a difference between that situation and the case at bar, and the difference is this: this Court, I think, focussed principally in its decision which came down in June of 1971, holding that the Act 109 was unconstitutional on its face, on the question of entanglement.

I think there are other threads that can be discerned in the fabric of the opinions of the Court, but I think this is -- we will assume for the moment -- the primary one.

And, as to entanglement, it is the position of the defendants here that all the entanglement that there might be under this statute has already occurred with respect to 1970-71.

In effect, the horse has been stolen. There is no point in locking the barn now.

This contention, the plaintiffs disagree with vigorously.

We say that there is no indication in this record, in fact, there is evidence to the contrary, that there has been the kind of discriminating meaningful inquiry by the Commonwealth into the applications which have been submitted by over 1,000 schools, most of them sectarian, to insure that these funds would not be used, in fact, for the furtherance of religious purposes in violation of the Establishment Clause.

And, not only is there no evidence in the record whatsoever to support the position of the defendants on this

point, they ask simply that you conclusively presume that all of this has been done.

I think there is now evidence, and we have referred to it in our supplemental brief,filed only last week, that indicates to the contrary.

In fact, the Commonwealth has advised one of the named defendant schools in this very litigation, the Philadelphia Montgomery Christian Academy, and certain other schools, that they are not eligible for any aid under Act 109, whatever remaining aid there may be under it, because in the bylaws or charter of the institution there is reference made to the fact that God's creation has a bearing on the teaching practices of that institution.

And, I think, my worthy opponent, Mr. Ball, would be the first one to concede that the application of that kind of administrative standard in making these determinations, if applied to all of the schools in the State, would disqualify every Catholic parochial school in the State of Pennsylvania.

I don't think there is any question about that.

The Montgomery Academy confronted with this decision brought suit against the Commonwealth in the Federal District Court, seeking to have a reversal.

They were told -- not surprisingly, at that point -- this occurring after the decision of this Court striking down Act 109, they were told they could not have a hearing to review

the administrative determination made by the State because that would create the very entanglement which this Court has said is forbidden by the religion clauses.

And so you have a conundrum. You have an apparently arbitrary decision --

Q That Montgomery School, is it a disbursement for the '70-71 school year?

MR. BRUTON: Two years in question. One of them is '70-71. One of them is '69-70, which is also interesting and I'll come to that in a moment.

Therefore, I submit that the evidence is that there has not been the kind of discriminating inquiry. That the really terribly difficult question of looking into the classroom -- and that's what it came down to in this case -- to determine whether in fact these expenditures would be for secular purposes.

And, therefore, I suggest that to permit the disbursement of the $24 million now would run directly afoul of the rationale of this Court's decision in Lemon v. Kurtzman, unless, of course, you simply say pay the money out without any further inquiry. And that, I think, would run afoul of this Court's decision because it would be done without any insurance that you weren't directly violating the Establishment Clause.

Now, turning to the other side of the coin. I have

been speaking now in terms of the rationale of this Court's prior ruling and whether it would be offended.

Looking now to the other side, are there any interests here on the part of the defendant schools which would warrant an exception to what I submit is the usual effect given to a judicial decision.

And, as to whether it is the usual effect, without getting into the nice philosophical distinctions between the Blackstonian approach and the brooding omnipresence in the sky, and so forth, and the more contemporary realistic approach, I do think it is clear that it has long been recognized, and for good reason, that judicial rule-making is essentially retroactive, unless there is good reason to make exception to that.

Q You meant to say Constitutional rulings?

MR. BRUTON: Constitutional rulings, primarily, although I think one can find precedents which address the same problem even in other areas.

Q All judicial rulings are not retroactive, are they?

MR. BRUTON: Surely injunctions, by their very nature, are not.

Q You mean the emphasis on constitutional ruling, constitutional adjudication?

MR. BRUTON: Principally. I don't think I have to address other areas. For example, without getting into it,

there are areas, I suppose, open to question when a court interprets a statute in one way and then reverses itself in another case at sometime later and interprets the statute in another way.

There are questions there whether that is a retroactive, if you will, interpretation of the statute. Usually, I think, it is held that it is, although there may be some exceptional cases.

But certainly in the area of constitutional adjudication, I think the general rule is that it is retroactive, unless there is sound reason to depart from that.

And the two principal areas of exception which we have referred to in our brief are, of course, the bond cases where you have public bonds being issued in reliance on the validity of the procedures involved, and then those procedures are struck down.

This Court has, on many occasions, expressed reluctance and unwillingness to hold that those bonds now in the hands of innocent holders are void and that the money that has been paid for them is simply to be forfeited.

Q What about the reliance factor here?

MR. BRUTON: This is exactly what I am coming to.

First of all, with regard to these so-called agreements, I think there are several points to be made here.

With regard to the so-called agreements --

Q May I ask why you call them "so-called"?

MR. BRUTON: Well, I think there is a real question, Your Honor, as to whether these agreements are true contracts in the sense of a quid pro quo between the Commonwealth and the schools.

The schools don't have to show that they are really hiring any new teachers, adding any new pupils, incurring any new expenditures, in order to be reimbursed.

Essentially --

Q You mean it is a subsidy really?

MR. BRUTON: They are really being subsidized for doing what they would be doing anyway.

Now, I know that defendants have cited cases which indicated that, at least in the law of Pennsylvania, very technical approach to aspects of consideration can be taken and you can say there are valid contracts under contract law.

Q Isn't there a quid in the sense, broadly, for the Commonwealth of Pennsylvania or any other State, in that maintenance of private schools relieves the State of considerable burden, and that even an open subsidy, identified as a subsidy, is a partial recompense for that.

You are now talking just about contract law and not constitutional law.

MR. BRUTON: That's right.

Perhaps there is an ultimate quid pro quo. I think

it depends in this sense on whether the -- I'll call them interorum, I think, kind of arguments that are made here are true. That is, that without this subsidy, you will have widespread closing of private school system and that otherwise this great burden will fall upon the public school system.

I suggest that the record doesn't really indicate that that's a fact. It is not the parochial schools that didn't open this fall for lack of funds in Philadelphia, it is the public school system that didn't have the money to pay its teachers. It was two and a half weeks late. It is the public schools who may have to close early next spring.

But in that ultimate sense, if that were ultimately shown to be the case, I guess it could be said, yes, there is a quid pro quo. I suggest it need not be assumed to be true at this point.

And in respect of the particular years involved, I think it is clear that the schools would have incurred these expenses anyway.

Secondly, you have the fact that the Commonwealth itself has regarded this statutory scheme as essentially a subsidy. Again, I point to the case referred to in our supplemental brief. The Philadelphia Montgomery Christian Academy was told by the Commonwealth in July of 1970 that it would receive no payments in respect of services provided during preceding school year, 1969-70.

And, interestingly enough, the District Court never faced that question when it dismissed the academy's complaint.

The Commonwealth didn't talk about contractual reliance there, equitable obligations, contractual obligations. They treated it as a subsidy which could and should be cut off at any time the State decided that it was improper.

And this is precisely the position that we are taking. I think the actions of the Commonwealth confirm it.

Third, the fact is that because the contracts were not entered into for the year in question until January 15, 1971, the schools have already incurred whatever expenses there were in teaching these subjects. They were half-way through the school year.

And the single most important sentence, I think, in the opinion of the Court below, which justified the decision below, was this, and I am quoting from our jurisdictional statement, page 9 of the Appendix: "In reliance on these contracts --

Q Just a moment to find that. Page 9 of the Appendix?

MR. BRUTON: I am sorry, it is the Appendix, Your Honor, to the Jurisdictional Statement, rather than the Appendix itself.

Page 9 of the Appendix, which is towards the rear.

The bottom paragraph on that page, the Court said:

"In reliance on these 'contracts'"-- and it used the

word contracts in quotes because it wasn't deciding whether they were really contracts or not -- "the non-public schools adjusted their budgets accordingly and performed the services required by them."

My proposition is: how can you rely on contracts that haven't even been entered into?

And, I think -- I can only assume -- if it please the Court, that the Court below had in mind that these contracts had been signed on January 15, 1970, not January 15, 1971.

Q You have a course of conduct of relationships between the parties that might give a basis for some reliance, haven't you?

MR. BRUTON: You have anticipated my next point, Mr. Chief Justice.

I think that is the next dimension of the argument that the defendants are making, that they thought the statute was constitutional. They say they assumed it was going to continue to be so, and that therefore they could continue to rely on the subsidy which they had had in prior years.

And, I think, there it is relevant to look at the question of what really were the expectations of the parties here.

This is not, as we made clear, a case of overruling a prior precedent.

This is a case in which the statute was passed and from the very beginning every party involved in it recognized

that its constitutionality was open to serious question.

Everyone knew it was going to be taken to the Court and that ultimately this Court was going to have to decide the issue.

Q Say it again, Mr. Bruton. The date on which the District Court first held the statute unconstitutional, in relation to this January 15, 1971, date.

MR. BRUTON: The first decision -- I am not sure I know which decision you are referring to -- the first decision in the District Court was in November of 1969.

Q And that was to what effect?

MR. BRUTON: And that was to the effect that the statute was constitutional.

Q Was constitutional.

MR. BRUTON: They dismissed the complaint.

Q Right.

MR. BRUTON: The second decision was not rendered until after remand from this Court which was in, I think, November 1971.

Q So at least so far as any judicial determination, that determination was favorable of the constitutionality of the statute? As of the time these agreements were made.

MR. BRUTON: It is correct.

Q Of course, in the meantime, you had the Rhode Island decision.

The Dicenso case came down from the three-judge District Court in June of 1970, before the school year in question here, eight months before the contracts were signed, unanimously striking down a very similar statute concerning salary supplements.

This Court's decision in Woltz v. Commissioner, which to be sure, held that tax deductions for religious contributions were appropriate.

The rationale of that decision certainly prefigured the ultimate result in this case, and narrowed, really, the area of principal involvement, I think, between Church and State, and focussed on the problem of entanglement.

All of these things were intervening.

Q As you go along, will you let me have your ideas about burden of proof as to reliance? Who has it?

MR. BRUTON: I would be happy to.

Let me start first with the argument the defendants have made. They have said, in effect, that in the absence of any proof, it falls on the plaintiffs and that you must presume that everything has been done and that there is full reliance here.

Perhaps, Mr. Justice Blackmun, I have misanticipated the direction of your question. I was going to focus on whether the plaintiffs or the defendants had to show that all had been done by the State that's necessary to be done, but

perhaps your question was directed to a different point. I want to be sure I am responding.

Q Go along on what you are just suggesting.

MR. BRUTON: Well, they have cited the Allen case for the proposition that on this kind of record it must be presumed that the State has been doing everything right, at this point, that this money can be distributed.

And I only want to distinguish what this Court did in Allen from what this Court did in this case, Lemon v. Kurtzman, where it specifically declined to assume, on the basis of a bareboned record, that there could be no entanglement here.

Allen was dealing with textbooks. The judgment there was that you can't assume that the State isn't able to choose the right kind of textbooks in approving textbooks for the parochial schools.

In this case, where you have teachers' salaries involved, and so forth, the presumption was to the contrary, that there would have to be entanglement.

So I am saying that I don't think the defendants' citation of Allen is well-founded on this point, plus the fact that I say the record does have positive evidence indicating the State is not doing what it would have to do, really, to take care of its constitutional obligations here.

Q Mr. Bruton, isn't -- at least in normal litigation,

where you have a judgment of a lower court in your favor -- isn't the normal approach to the equity in the situation that if you think it is going to be reversed on appeal you get a temporary restraining order or a stay, rather than requiring the prevailing party to anticipate the often serpentine paths of adjudication in the higher court?

MR. BRUTON: That is certainly often done. I can only say here that I don't know what the expense of the plaintiffs would have been in seeking such a stay, or any kind of an injunction. They would have been holding up funds, and they decided not to hold up those funds.

And, as I say, again, we are not seeking now to undo those payments; payments that were made during the period between trial and appeal have been made, and we are not asking to reverse them.

We are only talking about the future payments.

Here we are again on the question of reliance. As I say, I don't think there could be any genuine element of surprise here.

I think it's perhaps interesting in connection with the question you raised to look at the one case in this Court that I have found which lies in this stream of municipal bond cases, Norton v. Shelby County.

It is cited in both of the briefs. It may even be referred to in the opinion below. And what that case is

usually cited for is some rather Blackstonian language about the absolute retroactivity of judicial decisions.

But what I would like to call attention to is the facts of that case. Contrary to the other bond cases, in that case, you had a statute passed which purported to transfer certain taxing powers from one political body to another.

The statute was challenged. The lower court ruled in favor of the statute. In the time intervening between the trial and the appeal, bonds were issued. On the appeal, the lower court was reversed, and in that case, this Court concluded that the bonds were invalid.

That goes farther than what we have to do here, but I think it is the only case in that line of cases where you find that sequence of events.

Elsewhere, the case always was that there had been consistent judicial interpretations upholding the statute by the highest court of the jurisdiction involved.

Subsequent to the issuance of bonds, there is a reversal of that precedent.

I think that's a very different case and certainly not one that we have here.

We are much closer to Norton v. Shelby County.

When you are done, I think, looking at this reliance question, and really looking at it, not just taking it on its face, I think the record indicates that there are no genuinely

persuasive reasons for departing from the precedents of this Court in the area of prospective and retrospective application.

Indeed, as I say again, in a literal sense, a prospective application of the ruling in Lemon v. Kurtzman will give the plaintiffs the result that they are asking for.

Q Do I infer correctly, Mr. Bruton, that if you are wrong on this reliance point, your case is lost?

MR. BRUTON: No, I think the reliance point is only an element which has been indicated in the decisions of this Court to be taken into account. I would say that notwithstanding the reliance, the fact that there is more entanglement here would override that.

And that for that reason alone it would be appropriate to deny any further payments.

Q You mean the entanglement of trying to determine these past events?

MR. BRUTON: Precisely.

In conclusion, let me say only that I think that in this case, to grant the relief that the defendants have sought and have obtained below would carry this Court really beyond the verge of violation of substantial First Amendment rights, and beyond the verge of the previous limitations which have been developed with respect to prospective limitation.

And I don't think that this case provides an appropriate bridge for this Court to travel in either of those

two directions.

Q Well, would it be appropriate for someone at some point to try to find out whether $24 million, if that's the amount involved here, would have a rationale relationship to the totality of secular education costs involved here?

MR. BRUTON: The inquiry is would this fully pay for the --

Q No, would it be more than -- not fully pay for -- would it be more than the total secular educational expense that these private schools dealt with?

MR. BRUTON: It is my presumption, Your Honor, that it is less than that, in fact, there are more, and we have here the Attorney General of the Commonwealth. I am sure if necessary, he could be more specific on that.

Q I gather, Mr. Bruton, what you are telling us about the Philadelphia Montgomery case -- do I get this correctly -- at least in its administration, the State itself has felt that some kind of inquiry of this nature had to be made as to each of the schools involved.

MR. BRUTON: Well, the inquiry seemed to me to be quite cursory. It seemed to me that in looking at some language which appeared in the brochure or the --

Q Whatever it was --

MR. BRUTON: Whatever it was, an inquiry was made --

Q And it was determined, therefore, that perhaps this

involved some support of religious education in the school and therefore that that school was not qualified.

Does this suggest that this would have to be done then by the -- or is this what the State intends to do to every school where the $24 million would go?

MR. BRUTON: I am suggesting, Your Honor, that if the State were to be consistent with what it has done in this case, it would have to do that and that if the same standard were applied, it would rule out all the schools.

And there you are right into the morass.

Q Was this a single District judge who took the view he couldn't look into this?

MR. BRUTON: That's correct. He was asked to convene a three-judge court. It was Judge Troutman, one of the three judges in the court below. He declined to convene the three-judge court. It is now on appeal to the Court of Appeals.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Ball.

ORAL ARGUMENT OF WILLIAM B. BALL, ESQ.,

ON BEHALF OF THE APPELLEES

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

I am arguing here today not only on behalf of the defendant schools who are named in the complaint, Lemon v. Kurtzman, but also on behalf of the Commonwealth who is

represented here today by the Attorney General who sits next to me at counsel table.

And on behalf of the intervenor defendant, the Pennsylvania Association of Independent Schools, whose counsel, a distinguished Philadelphia -- a member of the Philadelphia Bar, Mr. Henry T. Reath, is here, and who has presented a brief in this case.

The appellants agree with the Commonwealth,with the schools, with the intervenor defendant and with the Court below, that a decree of unconstitutionality does not necessarily have,in all cases,a retrospective effect, but rather the answer to whether it does or does not will depend in part on considerations of the interest of justice,and it will depend also on whether the constitutional policy which was expressed in the decree will be frustrated if the application is made only prospectively.

The appellants on the first point have said there is really no interest of justice involved so far as the schools are concerned, and they have said secondly that the very voices which the Court attacked in Lemon v. Kurtzman will be perpetuated should the Court hold and agree with the unanimous Court below that this statute should be -- that it's decree should be applied only prospectively.

And it is these two points, namely, the question of the interest of justice and the question of the constitutional

policy that I will address myself to in this argument.

We speak of the interest of justice. I think, Your Honors, that we have to focus, first of all, on the holders of that interest.

In this case, they are school people. They are educators. They are people who are working with parents and with children in Pennsylvania, in the real-life business of being locked in a struggle against inflation and taxation and educating 23% of the population of the Commonwealth of -- of the school population -- of the Commonwealth of Pennsylvania.

Some 535,000 children. Children who are being educated in schools in the inner-city of Philadelphia, and the large population centers of Pittsburgh and Scranton, Erie, and who are also found in the coal regions and the rural regions of that State.

As we look at these holders of this interest, then we have to ask ourselves whether they were in good faith, whether they were justified in reasonably relying upon the continuing validity of this Act which had been passed by the Legislature.

Whether, indeed, there were actual real legal contracts which they had entered upon and whether they are going to suffer hardship if the 1970-71 payments which they have earned are now to be denied them.

I, too, feel that the chronology of events becomes

important in understanding this case.

As counsel has stated, the Act was passed in June of 1968. Immediately thereafter, the Commonwealth's Department of Education tooled up to put the Act into full operation.

That began to occur immediately upon the passage of the Act and by the fall, at the time of the opening of the school year, an office to administer this Act had been set up and paid employees of that office appointed and their work had begun.

Indeed, counsel speaks of the regulations which counsel's briefs tell us appeared in December of that year. These were created in the fall of that year.

Thus, the fact that a challenge to this Act had been announced in the press immediately upon the passage of the Act, but no suit brought, certainly gave the administrators of the schools reasonable reliance, at least a measure of it, that the Act was going to remain unchallenged.

The plaintiffs had every opportunity to bring an injunction action that very fall, because money was committed to the program and the program was in operation at this time.

They neglected to do so.

Q When had the Act been passed by the Legislature?

MR. BALL: In June of 1968, Mr. Justice Potter.

Q In June. And you say there was immediately announced

publicly that there was going to be an attack upon it in the Court.

MR. BALL: Yes, that's correct.

And there was full opportunity for the plaintiffs to have brought this suit.

Q When was the action brought?

MR. BALL: The action was brought June 3, 1969.

Q Almost a year.

MR. BALL: Almost a year.

Q The announcement had been made upon its adoption that one would be brought?

MR. BALL: Yes, that is correct.

Q And was it the folks who announced they were going to bring it, in fact, the ones who did bring it?

MR. BALL: Yes, the group that announced it is one of the plaintiffs in this case, the spokesman for an organization known as Americans United, in a speech given in Pittsburgh.

Counsel has said and admitted in his argument today that the plaintiffs,in the plural, did announce this at this time. Thus, this was apparently with the concurrence of those who ultimately did become all of the plaintiffs in this case.

Now then, contracts were entered into January 15, 1969. Why the delay if this was a true contractual situation?

In this Governmental program, as in many similar

programs, say, of the Federal Government, sometimes legislation is passed putting a program into effect, then the people who are going to participate in the program enter into application relationships in anticipation of entering contracts under the program and they then go ahead and execute the contract at some later date.

And this is how that January 15th date gets locked into the annual renewal of the program.

Eleven hundred and eighty-one schools entered into contracts with the Commonwealth.

And I should like to pause here briefly to cover a point that I don't think is essential to our case, though I think it does add to the interest of justice, the equity aspect of this case.

Q Mr. Ball, when were the appropriations available?

MR. BALL: The appropriations, under the scheme of the Act, would not become available until the following September.

In other words, the first payment -- these are payments by reimbursement in a typical purchase of service situation, Mr. Chief Justice -- and the first payment would be made for the 1968-69 school year, the first payment would be made in September of '69.

Payments were always after the fact.

Q Do I understand that what you are saying is that,in

effect, in January '69, if that was it, they executed a formal contract that carried out informal understandings and agreements that had been reached beginning with the opening of school or before the opening of school?

MR. BALL: That is correct, Mr. Chief Justice.

Just a passing word about contracts, because we do not think that the existence of a contract is essential to our case, though we believe it adds to the equities of our case.

The lower Court, the District Court, in its original decision upholding the Act, 310 Fed. Supp. at page 40, called these contracts.

We have stated in our brief the Pennsylvania Law which is applicable to these agreements and which clearly demonstrates their contracts.

If these are not contracts, then the purchase of service contracts which typifies all sorts of arrangements between States and sectarian institutions of welfare and health and care of the aged, child care, and so on, are certainly not contracts, though they have been upheld as contracts in case after case.

Among these, the leading Pennsylvania case on purchase of service from sectarian child caring institutions, Schade v. Allegheny County Inst. Dist., which we have cited in our brief.

Q Mr. Ball, was anything added or any difference -- did

any difference result by virtue of these contracts? Were teachers added? Was curriculum changed? Anything of this kind?

MR. BALL: Yes, Mr. Justice Blackmun.

Under these contracts, and under the arrangement, under the service which took place, and pursuant to the Act, first of all, it was necessary that the sectarian schools replace any religiously oriented textbooks which they might have in the four subjects covered by the Act, with books which had to have the prior approval of the State Secretary of Education, as provided in the Act and the Regulations.

Furthermore, they had to conform their teaching plans to the severe secularity requirements of the Act. So that in teaching these four subjects, those requirements would be observed.

They also had to set up separate accounting systems according to one provision of the Act, whereby they had to keep separate accounts related to these four subjects.

They made administrative changes obviously in the areas pertaining to teacher certification requirements under the Act, and also with respect to standardized testing, which came as a new requirement to many of the schools and was aimed at improving quality.

This Court in its opinion in Lemon v. Kurtzman, made note of the fact that the very purpose of this program was to

enhance -- and this this Court found was to enhance the quality of education in the schools which were served under the Act.

Q Mr. Ball, that's not to suggest that the schools, had this Act not been passed, would not have taught the four subjects?

MR. BALL: No, indeed.

And the fact that the schools now did, in some cases, what they had been doing before, now being funded for it, presents us a picture very, very similar to what happened under Medicaid, to what happens under other kinds of purchase of service agreements.

That is to say, the State enters into a contract with, let us say, a sectarian child-caring institution. It does so -- and this brings us back to a question asked by Mr. Chief Justice Burger this morning -- it does so because it has a public need. The State has a need for that service. It needs to have someone take care, let's say of dependent and neglected children. So it goes to a sectarian institution, child-caring institution, and pays it to carry on this publicly needed service.

The institution itself does nothing more than it did before, but it is now aided materially in the rendering of that service, and, indeed, it may improve the services.

We happen to know that in Pennsylvania what this Act

meant was that a school which had a class, let's say, of 70 children in a math class, could now split that into two or three sections.

A school which had not been able to afford to have a calculus course, could now hire a calculus teacher.

A school which had not previously had a course in Spanish could now institute a course in Spanish.

Q Which is to suggest then that, in fact, this enabled expansion of faculties, at least in terms of numbers?

MR. BALL: Oh, indeed, it did, yes. That is correct, Mr. Justice Brennan.

Finally, the Act itself four times uses the term "contract" which I think is significant in terms of Pennsylvania's Legislature, knowing Pennsylvania's law and what it was doing pursuant to that law.

Then June 3, 1969, the plaintiffs instituted their case. The program goes into its second year. And on November 28, 1969, the very forum selected by the plaintiffs, the three-judge Federal Court at Philadelphia, upholds the Act as being unconstitutional.

I could scarcely think of a greater incentive to the schools to continue to serve under this Act. As to the Commonwealth, the Commonwealth had no need to have a reliance upon the Act. The Commonwealth was bound by the Act, bound by the law of Pennsylvania to continue the program.

Thereafter, on May 15, 1970, the decision of this Court in Woltz v. the Tax Commission, takes place.

There was some comment during Mr. Bruton's argument with respect to the Woltz case. This seemed to us as attorneys, this decision, first of all, to uphold direct aid to religion. This was the fact of the case, the most essential part of it. It did nothing to disturb the purpose and effect test in Allen and Allen's careful demarkation of the secular function which was found to be supportable by the public in that case.

Q At least some of the opinions in Woltz suggested that there might be a distinction between subsidy situations and tax exemptions.

MR. BALL: That's perfectly true, Mr. Justice Brennan, but the fact --

Q Isn't it fair to say that the Court's opinion indicated some doubt -- at least doubt -- about direct subsidy?

MR. BALL: I think there can be no doubt of that, but on balance, as we read that opinion, we felt that it did not disturb and could not have disturbed what was already determined by the Court in Board of Education v. Allen, where we have a clear support with public funds of the secular function clearly spelled out by the Court which is -- which takes place or is offered in sectarian schools.

We were also encouraged by the fact that there was extensive italicizing by the Chief Justice in his opinion for

the Court, of a number of passages from cases in which the aid which had been given to sectarian education, as for example in Allen, was heavily stressed.

Again, we had the authority of Mr. Justice Douglas in the Woltz case who all but predicted that the Woltz decision led directly to support to aid to parochial schools.

Again, we found --

Q That was a dissent.

MR. BALL: That, indeed, was a dissent, but a very authoritative dissent, if I may say so.

Q I am sure of that.

MR. BALL: We also examined the concept of entanglement in terms of, or in comparison to, the extensive regulation of non-public schools which this Court had pointed to in Board of Education v. Allen.

We did not think that the provisions with respect to secularity, with respect to State-school relationships contained in Act 109, added a feather's weight to the kind of relationship which was already considered listed in the law and which had been recognized by this Court.

The school administrators, both sectarian and non-sectarian, had no complaint with respect to the admimistration of this Act. Conceivably, they would be sensitive to it.

And, again, we say no degree of relationship such as is observed in purchase of service arrangements in the welfare

and health care fields.

And, thus, we think that the situation, as we came into the '70-71 school year, was one in which this Act had been upheld by a Court chosen by the plaintiffs. We thought this Act, basically, did not confront the decision of the Court in Woltz, and, therefore, we think there was a complete basis for a lawyer's reliance in proceeding with the contracts for the coming year.

But we are talking here not about a lawyer's reliance but educator's reliance, people who are in the job of educating and whose schools desperately needed the funding in question.

Those people and the parents who are the basic source of support of the schools in question, and they certainly could not have desisted from the program in accordance with the ethical obligation which they have to their constituencies.

Q You are addressing yourself, in part at least, to the predictability of the Court's holding on this program as of sometime before the polling was actually rendered.

I suppose it is reasonable to assume that people trying to make that prediction would be entitled now to look at the fact that some members of the Court didn't agree with the holding.

MR. BALL: Yes.

Q I just don't recall now the numbers in the first Lemon-Kurtzman. There were dissenting opinions, several dissenting opinions.

MR. BALL: There were, indeed, Mr. Chief Justice.

But the point that I am trying to stress is this. That if we are talking here about good faith reliance, I think that we cannot impose upon either attorneys for the schools the duties of predicting where this Court would have gone in Lemon v. Kurtzman, the test case.

I think, in the second place, the educators, the people who are operating schools, and the parents, were certainly bound to continue the program and, having before them not a decision of this Court striking down such a program but having before them a decision of the District Court upholding the program.

I couldn't imagine a better basis for reliance,and good faith reliance.

The decision came down, finally, June 28, 1971. The Court remanded the case to the District Court, the Supreme Court not attempting to spell out, to rule upon the effect of its decision in Kurtzman.

The Court below, after full briefing and argument unanimously, this time including Judge Hasty, held that the effect of this decree should be prospective only. And pointed to the elements of reliance and hardship which we have

been discussing here.

Q Judge Hasty dissented in the first three-judge Court.

MR. BALL: That is correct, Mr. Chief Justice.

I come now to the second problem that this case poses, namely, whether the purpose served by the decree of the Court in Lemon v. Kurtzman, namely, the prevention of excessive entitlement, will be frustrated if the payments are to be made.

The Commonwealth, of course, had to make a determination that the eligibility of the schools before it could have taken a position in Court asking that these schools be permitted to be paid the money in question.

And, admittedly, the very activities which the Act required the Commonwealth to go through, the inspection, the surveillance, the audits, and what not, were precisely what was offensive to this Court, as it reviewed the Act in question.

The price, in other words, of payment to the schools, would be the subjecting of the schools to these various kinds of controls and inspections and checkups which this Court said constituted excessive entanglement between the State and the church schools.

I'd like to focus, if we might, on precisely what these inspections, and so on, what the requirements of the Act were.

Q Before you do, Mr. Ball, may I ask does payment out of this $24 million contemplate doing this to each of the recipient schools?

MR. BALL: It contemplates that it will have been done before the money is paid out, precisely.

Q But you are now going to tell us it should be done before the money is paid out, is that it?

MR. BALL: Yes, that's right.

The Act calls for reimbursement of what it describes as actual cost, actual cost of two things: teachers' salaries, not teachers' salaries broadly, teachers' salaries allocated to the four subjects. The number of hours a teacher logs in, for example, in high school French I.

Secondly, instructional materials and textbooks, allocated again to the four subjects.

Actual costs of these.

Now, as to the textbooks and instructional material, looking at it now from the point of view of entanglement, the Act required that these be previously approved prior to use, prior to use in the classroom, prior to any reimbursement for these books, previously approved. And the regulations spell that out.

The regulations say that a list of textbooks used by participating non-public schools in programs for which payment is sought under the Act, shall be submitted to the superintenden

of public instruction by the non-public schools.

Thereafter, the superintendent shall review each list and will notify the non-public school of his approval in whole or in part of the list of textbooks, being guided by the requirements of the Act.

So as far as textbooks and instructional materials are concerned, these had to have been previously reviewed and approved by the superintendent of education.

This has been discharged. This is an accomplished fact. Pgment is not going to cause some State official now to go into classrooms and to begin to examine books.

Secondly, as to teachers' salaries, the classes involved took place years ago, so that if it were asked were the secularity requirements of the Act observed in the teaching of the four subjects, one would have to say that the Commonwealth did perform that function, that this case which Mr. Bruton cites is strong evidence of this fact, but more important than that is the fact that there is a clearly established presumption in the Law of Pennsylvania. I cite the case of Falkenberg v. Bonango Township, 297 Pennsylvania.

There was always a presumption that official acts or duties have been properly performed. And,in general, it is to be presumed that everything done by an officer in connection with the performance of an official act in the line of his duty was legally done.

Now, the plaintiffs had every opportunity to rebut that presumption.

Q Do you know exactly what audit procedures were followed as to teachers' salaries?

MR. BALL: As to teachers' salaries? I believe you mean instruction --

Q I thought you said, Mr. Ball, perhaps I didn't catch it correctly, that a teacher logged in a certain number of hours, and then submits, I gather, or the schools submit on their behalf a reimbursement of the amount paid out to that teacher, isn't that it?

MR. BALL: And there are two audits which then take place.

First of all, there is an audit which neither of us has referred to in our briefs, but it takes place under Pennsylvania Law. It is an audit of the State Treasurer which would be obvious. That the State Treasurer would not certify that a certain school could be paid any money until the State Treasurer's auditors had checked out whether these hours had been performed, whether teacher X had taught 100 hours of freshman high school French, for example.

Q That's the extent of his audit?

MR. BALL: That's correct.

The superintendent of public instruction, now the Secretary of Education of Pennsylvania, has the duty to ascertai

whether the instruction in question, whether in the course of the instruction in question, the secularity requirements of the Act were observed.

Q How does he go about doing that?

MR. BALL: That I cannot answer.

The Act requires that no religious matter be introduced in the teaching of the four subjects.

Whatever technique the Secretary of Education would use to ascertain that, whether he would have an inspector, spot-check classrooms, or whether he would assume that in the absence of complaint, as we do in the public schools with respect to Bible reading, that in the absence of complaint, it is presumed that the teacher carried out the obligation imposed upon him by law.

Q Mr. Ball, we have nothing in this record to show us what, in fact, he did?

MR. BALL: That is perfectly correct.

Q What about this Philadelphia -- the case that Mr. Bruton --

MR. BALL: This, of course, is not in the record of this case.

Q I know.

MR. BALL: And nothing that has been said in the brief submitted is necessarily true or false. It is a statement of counsel about what's going on in another case.

Taking that to be true, however, as I do, this evidences the fact that the Commonwealth used certain techniques to determine whether a particular school was within or outside of the law -- of the secularity requirements of the law.

Q Doesn't that get us into the very problem of entanglement?

MR. BALL: Precisely.

It is entanglement already over. It is entanglement which took place.

Q The basic point is that that is water over the dam.

Q It was that entanglement that formed the basis of the Court's holding in the prior case, was it not?

MR. BALL: Exactly.

You see, Mr. Chief Justice, we are not here to reargue Lemon v. Kurtzman. I tried to state very, very carefully that these offending relationships are precisely what took place. The fact of having to change the textbooks, to get approval of textbooks, prior approval of textbooks and instructional materials. The requirement that the Secretary of Education satisfy himself that no religious matter was introduced in the teaching of the four subjects. All of that must be presumed to have taken place. The law is presumed to have been carried out.in the very fact of the Commonwealth's having asked the Court to make the payments to the schools, to

permit the payments to be made to the schools.

Q. And you say that under Pennsylvania Law that is presumtively correct?

MR. BALL: Yes.

Q Do we know, Mr. Ball, whether there have been any disqualifications of schools upon that kind of an audit and a determination that they had been teaching religion?

MR. BALL: I am quite confident that there have been disqualifications of schools. The plaintiffs in their brief say that not only this school but several other schools, Christian Montgomery and other schools, have been disqualified.

The plaintiffs have had every opportunity to bring this into Court. They certainly could have adduced evidence to show what kind of inspections were made and whether these inspections conform to the Act and in what instances there have been improper inspections, not enough of them, and so on.

They have never rebutted the presumption.

And I think that we cannot presume that the Commonwealth would not carry out the law, that the Commonwealth would behave dishonestly, any more, I think, than we can assume that teachers and administrators in schools are not capable of observing the law and acting as good citizens, capable of understanding and observing the law in spite of all religious zeal which they might have.

With respect then to all of these features, they

have been discharged, and these factors of entanglement can no longer exist.

Q I gather, Mr. Ball, those are the only two audit operations that take place, one of the Treasurer --

MR. BALL: Approval of the textbooks; secondly, the Secretary of Education's check-out of the teacher; thirdly, the State Treasurer's audit; and fourthly, a post-audit.

Now the post-audit is referred to in the Act, and it is an audit whereby the auditor, according to the terms of the Act, the Auditor General, examines the separate funds and accounts, not of the school, not of the whole school operation, at all, separate funds and accounts pertaining to the cost of secular educational services, which is a defined term in the Act, the providing of services in the four subjects.

Q Is this a check on the State officials rather than a check on the --

MR. BALL: It is a check on the check, so to speak.

In other words, let us -- what takes place in the post-audit is simply a review of the audit of the State Treasurer. In other words, the checks which have been paid out are examined, examined against the allocation of time. If a teacher is paid $15 an hour, let us suppose, and the record shows that she put in 60 hours. Is the amount that she is to be paid, or was paid, or is listed -- certified by the State Treasurer that she is to be paid -- does that equal 15

times 60?

That's what that audit amounts to.

In no sense, Mr. Justice Brennan, is it an examination of the whole curriculum, or life of the school. In no sense does it involve classroom surveillance.

I, therefore, conclude by urging the Court to affirm the judgment below.

It is clear to us and I hope it is clear to the Court and the interests of justice are thereby served, and secondly, that no entanglements for the future are possible under the decree of the Court below.

Q Mr. Ball, will you take just a minute and try to get me clear on the point that Mr. Bruton was making.

As I understood him, there was a mistake in the record as to the date the contracts were entered into. I think he said they were entered into January 15, 1971, for the school year '70-71, and, therefore, there could have been no reliance on the contracts, since the school year was half over.

What is your response to that?

MR. BALL: My response to that is that the pattern of contracting had been established in the year 1968. There was a period between the enactment of Act 109 and the getting it into operation, during which the school year, 1968-69 began.

Therefore, what was sought were applications from

any schools that were interested in participating in the program, and they began to flow in.

Everyone had read the terms of the Act and knew that they would be under contract. The nature of the contract could certainly be divined through a reading of the Act, and, therefore, in the initial year of tooling up there was a small lag between the beginning of September and January 15th for the issuing of those first contracts.

Then a program is instituted which will obviously be an annually-repeated program. And each year, therefore, this date of January 15th was carried forward, so that there could be complete reliance not merely on the contract but, more basically, upon the ongoing continuation of the program.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:58 o'clock, a.m., the oral arguments in the above-entitled case were concluded.)