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In the

Supreme Court of the United States

RICHARD W. HUNT,

Appellant,

v.

ROBERT E. McNAIR, GOVERNOR OF
SOUTH CAROLINA, et al.,

Appellees.

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No. 71-1523

Washington, D. C.
February 21, 1973

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Appellant, :
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SOUTH CAROLINA, et al., :
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Appellees. :
:
- - - - - X

Washington, D. C.,

Wednesday, February 21, 1973.

The above-entitled matter came on for argument at
1:16 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:

ROBERT McCORMICK FIGG, JR., ESQ., 10-G Jefferson
Square, Columbia, South Carolina, 29202; for the
Appellant.

HUGER SINKLER, ESQ., 2 Prioleau Street, Charleston,
South Carolina, 29402; for the Appellees.

C O N T E N T S

<u>ORAL ARGUMENT OF:</u>	<u>PAGE</u>
Robert McCormick Figg, Jr., Esq., for the Appellant	3
-- In Rebuttal --	35
Huger Sinkler Esq., for the Appellees	19

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments now in No. 71-1523, Hunt against McNair.

You may proceed now, Mr. Figg.

ORAL ARGUMENT OF ROBERT McCORMICK FIGG, JR., ESQ.,

ON BEHALF OF THE APPELLANT

MR. FIGG: This is an appeal from the judgment of the Supreme Court of South Carolina which upheld against a challenge, under the First Amendment of the Constitution of the United States, a transaction between the State of South Carolina and the Baptist College At Charleston made under a 1969 statute entitled the Educational Facilities Act.

The transaction on behalf of the State was to be conducted by its Educational Facilities Authority which this Act provided should be the State's Budget and Control Board.

That Board is composed of the Governor, the State Treasurer, the Controller General, and two legislative chairmen ex officio. It is the core of the State Government. It is the governing board of the State's departments of Finance, Property and Personnel and the Act gives it these duties which I shall refer to, quote, "as an incident of its functions in connection with the public finances of the State," unquote.

The Baptist College at Charleston is an activity of the South Carolina Baptist Convention and it is chartered to, quote, "operate a Baptist liberal arts college for educational

purposes," unquote.

It manages the affairs of the college in trust for the South Carolina Baptist Convention. And the courts below have found that it is a religious activity, and that the question is properly raised in its case under the First Amendment, even though they didn't agree with our view of the decision.

Under this transaction, what is happening here is that the State, under its own constitution, cannot give a grant to a religious institution to construct a building or a facility, even though it is of a neutral purpose, because its own constitution prohibits direct or indirect aid to a sectarian institution.

And our court has said that that means that no State funds can be given to a religious institution.

It undertakes, therefore, to authorize the Budget and Control Board which, as I say, is the core of the State Government, to issue South Carolina State revenue bonds which would give the purchasers immunity from Federal income taxation on the interest, and thereby benefit the institution.

To that extent, it enables, in other words, borrowing on behalf of the college to be at a lower rate of interest than would otherwise apply.

And it uses, in order to accomplish this, the format of legislation under which what were commonly known as self-liquidating projects were authorized back in 1933 and '34 and

by other acts under which electrical systems and water works and whatnot were financed out of the earnings of an operation and out of the profits, the fees, that were derived from the consumers.

Q Did they ever default on a revenue bond to the extent that you could call that a default?

MR. FIGG: In this case?

Q No, no. In the experience of the State, if you happen to know?

MR. FIGG: If our State has ever defaulted?

Q Yes.

MR. FIGG: On the contrary. Our Supreme Court has made the statement, in one case, that in this enlightened age the State would not allow one of its revenue bond issues to go into default even though it is not technically liable on them. And we've never had a default on a revenue bond issue, of the electric or the water works or the others.

Now, the State did have one revenue bond issue issued on what we call the South Carolina Public Service Authority, the Sam T. Cooper Hydroelectric Project, but those bonds have been paid out of the operation of an electrical system and the charges to consumers.

Now, this is a little different, though, from the usual self-liquidating project, because here they do not let the project issue the bonds and then pay off out of its

operation because the project is the college. And the college issuing revenue bonds would not be able to give the purchaser the tax immunity which the State can give.

So what the State does is to take a conveyance from the Baptist College of a part of its campus, then it leases it back at an agreed rent -- leases that campus back at an agreed rental -- and that rental is, of course, calculated to pay off the principle and interest of the bonds which the State has issued.

Now, the Act provides that this authority, the Budget and Control Board, that is the State Government's core, issue and sell to the public State of South Carolina general revenue bonds payable principle and interest only from the rent to be received by the Board under the lease.

And those proceeds, as I said, are to be spent in a general program because it is not just for religious colleges. It is for all non-public colleges in the State and for religiously neutral facilities, just buildings and facilities.

But in order to make the bonds saleable, the State Board is empowered by this Act to fix and revise from time to time and charge and collect fees and charges for the use of and for the services furnished by the project.

So that while the bonds are issued pledged against the rents, the rents will never change because you don't need to raise or lower the rents. The rent is calculated to be the

amount required to pay off the bond issue.

What the Board has to do with in seeing that the rent is paid is to have to do with the adequacy of the fees and charges for the use of the project. Just as in an electrical project the project itself would raise or lower the rates, here, the State assumes by legislation and responsibility in that regard.

In fact, the Act says that a bond holder can compel the authority to exert that power to fix and revise from time to time and charge and collect fees and charges for the use of the project.

Q Mr. Figg, may they also cut expenses in order to be sure that the net rental is --

MR. FIGG: I don't know that they are specifically authorized to do that, but they are commanded to see that enough fees and charges are charged by the college to pay the maintenance, the repair and the operation of the college. That's the first group that is to be taken into account in fixing and revising the fees and, then, next, pay the -- sufficient to pay the principle and interest on the bonds.

Ordinarily, of course, you would think that rent came in operating. That shows you the language here is more referable in its wording to an ordinary self-liquidating project, but it does point up the fact that the income -- the funds that are pledged for these bonds are these student fees

and charges, not just the rent, because there would be no rent. If the fees and charges are not adequate, the rent wouldn't be paid. If the fees and charges are too high and the student body is cut down, perhaps the rent wouldn't be paid.

If the college got discouraged, perhaps the project would cease.

What would happen then?

We think the State, under a power given to operate these projects, would have to step in for the bond holders and see that the religious activity is operated.

Q What are the practicalities of this? Why can't this college do this itself?

MR. FIGG: Well, just as all other colleges do, Mr. Justice, I think it can and I think it's an annual performance, especially in these days of changing cost, it's been an annual performance that student fees at virtually all institutions are not only fixed every year but are fixed higher every year. The requirements have been going up, and, of course, to some extent, that affects the patronage.

Q I know that, but what I am trying to get at is what is the reason for the South Carolina legislation. What brought it into being? Were the colleges unable to do this kind of thing?

MR. FIGG: The reason was that the colleges, I suspect

were having trouble from the fact that, not being public, their tuition fees have been larger and, therefore, their student patronage has been smaller.

And the State has interested itself because of that fact. It has been recognized by this Court to be a public purpose to stimulate education and the State is undertaking, I suppose, to protect itself against having to take over the load that has been carried by some 21 private colleges in South Carolina.

Q Now, you are here asking us to invalidate the statute. Would you throw the whole statute out?

MR. FIGG: I would think that our position, under the First Amendment, is that what involves the State Board, that is, the Board of Budget and Control, in guarding against default on these bonds, we think that it has to keep itself informed, to oversee to an extent the fiscal operations of this college.

We think that it is too late when default has occurred. We think that it has a duty, if not spelled out in so many words, so strongly implied by the powers that are given to the State Board in respect to the payment of these bonds, we think it has a duty to see that the student fees and charges are at all times going to be calculated to keep that rent coming in in the amount that will discharge the bonds.

If this were an ordinary self-liquidating project,

the college alone would, in the first instance, fix its income, and then if that weren't sufficient, as I recall, a trustee would be appointed by the court to operate the project and to adjust the fees so that the project would pay out. And this is the normal setup, I believe, of a self-liquidating project.

Q Let me repeat my question.

MR. FIGG: Yes, sir.

Q You are asking us -- well, you are attacking the statute here. What I am asking you is, in your theory, does the entire statute fall or would you be content if certain of the powers granted were rejected?

MR. FIGG: Well, I would think that the unconstitutional parts of the statute, if it is unconstitutional, are those under which the duty is either expressly or by implication or the function is put upon the State Board to fix and adjust from time to time the charges.

Q You do not claim that the State lending its credit is unconstitutional in the sense that by lending its credit the institution gets a much lower interest rate on its bonds, and that degree of benefit you do not content is unconstitutional?

MR. FIGG: We do not contend that.

Q So you are going strictly on the entanglement theory rather than any benefit theory?

MR. FIGG: That's right, Mr. Justice.

We think it is strictly an excessive entanglement proposition. We think that the two things that we ask the Court, or submit to the Court, are entanglement of an undesirable nature, under the First Amendment.

One is that the State should busy itself with the operating affairs of a religious activity to be sure that it pays off bonds issued in the name of the State.

And the other is that it be under the eventual possibility of having to take over and operate it because it, in effect, is the operator of the project when you apply a self-liquidating piece of legislation to it.

Q Your response prompts the question -- hypothetical question -- if you will permit it. Suppose the State, having made the judgment that you suggested earlier, the State made the judgment that rather than build two new universities, or three, it would offer to these colleges in the State that they would build needed buildings on their campus or near it and lease these buildings to the church-related college. Straight leasing arrangement.

Would you think that that was unconstitutional?

MR. FIGG: It wouldn't seem so under the First Amendment, as I understand the holding of this Court in the Tilton case.

Q You think this is pretty close to Tilton, then, if

you had that approach?

MR. FIGG: That's right. And I think that if the State of South Carolina had given these people the money to build this and walked away and forgot about it, as the Government did in Tilton except for the covenant against religious use, I think that it would have been valid under the First Amendment.

Our State couldn't do that because of its own constitution.

And so, this has been the approach, to adapt the ordinary self-liquidating project legislation to getting around its own constitution which prohibits it from doing what the Government did in the Tilton case.

So that --

Q Before you go on, I think you said that there were twenty-one private colleges in South Carolina that benefit or have the right to benefit from this fund, or this Board.

I take it from what you've just said in response to the Chief Justice's question that if you had a non-sectarian college you wouldn't be here.

MR. FIGG: That's right.

Q What percentage of the student body at this college is Baptist?

MR. FIGG: Certainly not all. I believe that the student body would be mostly Baptist. I would say the majority

is Baptist. Sixty percent, I am told by my colleague who is better acquainted with the affairs of the institution than I am.

Q No restriction on taking non-Baptists, then, I take it?

MR. FIGG: None at all.

Q I would like to ask you another question, since I've interrupted you.

The record may show it, but I don't recall it. You referred to the responsibility of the State, as I understood you, to fix the fees charged students in order to assure that revenues are sufficient.

Is that the way the statute reads or does the indenture merely impose covenants on the college itself to fix fees that are adequate to service the debt?

MR. FIGG: On page 41 of the jurisdictional statement, which is where the Act itself is set out, under Subsection (1), it reads, "The Authority may fix, revise, charge and collect rates, rents, fees, charges for the use of and for the services furnished or to be furnished by each project and may contract with any person," and so forth, "in respect to it. Such rates, rents, fees and charges shall be fixed and adjusted in respect of the aggregate of rates, rents, fees and charges from such projects, so as to provide funds sufficient with other revenues, if any, (1) to pay the cost of maintaining,

repairing and operating the project, and each and every portion thereof to the extent that the payment of such cost has not otherwise been adequately provided for; (2) to pay the principle of and the interest on outstanding revenue bonds under the Authority issued in respect of such projects, as the same shall become due and payable in (3)," and so forth.

Q I see that now.

MR. FIGG: And then it provides, "such rates," and so forth, "shall not be subject to supervision or regulation by any other department, commission, board," and so forth, "other than the Authority."

Now, the other place for fixing of rates and fees is on page 36.

"The Authority is given the power to determine the location and character of any project to be financed, to construct, reconstruct, model, maintain, repair, operate, lease as lessee or lessor," and so forth.

And then it is to "designate a participating institution for higher education as its agent to determine the location and to build it and operate it, and, as the agent of Authority, to enter into the contracts for any or all of such purposes, including contracts for the management and operation of such projects,"

So the authority legislatively given is to the -- the power legislatively given to the Authority is to do all of

this and to constitute the college as its agent in accomplishing its construction, its operation, its financing, its fee charging, and everything else.

And then (f), to issue bonds. That's the bond section.

And, (g), generally, to fix and revise from time to time and charge and collect rates, rents, fees and charges for the use of or for the services furnished or to be furnished by a project, or any portion thereof, and to contract, and so forth. And to establish rules and regulations for the use of a project.

Now, I am not sure that all of that language would be in just those words if the Act had been tailored for this particular transaction.

I think that what has occurred is that language of the ordinary self-liquidating project statute has been put in here and the Authority, thereby, has been endowed with the powers of the ordinary operator of a self-liquidating project.

And if it is going to do what the statute says that it is empowered to do, and if the bond holders, under Subsection (n) of the Act, have a right to go to court and get an order that it do, it has got to be well posted on the daily and the monthly and the yearly affairs of this college. It has got to do what the ordinary responsible project would do for itself in overseeing the operation,

And, we submit that this whole fee provision, these fee powers, after all, fixing fees is a continuous process. There is no formula for it. It involves estimates --

Q Mr. Figg, what is your client's standing in this action? How does he claim he was harmed by this statute?

MR. FIGG: He is a citizen and taxpayer whose interests would be affected --

Q If you prevail, you are not going to prevent the expenditure of any tax monies, are you? If you prevail and simply get some of the restrictions taken off, presumably no tax monies are going to be saved.

MR. FIGG: I think the spending of tax monies has been avoided by this process.

Q You concede there is no aid -- your complaint is not that there is aid being given in violation of the Religion Clauses?

MR. FIGG: There has been no aid given in violation of the First Amendment.

Q There has aid been given. It just isn't in violation?

MR. FIGG: I don't think so.

Q It is only entanglement that you are concerned about?

MR. FIGG: What is the entanglement?

Q No, I say you are only concerned about the entanglement. Then, going back to Justice Rehnquist's question,

how does the entanglement produce a standing platform for your clients?

MR. FIGG: Well, we would say, if Your Honor please, I suspect that we don't have a standing problem in this case under the State procedure. If there is a standing problem under the First Amendment, then it arises for the first time in this Court. That question hasn't been raised below and the court below considered the plaintiff had standing, I believe. In the Circuit Court, the question wasn't raised on appeal. It wasn't raised the first time this case came up to this Court, and it hasn't been raised on the second time.

Q Well, maybe if there is a standing question, or if there was a standing question, perhaps there isn't one any more.

MR. FIGG: That could very well be. I must confess that I haven't given too much thought to the question of standing because before I entered this case the Court had been satisfied on the standing of the plaintiff and the question has never come up, and we didn't anticipate that that would be.

As I've tried to make plain, I don't see anything but an entanglement question, but I do think that the responsibility is put upon the State Government. I would think that this plaintiff who has brought his complaint as a citizen and a resident of the State of South Carolina, the State has recognized that he has some interest in its operation here. Its courts have recognized that interest. And I think it could

very well be that his interest in the -- since this is a controversey between one of its citizens in the State of South Carolina as to whether it is violating the fundamental law of the United States as well as of the State which he first challenged -- he challenged both -- that this Court could very well consider that it is the standing between the citizen and his Government, rather than a monetary standing under the First Amendment.

I am not sure that the First Amendment is necessarily a monetary question. I think that question goes beyond, perhaps, the amount of taxes he might have to pay or any other question.

And, to conclude, if Your Honors please, the entanglement of fixing fees, we think, which involves the previous year's surplus or deficit, the amount of maintenance expected, the repairs, insurance, the depreciation, salaries, wages, supplies, rent, and so forth, that all of that has got to be taken into account by the State in advance of the fixing of fees. Default is to be guarded against and not awaited before the State would take action in discharge of these statutory duties.

And, in the event that the college proved unable or unwilling to continue, then we think that in the end the fact that the State would have to see to the operation of this religious activity to pay off the bonds, in itself would produce

objectionable entanglement between Government and church activity.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Figg.
Mr. Sinkler.

ORAL ARGUMENT OF HUGER SINKLER, ESQ.,

ON BEHALF OF THE APPELLEES

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

I certainly hope that the appellant here is regarded as having standing because this case does have some significance, not only in South Carolina but throughout the United States.

This type of statute, this particular statute, was adapted from the Massachusetts statute.

You have similar statutes in New Jersey which yesterday filed an amicus brief, late in this case, which I hope Your Honors will entertain.

There are similar statutes in Ohio, that I know of, because I have had correspondence with bond counsel out there. And quite a number of bonds have been issued in the State of New York.

We were lucky enough to have, somehow or other, foreseen from the trend, the dissents perhaps, what might happen in Tilton and Lemon in dissents, so when we started this case in 1970 we raised this First Amendment -- had the

question raised.

This is a declaratory judgment suit --

Q What do you mean when you say you had the question raised?

MR. SINKLER: Well, because, as bond counsel, it is our duty to see that all possible questions involving the constitutionality of the Act were properly presented and disposed of before people would be invited to buy bonds based on the statute. The statute had serious implications.

Q But it takes adversary litigation --

MR. SINKLER: This is adversary litigation of the test suit variety which is quite frequent in all State courts to determine questions of constitutionality of statutes.

We felt that this did raise serious questions. There have been countless millions of dollars of bonds sold in this particular area. None can be sold now as a consequence of the pendency of this litigation.

While it is not particularly significant to the Baptist College because this litigation lasted so long they came along and financed most of their -- got most of their -- most of their problems with a private loan -- they still have an application before the Board -- it is important to the twenty-seven colleges that -- other colleges in South Carolina which need this type of help.

Q Are you employed by the State?

MR. SINKLER: In this particular case, we've been associated -- we were actually originally employed --

Q But you are representing the Governor?

MR. SINKLER: At the request of the Attorney General, yes. With his permission and at his request.

Q So you are speaking for the State?

MR. SINKLER: Taking the position of the State, yes, in urging you to hear and decide the case in favor of the State.

Now, to get to the merits, I would like to go back a bit and explain the nature of this transaction because it is not the ordinary self-liquidating type of revenue bond that really gained its prevalence in the '30's, at a time when my friend and I served in the South Carolina Legislature together and had a lot of those statutes.

This is comparable to the normal industrial development revenue bond which have been going on and I think gained their ascendancies in the '60's.

What happens here is this. The Authority takes title. It makes this lease with the college. In this lease, it sets up the covenants which the college has got to perform. It then mortgages the project to a trustee bank, and at the same time assigns to that trustee bank its rights under the lease.

So that, actually, the State is nothing more nor less than a conduit.

Now, the statute spells out what the State could do,

but actually once this contract is made the State steps aside. The trustee bank takes over just as in the case of all industrial development bonds, so that the bond holder looks to the trustee to enforce his rights, not to the State.

Q Then, you are saying that the trustee bank cannot be an agent of the State in any way?

MR. SINKLER: It may be deemed to be an agent of the State in the sense that it is exercising -- but it is actually really acting in a fiduciary capacity.

I think a trustee is in one sense an agent but it is an agent, not at that stage, for the State. It is an agent for the bond holders which it represents. That's its primary duty, because the trustee bank receives the money, pays it out and, under the indenture, forces the rights and remedies of the bond holders.

That's, frankly, a routine type of financing in the industrial revenue bond field and in this college type of field.

Q This record contains no trust instrument of any kind?

MR. SINKLER: I don't think it contains -- does not contain the trust instrument, but what it does contain are rules and regulations that the State Board adopted following Tilton.

In those regulations, it prescribes that there shall be a lease and it prescribes that there shall be an indenture,

a trust indenture.

I think you will find those on -- let me see if I can pick up my -- beginning on page 47 in the Jurisdictional Statement, are the regulations relating to the functioning of the Authority which spell out just exactly what takes place.

So that, as I see it, in the, in Tilton, there was an outright grant of money, but there was also the covenant not to violate the religious -- make use of the property for religious purposes.

We have to do that in a slightly different way because we are not granting money and we can't make the institution pay us back. We've given them nothing. There is nothing to take back.

So what we do is to subject that property to a covenant that will not be used, and so long as the institution, or any voluntary grantee of that institution, owns this property it can't use it for religious purposes.

Now, that part of our regulations and the holding -- the plurality holding in Tilton, seem to me to be identical.

The only difference here is that we are not granting money, we are really taking advantage of a provision in the Internal Revenue Code to give these people tax exempt bonds.

Now, that's actually rather significant. On a million dollars, you can save at least 2%.

When this college, actually, refinanced most of its --

the money that it originally wanted to get.

The application is now cut down from -- and we noted that to the Court -- from about \$3½ million to about \$1 million.

Q Mr. Sinkler, may I interrupt you just a minute?

Have bonds actually been issued by any denominational college in South Carolina, under this -- ?

MR. SINKLER: Not in South Carolina, no, sir.

Q This is the first?

MR. SINKLER: This is absolutely the first.

Q Right.

MR. SINKLER: But they have been elsewhere, sir. They have been elsewhere, and I think the fact that in New Jersey, for some reason or other, their litigation stopped on the remand, didn't come back up, I think they are really twin cases. So they filed a petition yesterday to file an amicus, which I hope you all will grant.

Q I think you said at the outset, Mr. Sinkler, also, there is an Ohio case or was that just correspondence --

MR. SINKLER: Some of the people out there had talked to me about the fact -- I don't know whether there is an Ohio case testing the validity of your statute or not. I really don't know that, sir. I should know the answer to that and I am sorry I don't, but you might look because I am sure that bonds have been issued in Ohio, New York, that I know of.

Massachusetts, I am practically certain --

Q The New Jersey decision came here before, did it not?

MR. SINKLER: Yes. You treated South Carolina and New Jersey exactly alike.

Q New Jersey Supreme Court sustained --

MR. SINKLER: Just the same as South Carolina, about the same effect.

Their statute, they say they vary their procedure, if you'll notice, in their amicus brief, they use -- and they may be a little better, frankly, it might be a little less entangling.

I think it is a distinction without a difference.

We use this lease and you assign the rights to the lease to the trustee bank and you take it over there.

In New Jersey, they use the loan agreement approach, which we have used in other types of financing in South Carolina, but not in this.

Q Mr. Sinkler, do you agree with what I understand to be your adversary's explanation of a controversey here that the dispute is whether the credit shall be pledged with or without the condition, that neither of you dispute that it's proper to pledge the credit of the State in this type of situation?

MR. SINKLER: Well, I think, as I understand it, and

I hope I understand it, he simply alleges that the machinery or device that we have employed, viz., the lease in the State agency which has these powers which are all translated into the lease agreement. He claims that involves entanglement which is forbidden under the decisions of this Court.

Q If you were to prevail, what sort of relief ought he to get?

MR. SINKLER: He should get very narrow relief, I would think, Your Honor.

I would simply say that I don't see anything wrong with the thing except the fact that he might -- you might want to say that the State Board could not do these things, but I think the Stage Board ought to be allowed to supervise a lease agreement which would contain all these covenants.

Q Mr. Figg's argument puzzled me for a moment because I thought, as Mr. Justice Rehnquist's questions implied, that perhaps he was just saying strip out the entanglement features and let the rest of the statute stand.

The relief he asked for in his complaint -- I am looking at page 10 -- is an order declaring that the Act herein above mentioned is unconstitutional, null and void

That sounds to me as if he is saying by reason of excessive entanglement the whole statute must be declared unconstitutional.

MR. SINKLER: I think that is his basic position.

Q Isn't there a difference between the position he has asserted in these briefs and the somewhat modified position that he took in oral argument here today?

MR. SINKLER: It impressed me that way, Your Honor.

Q Let's assume, we rejected your opponent's position that there was excessive entanglement and put aside the question of aid that he says isn't involved in this suit. There would still be the question there, wouldn't there?

MR. SINKLER: Question of what, sir, I didn't understand.

Q Of lending the States credit.

MR. SINKLER: The State's credit is not -- is lent specially, in effect. All the States --

Q Do you think there is no benefit from lending the States credit?

MR. SINKLER: Oh, lending the States -- the fact that the State is the borrower and not the college amounts to about -- is worth at least 2% per million dollars per year.

Q So this is a substantial benefit.

MR. SINKLER: Sure, it's a substantial benefit.

Q So, as bond counsel, even if your opponent lost, you would still have to wrestle with that issue in terms of whether the bonds are valid or not?

MR. SINKLER: Oh, the State Supreme Court has held that this statute doesn't get involved on State constitutional

grounds. I would assume that if there is no entanglement or First Amendment question, we could go right along with it.

Q I don't think that was Mr. Justice White's question, Mr. Sinkler.

It was, as I understand it -- at least I would like to ask the question -- if there is State aid here, some kind of aid, as you said, there is a definite benefit to the institution, then isn't there a question, or may I ask it, is there a question here whether, independently of the entanglement features, this statute violates, by reason of the aid features, the First Amendment?

MR. SINKLER: By reason of the aid, which is getting back to the action the Court took in Wilson v. Essex, that sort of -- Wilman, I guess it was, the Ohio case, well, I think there you have to go back to the first and second premises which you examined these statutes under --

Q Yes, but I would think, as bond counsel, you would want the whole thing decided.

MR. SINKLER: Of course I do. Of course I do. I gathered that the thrust of his attack was sufficient to bring the whole First Amendment into play.

Q Do you think the issue was raised in the lower courts?

MR. SINKLER: It certainly was raised. I think if you will read the opinion --

Q Was it decided by the South Carolina court?

MR. SINKLER: Precisely, sir. Precisely.

Let me see if I can --

Q They decided that the extent of aid lent was not violative of the First Amendment?

MR. SINKLER: They said that the action taken was not violative of the First Amendment.

Q And the appellant, your opponent, didn't bring that part of the issue --

MR. SINKLER: Yes. He brought it all here, but I think he laid special emphasis on the fact -- certainly the object of the statute is a secular one because its purpose is to help the individuals throughout the States, not to help the individual, and even in Wilman v. Essex, where the Ohio Statute was giving money to the parents of children who went to parochial schools, the three-judge court which you all approved upheld, recently, held that that object was perfectly valid.

And then the question of whether its principal or primary effect will advance or inhibit the schools down there, I suppose there are more religious schools -- I think the actual breakdown, if you are interested, is there are nineteen four-year colleges, of which twelve have Baptist, Episcopal or something.

Q May non-denominational colleges issue bonds under this?

MR. SINKLER: No.

Q Not a single bond has been issued under this?

MR. SINKLER: Not a single bond has been issued under this. We have been litigating for three years.

Q I understood Mr. Figg's litigation position in this Court -- and he will correct me later, if I misunderstand it -- was that the State gets a substantial benefit, the State gets an aid by being relieved of having to enlarge its State colleges and in exchange it gives this, quote, "aid or assistance by lending its credit to these colleges."

MR. SINKLER: That's correct, sir. They do get -- the State does get the benefit of not having to build additional four-year schools.

Q But what he objects to is the entangling relationship.

MR. SINKLER: Well, I think that is the emphasis of his argument, sir. I think, perhaps, he has suggested that the whole thing is bad anyway under the First Amendment.

I think the First Amendment question -- to answer, I think it was, Mr. Justice White, I think if the Supreme Court decision is in one of these things. I guess it is in the Jurisdictional Statement. And the last time it went back to the court they very carefully -- I think that decision begins on about page 15, yes, of the Jurisdictional Statement.

They specifically pass on these three questions.

I don't think, if you look at the substance and not

the form of this transaction, you will see that the State is simply the conduit and the aid that they are giving is to -- because those bonds will be State of South Carolina, they will have tax exempt status permitted under the IRS, Section 103, and, as a consequence, save these institutions substantial sums of money.

Q Mr. Sinkler, suppose you had a default on a bond issue like this? What would happen? Who would enforce the rights of bond holders?

MR. SINKLER: The trustee would do it.

Q Would the State do anything?

MR. SINKLER: The State would presumably be a party and presumably would join in the prayer of the trustee. I am sure that the State would not want to see any bonds issued.

As a matter of fact, even industrial development bonds, which are really industrial bonds, rather than the State, our same body reviews the financial standings -- the figures of those companies -- before they approve bonds.

Q Would the trustee or the State go to the college and say, "Look, you must raise your fees and tuition -- "

MR. SINKLER: The trustee would do it. In other words, the rights of the State, under the lease agreement, which is the document which prescribes that rates and charges shall be sufficient to pay when due principle, interest, redemption premium, if any.

They are assigned to the trustee, just as in the case of the industrial development bonds. It is all one transaction. It all happens at the same time.

You, first of all, make your conveyance. Next, your lease. You make your trust indenture. And the trust indenture not only mortgages the property itself, but has an assignment in it of the leasehold of the State.

So that the trustee, at that time, takes over everything. The State stands aside. And the State has been in the transaction for a few hours, at best, because all of these things are, in theory, done simultaneously, as Your Honor knows.

Q What about that language Mr. Figg read about the Authority has to find out all of this and must do it itself?

MR. SINKLER: I don't think the statute says that. I think Mr. Figg was arguing that the statute meant that the Authority had to do that. I don't think the Authority has to do that.

Q He read from it.

MR. SINKLER: Maybe I misunderstood him.

Oh, paragraph (1) of the Act.

That simply says that the Authority may exercise those powers. It is not mandatory on the Authority to do that. As a practical matter, the Authority would do that through the lease, but, as I say, the lease is assigned to the trustee, so

the State steps out.

But, actually, this entanglement -- actually, what would happen would be that whoever, the bond holder himself or the trustee for the bond holder, was willing to act would go to court and ask that the covenants be enforced, or that the mortgage be foreclosed.

Because, as I pointed out --

Q What about the Act that's before us? The Act does --

MR. SINKLER: The Act doesn't say you shall do that. The Act simply says, if it please, Your Honor, that those are powers that may be availed of.

Let me see if I can -- well, I think, you go back to page 39. Thirty-nine says the Authority may.

Then the resolution -- you talk about the resolution, which, of course, is also one of the working papers at the time of the transaction. Its terms are set out on page 39, as to what it can do and what it can't do.

But, actually, you could strike this paragraph 11 out of the Act and not hurt anything, as I see it, because you can do it all in the lease or in your resolution.

Q It says if there is a default and foreclosure --

MR. SINKLER: That's just a straight, regular mortgage foreclosure.

Q Yes. And then the school can be operated as a religious school thereafter, can it?

MR. SINKLER: Well, no. The Act says that neither the school, nor any voluntary transferee, may do this.

Now, you say the college lets the mortgage get foreclosed with the idea that --

Q That's an involuntary transfer, now.

MR. SINKLER: -- that it would get some third party to buy it and then sell it back.

Q That's the point made in your opponent's brief.

MR. SINKLER: That would be collusion that the courts could upset.

I mean that is a collusive transaction.

You couldn't premise a decision here on the --

Q Well, let 's say we are not collusive. Let us say we are a non-collusive buyer who wanted to operate this as a religious organization which, in the meantime, has had all this State support.

MR. SINKLER: That's a pretty farfetched --

Q Isn't that the argument made in the brief of your brother?

MR. SINKLER: Yes, that's the argument made in the brief.

That's a point, but we had to have the foreclosable mortgage to be able to sell the bonds, from a practical standpoint. And that's the reason that was put in there with that recognition.

I think that's so remote and, actually, if the college went ahead and mortgaged the property now people could use it for anything, but I think that in this particular case, and I suppose it is a bad way to pattern statutes on particular cases but the college was really in financial trouble when this thing started. It is fortunately not in it now.

It had a very valuable tract of land that would be security and one or two underwriters in New York looked at it -- and that was one of the things --

So this foreclosable mortgage with -- free of the covenant-- is security to the guy who buys the bonds.

Thank you, Mr. Justice.

MR. CHIEF JUSTICE BURGER: Thank you.

Do you have anything further, Mr. Figg?

REBUTTAL ARGUMENT OF ROBERT McCORMICK FIGG, JR., ESQ.,

ON BEHALF OF THE APPELLANT

MR. FIGG: If you will indulge me for a couple of moments, Your Honor.

I did not intend to cut down the attack that was made in the original complaint on this litigation by the position I took here today, but the Tilton case was decided since this complaint was drawn and I am not sure it would have been drawn this same way --

Q I gather that, Mr. Figg, if one were to think that independently of the entanglement features one thought that the

aid, in and of itself, was a violation of the Establishment Clause, you would advance that argument?

MR. FIGG: I thought it was until we tried to apply the Tilton case to this case, I thought the aid itself -- and we contended in the first argument in the Supreme Court of South Carolina --

Q You are not going to give it up, based on Tilton, are you?

MR. FIGG: Didn't intend to give it up.

Q In any event, the issue is here for us to decide.

MR. FIGG: What we were trying to do here was to accommodate ourselves to the entanglement theory because I believe both the Walz case and the Tilton case have been decided since this complaint was drawn and presented to the Circuit judge.

Q Can you tell me what makes this college involved here : questionable under the First Amendment?

You say it is a Baptist College. What makes it a Baptist college?

MR. FIGG: Well, it is chartered to operate a Baptist liberal arts college. Its trustees are appointed by the South Carolina Baptist Convention. It operates --

Q But it has an open admissions policy?

MR. FIGG: It has an open admissions policy.

Q Are all of its faculty Baptist?

MR. FIGG: No, neither its students nor its faculty.

Q Is any student required to take any course in religion if he doesn't want to?

MR. FIGG: I don't think they are required to take any course. They merely offer a Baptist offering, but I know this that when, I believe, that counsel in this case were arguing at one time that it wasn't a Baptist activity, and I think that the South Carolina Baptist Convention called them on the carpet, didn't they, and told them it was.

(laughter)

Q Has some court in this case decided that it was in the sense that --

MR. FIGG: Yes, the Circuit judge said it was at least in part a function of the South Carolina Baptist Convention. They give them capital.

Q Does that make it a sectarian institution in the sense that aid to it will support religion?

MR. FIGG: Well, the Baptists think that it is a religious activity of theirs.

Q I don't care -- how about under the First Amendment?

MR. FIGG: Well, I think that this institution is an activity of the Baptists of South Carolina and I believe that they think, regardless of this application for assistance, that governmental interference with what they are doing here would be a violation of the Federal constitution. They think

that this is a religious activity.

Q That wouldn't bind the Court, or us, would it?

MR. FIGG: No, it wouldn't bind the Court, but it is some evidence of what they think they are doing --

Q What do you think makes it a suspect under the First Amendment, the connection between this institution and the Baptist Church? What practical things make it suspect in your mind?

MR. FIGG: Because it was created to include in its curriculum some religious courses and offerings and instruction and preparation to be a Baptist preacher.

Q They do teach religion there -- the Baptist faith?

MR. FIGG: What they think is the Baptist approach --

Q And produce Baptist ministers?

MR. FIGG: That's right. They have courses that lead up to being a Baptist minister.

Q Mr. Figg, they don't give degrees in Divinity at this college, do they?

MR. FIGG: I don't believe they do, Mr. Justice.

Q I thought you just said they did.

MR. FIGG: No, I say they give courses.

Q They give courses, but they get ministers out of that?

MR. FIGG: Well, I am not -- this is a fairly new educational institution, isn't it, and it hasn't yet developed

to the point that I think the Baptist intended it to develop.

Q Let me take another approach. Some of these schools have requirements that the Board or percentage of it be members of the denomination.

Is that true here? Does the record disclose this?

MR. FIGG: The Board of Trustees here is named by the South Carolina Baptist Convention. Now, they don't have to be Baptists, but they are appointed -- the whole Board -- and to operate it in trust for the South Carolina Baptist Convention.

Q Maybe, this answers, in part, Justice White's inquiry, then.

MR. FIGG: And when they got the charter, they wrote in there that to operate a Baptist liberal arts charter.

Now, they are in --

Q Does the record show what degrees are offered at this college?

MR. FIGG: I don't believe it does, Mr. Justice.

The only other observation I wanted to make was --

Q Baptists could never support and pay the expenses of a college that wouldn't be suspect under the First Amendment?

MR. FIGG: If they hadn't done it?

Q No. It is just impossible for a church to pay the expenses of a college without being suspect under the First

Amendment?

MR. FIGG: No. I think they could contribute to it.

Q Well then, what is it that makes it -- makes this college a Baptist college?

MR. FIGG: To me, it is because they think it is.

I take that as evidence that they've accomplished what they set out to do.

Q Is that the most you have to say about it?

MR. FIGG: That's all I know, Your Honor.

Q I suppose you might add to that their power to select the governing board. I suppose that's central to your position.

MR. FIGG: Naming the Board of Trustees.

Q Even if they include Catholics and Presbyterians and Methodists, and a lot of other people.

MR. FIGG: That's right.

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

Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:12 o'clock, p.m., the oral arguments in the above-entitled case were concluded.)