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SUPREME COURT, U. S.

In the

Supreme Court of the United States

GRACE SLOAN, AS STATE TREASURER OF THE COMMONWEALTH OF PENNSYLVANIA, et al.,

Appellants,

v. No. 72-459

ALTON J. LEMON, et al.,

Appellees.

and

HENRY E. CROUTER,

Appellant,

v. No. 72-620

ALTON J. LEMON, et al.,

Appellees.

Washington, D. C.
April 16, 1973

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and	
HENRY E. CROUTER, Appellant, v. ALTON J. LEMON, et al., Appellee.	No. 72-620

Washington, D. C.,

Monday, April 16, 1973.

The above-entitled matters came on for argument at 2:15 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:

ISRAEL PACKEL, ESQ., Attorney General of Pennsylvania, Capitol Annex Building, Harrisburg, Pennsylvania; for the Appellant Grace Sloan.

WILLIAM BENTLEY BALL, ESQ., 127 State Street, Harrisburg, Pennsylvania 17101; for Appellants Diaz, et al.

HENRY T. REATH, ESQ., Duane, Morris & Heckscher, 100 South Broad Street, 16th Floor, Land Title Building, Philadelphia, Pennsylvania 19110; for Appellant Henry E. Crouter.

THEODORE R. MANN, ESQ., 1845 Walnut Street, Philadelphia, Pennsylvania 19103; for the Appellees.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 72-459, Sloan against Lemon, and 72-620, Crouter against Lemon; the two cases being consolidated.

Mr. Attorney General, you may proceed whenever you're ready.

ORAL ARGUMENT OF ISRAEL PACKEL, ESQ.,

ON BEHALF OF APPELLANT GRACE SLOAN

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

I appear to make one point, and I think it's the controlling point; and that is that the dominant purpose and the primary effect of the Pennsylvania Act is economic and not religious.

Of course I realize that the case does have sociological and religious collateral effects. But I say that essentially we are dealing here with an economic measure by the Commonwealth.

What is the economic situation that confronted Pennsylvania here? There were several factors.

First of all, and I am of course talking about education -- first of all, in our schools throughout the Commonwealth, and particularly in Pennsylvania, there was a serious financial situation. I think this Court can take judicial notice of the two serious strikes that we had in the

City of Philadelphia because of financial problems.

Secondly, there was the factor that 20 percent of the students in the Commonwealth of Pennsylvania were going to non-public schools.

Thirdly, the average annual cost for a student in a public school was $980 per year.

The next item was the fact that many of the non-public schools were threatening, there was a present danger that they were going to shift, give up their school and the students would all be, a great many of them would be shifted to a public school.

And the fourth significant factor is the obvious one, true in so many of the States, Pennsylvania, under its constitution, had the duty to make provision for the education of all its young.

Now, what to do? How to cope with this economic situation?

The Legislature came to the conclusion that the thing to be done was to offer to parents of non-public students $75 if they were in elementary schools or $150 if they were in a secondary school. In effect, Pennsylvania was saying to these parents: Look, folks, if we have your students here, not only would we have a tremendous capital program, which will take millions and millions of dollars to build enough schools, but if you continue to send your children to the school where you have been sending them, if

you don't switch them we would be saving, at the least, $980; and to induce you to keep doing that, because of the economic plight in which we are, we will pay you the $150 or $75 per student.

It was purely this economic measure, it's spelled out in the legislation, the General Assembly made it crystal-clear that this was an economic motive in which they were trying to cope with this very, very serious situation before them.

Really, I think in the analysis you've got to consider this very high function of this Court, to say that legislation of a State is unconstitutional, ought to be asserted only in the case where are illegitimate ends being sought to be achieved.

I can't help but make the analogy -- it may be a little far-fetched -- I'm thinking of the Twenties and the earlier period when you had the situation in dealing with congressional power, where the Court would say: Well, you may have the power, but what you're trying to do with this statute, its collateral effects are something different. I'm thinking, for example, of the prison labor case, or the cases where Congress purported, attempted to regulate interstate commerce, and this Court used to say: Oh, well, if what you're trying to accomplish, if you're trying to regulate manufacturing, or if it has the effect of regulating manufacturing, we don't care, even though you are asserting a power

over interstate commerce.

Similarly, I say, here we shouldn't look to the collateral effect where the Legislature is clearly asserting a legitimate end. Here the Pennsylvania Legislature said we're trying to save money so that the schools will be conducted properly.

Sure, it has a collateral effect. It gives some benefit. But I say, look at the main object of what the Legislature is trying to do; and, for that reason, this legislation should be held constitutional.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Attorney General.

Mr. Ball.

ORAL ARGUMENT OF WILLIAM BENTLEY BALL, ESQ.,

ON BEHALF OF APPELLANTS DIAZ, ET AL.

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

The Commonwealth, following Lemon vs. Kurtzman, carefully structured the Act which you're considering today, structured it to try fully and faithfully to meet every standard which this Court had expressed in its various decisions under the Establishment Clause.

Why? In an effort to solve a twofold problem which simply won't go away.

The first part of that problem having been described

by the Attorney General just now, a massive public problem which involves the total fiscal, economic, and educational crisis that the Commonwealth today does face.

And secondly, the severe problem of thousands of Pennsylvania individual parents, broad masses of parents in the middle-income group, and including the lower income parents in Pennsylvania, who are involved in a problem relating to law, to conscience, and to family economy.

May it please the Court, I represent twelve such parents here this afternoon. The group described in our papers as Jose Diaz, et al., who last year had paid a tuition at a Protestant, a Catholic, a Jewish, or a non-sectarian school. They are members of a numerous group in Pennsylvania who are, in fact, truly caught in a three-sided vise.

They are faced with the compulsion of law, to begin with. They're faced with the fact that the, under criminal sanction, the Pennsylvania Compulsory Attendance Law requires them to have their children in some school, which meets reasonable State requirements.

They are also under legal compulsion, of course, to do what they have always been doing, they are all taxpayers, in paying their public school tax.

They also face a compulsion of conscience, which impels them to seek other education for their children.

And, thirdly, they are faced with the twin effects

-- which we hardly need describe further today -- of inflation and taxation.

Now, how does Act 92 seek to remedy this problem?

It does it by giving unearmarked payments to people whom the Legislature determine to have special need because they carry a special burden. The proof of that burden, the General Assembly found to be -- the best selected proof of their carrying of this burden was the fact that they had in fact paid a tuition at a non-public school the year past.

Now, the court below looked at this statute, found it unconstitutional. The court below said that this statute -- first of all, it said it had a secular legislative purpose, and that that winged the court's tests.

It then looked at the entanglement problem and found no kind of entanglement whatever to be involved in this statute. But it did at least grope at the idea that the statute has a primary effect of advancing religion. I say the court groped at it, because as you read the opinion you find that it's hard to point it right down, where you find the court truly talking about premise, or principal character of effect and advancing religion rather than having possibly a relationship to religion.

At any rate, the court based, what we will be willing to call, the failure of the Act to meet the primary effect test on three different arguments.

The first that the parents were merely a conduit under the Act, that they are merely a conduit under the Act for the payment of public funds to non-public schools.

Secondly, that it was possible and quite likely that the parents were going to use the money they got under these payments in the future for payments to sectarian schools.

Thirdly, the court pointed out -- and this is not in its opinion, but appears in its order, its final order, at page 53a of the Appendix -- pointed out that, or stated that 90 percent of the children attending non-public schools in Pennsylvania are enrolled in schools which are religious in character. There was no record evidence of this, but this was the court's reasoning.

As to the conduit argument, here the court immediately invoked, as did, as did Mr. Pfeffer this morning, the tuition grant cases from the Southern States, Almond vs. Day and so on, and equated the arrangement provided by the Act with the situation found in those cases. The handing to a parent of a check which would be negotiable only at an institution, or the providing of a parent with a voucher which he then could take and exchange for education at an institution.

None of these techniques appear in this Act. There is no such provision under Act 92. There's no condition whatever attached to payment under this Act. The money does in fact, in legal fact, become that of the parent. It's

subject to his unlimited power of disposal. The money becomes his private money. And regardless of what hopes the State public policy has, as to how he may relieve the education crisis, in expending this through tuition, the very legal fact of the Act is that he may use it for education or he may not. He need not, under the terms of the Act, use it for education.

No institution -- and I want to underscore this to Your Honors -- no institution has a breadth of legal claim, right, title, or interest in one cent of the money in question.

Now, the court, almost as though it felt it couldn't make the conduct argument stick, invented then an amazingly, very standard for constitutional adjudication in its rule of possible and quite likely.

The court said this, that the Act offended the Establishment Clause and now I quote, "a possible and quite likely use of the aid under review is to enable parents to continue to pay tuition at sectarian schools." This rule has no foundations in decisions of this Court, it's guesswork, perhaps it's intelligent guesswork, but it is that.

It certainly does not measure up to, and is not synonymous with or an equivalent of, the clear standard which this Court stated when it said that, to meet the strictures of the Establishment Clause, it must be shown that an enactment does not have a primary effect advancing religion.

Thirdly, on the matter of 90 percent. I mentioned

to the Court that there was no record evidence at all on the 90 percent figure respecting children. However, it also must be considered that these payments go to individuals, and the law controls or conditions no man's choice under this Act, the choice of no parent.

Thirdly, if one is to take and play the percentage game, I think we begin to invite problems which have possibly not been foreseen. If one were to make a head count with respect to who is getting certain welfare benefits or who is benefitting under an anti-poverty program, and then determine, as a result of that head count, that the people who are beneficiaries were 90 percent blacks, would this make this class legislation?

We've just enacted a perfectly splendid program, an immensely humane program for relief, of relief through expenditure of some $135 million of taxpayers' money for resettlement in Israel of Jewish refugees from religious persecution in the Soviet Union.

Undoubtedly 90 percent of these individuals are of a single religious faith. Certainly this cannot be taken as a standard for invalidating any such program.

What we have here, then, we believe is a measure which in no wise offends the Establishment Clause. We have, however, raised affirmative defenses, as Your Honors have doubtless noted in our brief and from the record. The parents

in this case have raised affirmative defenses of equal protection, which I should like briefly to comment upon.

I should point out at the outset that we are not here arguing the proposition which was argued for in Brusca, the case to which Mr. Pfeffer referred this morning, where parents of non-public school children asserted that they had a constitutional right to participate in public funds, a right to have these funds devoted to non-public education.

Rather, here a statute exists, and that statute gives unearmarked assistance benefits to a class of parents rationally determined and without conditions attached.

I'd like to talk first of all about parents who are described in the papers and in our brief as the Watson parents. Mr. and Mrs. Watson have a daughter, Ellen, who attends Baldwin School, a non-sectarian school, in Pennsylvania. They are express beneficiaries of this Act; they are parents of non-public school children and non-public school is clearly defined in the Act in a measure and in a way that includes non-sectarian, non-public schools.

They cannot have an Establishment problem; there's no way that they can have an Establishment problem.

They moved for summary judgment in the lower court, and the court denied their motion on the peculiar ground that although they were -- had been granted intervention as of right, the court's reasoning was that the plaintiffs had sought

no relief against them.

Later, the order of the court was to state that 90 percent of the beneficiaries of this Act being the parents of children attending sectarian schools, they, the court undoubtedly by that sought to provide another means for denying these individuals the benefits of the Act.

It's perfectly clear that to cut the Watsons out of the Act, on the ground that they are minority beneficiaries under the court's reasoning, would certainly be a denial of equal protection.

To say that they were not intended beneficiaries of the Act directly conflicts with what the Legislature itself said in its definition of parents and or non-public schools.

The second group of beneficiaries under this Act, whom we're here to speak for today, are Mr. and Mrs. Jose Diaz, who have a boy, Jose, Jr., in St. Peter Apostles School in Philadelphia; Mr. and Mrs. Kretzmann, whose daughter, Debbie, attended Redeemer Lutheran School and is now attending public school -- here, incidentally, may it please the Court, is an example of a parent who is eligible today for the benefit of the Act, on account of the fact that he had had, these parents had had their children, they had paid the tuition for their children in a school, in a sectarian school. Now they have elected -- high school time has come, and they have elected to send this child to a public school.

Another pair of parents are Mr. and Mrs. Zimmerspitz, who have their daughter, Rochelle, at Beth Jacob School. Now, these people have been told by the court that they may not participate in the benefits of this Act; the court below said that these latter parents cannot be paid because of two things: First of all, they had antecedently paid, out of their own pockets, money for tuition last year. Secondly, the court thinks it's likely, possible and quite likely, that in another year they will pay another tuition to maintain that child in a sectarian school.

Even though, as we have said, the payment of that subsequent tuition is absolutely, certainly a payment out of private money.

Therefore, the court has said that these parents must be excluded from a public welfare benefit. Because of what? Because they exercised an act of the will whereby yesterday they spent their own money, their own private money, because of their religion, and tomorrow, for the same reason, they may again expend their private money.

A person certainly may not be excluded from a program of public welfare benefits because of his race, because of alienage, or because he has done something which is nothing other than an exercise of religious choice.

Finally, may it please the Court, the appellees have devoted some time and much vigor in speaking of political

entanglement with respect to this Act.

We have pointed out in our brief this Act is self-executing, paid for out of the cigarette tax. There is no record, the court below in no way discussed any such issue, and there is no record whatsoever of any evidence at all that the plaintiff sought to introduce below on this issue, preferring, conceivably, to leave the matter to supposition, to guesswork.

In conclusion, may I say to the Court that a secular need of the nation is today, in a growingly socialized society, for people to be reasonably enabled to follow conscientious choices. Nowhere is this more important than with respect to education. Especially under this Act, where it is possible that such choice may help some parents to rear their children in the traditions of civility, non-violence, decency, and morality.

I thank the Court.

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

Mr. Reath.

ORAL ARGUMENT OF HENRY T. REATH, ESQ.,

ON BEHALF OF APPELLANT CROUTER

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

I appear here today on behalf of one parent with children in non-public schools, private independent schools.

I am also counsel for the Pennsylvania Association of Independent Schools, and, in essence, I speak really on behalf of all of the parents of children attending non-public schools within the Commonwealth of Pennsylvania.

I think that at the outset it is important to note that the tremendous diversity of interests that have shown their unqualified support for this Pennsylvania Act.

For example, we have filed in this case or in the court below amicus briefs from the Solicitor General on behalf of the Federal Government, a very strong brief filed by the Commonwealth of Pennsylvania on behalf of the people of Pennsylvania; there is an exceptionally strong brief filed by the City Solicitor on behalf of the City of Philadelphia and its financially beleagured school district; there is a brief that has been filed by the National Association of Independent Schools supporting 100 percent this Act; there is also an amicus brief that was filed in the court below by the Pennsylvania Association of Independent Schools; and finally, and I think most significantly, Your Honors will see attached to our brief a copy of the amicus brief filed in the court below by the Benjamin Banneker Free School, which is a school in a predominantly urban ghetto district of Philadelphia, and it is a school which depends almost entirely upon individual tuitions.

And because all of the students attending that school

are eligible, they, too, have joined in --

QUESTION: Do you want us to count these up, and decide on plurality?

MR. REATH: No, sir.

[Laughter.]

Not at all, Mr. Justice Marshall. I think the only point that I want to mention is that the effect of this Act is to cover every segment of education in Pennsylvania, and in no way could it be said that either its purpose or effect was designed solely for religious or secular schools.

Now, if Your Honors please, I would like to respectfully state to the Court that if this Court affirms the rationale -- if this Court affirms the rationale of the lower court in holding Pennsylvania Act 92 unconstitutional, then you have to invalidate every major piece of Federal and most State legislation, including the G.I. Bill and its successor, whereby grants or low-interest loans with liberal forgiveness provisions are given to college and postgraduate students.

For example, under the 1958 National Defense Student Loan Program Act, as greatly expanded by the Higher Education Act of 1965, there is presently in excess of $1 billion being paid out to several million students of college age attending higher education and postgraduate work.

But these Acts, if Your Honors please, as is the case

with the Pennsylvania Act which was stricken, and for the reason that the Pennsylvania Act was stricken, do not place any restriction whatsoever to insure that the funds are restricted, and here I quote the language of the lower court, "to secular education or general welfare services."

As a matter of fact, it would even invalidate an Act which has been in effect for the last 25 years, whereby the Congress authorizes Pages in this very Court to receive a private education, non-public education at a private or parochial school of their choice. And there is absolutely, of course, in that Act, not only not a restriction but a recognition that as long as the money goes to the child or to the parent, and the parent is the one who controls the choice of school, that does not constitute any Act of the State or of the Federal Government involved in advancing religion; but, to the contrary, it is the traditional role of the State or Federal Government being absolutely neutral.

Now, in this case, Your Honors, there were three points that the lower court made that were absolutely wrong and show how totally in error they were in upsetting this Act.

The first, of course, is the failure to restrict to sectarian education. A concept that this Court has never accepted, and I would hope that the Court never would, with the frightful consequences that would flow as a result of such a narrow interpretation.

The second had to do with the so-called conduit theory. What the court said was, Well, it doesn't really make any difference, when you pay the money to the parent you really are giving it to the school, and why try to say that there's any essential difference or distinction?

And then finally, as Mr. Ball pointed out, what the court tried to do was to buoy up the weakness of the other two arguments and say, Well, anyhow, we find that the effect of this Act, even though the purpose is secular in nature to advance education, that the effect of the Act is to aid and advance religion because we find, as a matter of judicial notice, that 90 percent of the children who might be benefitted are attending parochial schools.

Now, as far as the -- I think that here is the point that I want to make as emphatically, Your Honors, as I possibly can: that where the court fell into the error of its ways in the lower court was that it totally and completely misunderstood the problem facing this Court in Lemon and Tilton and DiCenso, where the Court was trying to experiment, or trying to find the outer and the inner limit of how you could pay money directly to an institution; directly to an institution. That was the problem in Tilton that Mr. Chief Justice had to resolve, that was the problem in Lemon v. Kurtzman. The funds were paid to the institution, it was the institution that had the control of the funds and not the parents.

Now, in order to cope with that problem, and in order to face up to that situation, the Court in Tilton quite properly said, If you're going to pay funds to an institution, we want some safeguard. And those safeguards were this prohibition against religious use.

Now, as far as the conduit theory. The conduit -- what they say is that it makes no difference, it's a distinction without a difference. We say to Your Honors it is a distinction which makes all the difference, because when you pay the money to the parent, the parent becomes the wall of separation between Church and State; the recipient institution who may ultimately benefit, of course they will indirectly benefit from this tuition program, in a sense, but they have no call on the funds. There is no way that they can insure year after year they're going to get the funds.

That isn't true where you have payments made directly to the institution.

Secondly, the State has no control over the use of the funds.

Now, I would like, if I may, to read to the Court one statement that was made by Kingman Brewster, in a Report of the President, at Yale University in 1970, because I think it illustrates the very basic and fundamental difference, whether you're dealing in secondary education or in higher education, between payment to the parent and payment to the

institution.

And here's what Mr. Brewster said, talking about the plight of higher education:

"The only other prospect for a new tributary to feed Yale's income stream would be the introduction of some massive program of Federal assistance. If this took the form of assisting students, either with grants or with a guarantee of their postponed tuition payment, it would be quite consistent with the university's freedom and autonomy.

"If, on the other hand, new Federal subvention were to take the form of direct bloc grants to the institution, there would be serious worries about the dependence upon political favor which this would entail. If Federal assistance became built into Yale's budget, we might find ourselves in a terrible bind if a shift in national priorities cut off the pipeline.

"More serious would be the temptation of some future Congress to attach strings and conditions to such grants. Future legislators might seek to bend or warp, if not direct our educational research or admissions policy."

And to the same effect is the statement made by William Bowen, now president of Princeton University, in which he said exactly the same thing, highlighting the essential distinction between payment to the parent and payment to an institution.

Indeed, one of the great advantages of channeling funds for higher education through the student is that this minimizes the danger of political control of higher education.

Now, in addition to the practical considerations, Your Honors, there are two very significant and major constitutional differences, where the money is paid to the parent rather than to the institution. One of them is illustrated by the Judd case, which is cited by Mr. Mann in his brief, because he says there that it doesn't make any difference whether it's a direct or an indirect payment.

Well, it makes a tremendous difference, because in the Judd case, which, interestingly enough, was decided eight years before Everson, and it had to do with whether or not the State of New York could provide busing for parents, there the Court held that there was an indirect benefit and that you were dealing with an indirect benefit and that that was a specific violation of a very specific provision in the New York State Constitution, which, under Section 4 of Article IX of the Constitutione, says: that you may not use public funds to be used directly or indirectly in aid or maintenance, other than for -- et cetera -- for an educational institution that teaches a specific religious dogma.

Then, and I don't have time to read it now, but I would ask you to make note of the Court's -- at page 212 of the Court's decision in this regard, where the Court pointed out

that the reason that there was such a difference -- that there was no difference between a direct and indirect was because the statute specifically said direct or indirect.

That clearly, as Your Honors know, is not the test that this Court has decided in the -- in Everson, in Allen, and in Tilton. The mere fact that a religious institution may benefit indirectly does not constitute a violation of the Establishment Clause.

Now, the other constitutional difference, and this is referred to in my brief and I won't have time to develop it extensively before the Court, but it's in our brief at page 32. The other significant constitutional difference, when you pay money to the parent, is that when the parent gets this money, I submit to Your Honors, that at that point he is free from any further inquiry by the State, by the court or any other body, as to what he does with it and what are or are not the religious practices of the school to which he elects to send his children.

This is under the very same First Amendment rights, and the other rights that this Court has found, such as the right of privacy, which was discussed in Roe v. Wade and other cases, where the Court has said that you are free from inquiry; and if you're free from inquiry, you cannot trace and attempt to trace the funds from the parent into any religious institution.

And therein, you see, lies the error of the ways of the lower court. Because what the lower court did, they were faced with this problem, as we've pointed out in our brief, early in the pleading; but they ultimately swept the problem under the rug and in the final decision of the court they said, Well, we find as a practical matter that 90 percent of the parents who will benefit have children who are going to religious schools.

But you cannot, where the money is paid to the parent, I suggest, you cannot make any determination of what happens thereafter, you cannot make any determination in trying to trace the religious or non-religious use. And if you can't do that, and that, then, brings me, if Your Honors please, to the last point that I want to make.

It has to do with the whole question of burden of proof. This Court has said time and time again that a party coming into this Court or the Federal Court, to ask this Court to use the extraordinary power it has of declaring State action unconstitutional, must carry the burden and he must establish those facts on the record that show that there is a religious effect, for example, in this case.

Secondly, this Court has said over and over again that there is a very heavy presumption of constitutionality to State action, and that the Court will only overrule State action, will reverse State action in the very clearest of cases.

And finally, this Court -- Mr. Justice Powell will know very well of what I speak, in the Court's opinion in the Rodriguez case, and as reaffirmed as lately as in Lemon v. Sloan, No. 2, where the Court again pointed out that the reluctance of this Court in a Federal system to substitute its judgment or to interfere with the delicate and complex problems of social and educational policy that are involved in this whole question of whether you're going to support pluralism in education or whether you're going to have a single, all-embracing, monolithic public system.

Now, I would be the first to admit that there are good, sound arguments to be made for both. It happens, however, that Pennsylvania has made a commitment to pluralism, and one which I happily endorse and applaud; but the fact of the matter is that I think that that is a matter for the individual several States.

And if there is any doubt as to the will and desire of the several States, I would ask Your Honors to take a look, when you review this case further, at Exhibit C of our brief, where we have attached a list of the different ways in which the several States have attempted to make their major commitment to pluralism in education.

I would like to close my remarks, if I may, by reading several lines from the brief of the National Association of Independent Schools, which I think speaks as eloquently to

this whole problem as any language that has been set down on paper to date. And it is as follows:

"To say, as some critics do -- and without a shred of evidence to support it -- that the parent acts as a mere conduit to the school, is to denigrate the very stuff of which this country's greatness was made and to undermine the rock upon which our Constitution and Bill of Rights is grounded -- personal freedom and the right of each individual to make his own free choice.

"Where the parent is the recipient of State aid, he alone decides how and where the funds are applied and thus effectively cuts off State control or participation, thereby enabling the State to aid its legitimate interests in secular education, and at the same time, to preserve, in the words of the Chief Justice, the spirt of 'benevolent neutrality' which will neither advance nor inhibit religion.

"This is in the best tradition of a country that treasures its private institutions and the freedom and rights of individuals. Far from offending the Constitution, tuition aid to parents supports and reinforces the very principles the Constitution was designed to protect."

We ask this Court to reverse the lower court and to find that this is a lawful exercise of the State's concern with preserving pluralism in education, and to find that the Pennsylvania Act 92, of parent reimbursement, is in every sense

constitutional.

Thank you, Your Honors.

QUESTION: Mr. Reath, before you sit down, in a word or two, what's the difference between this case and Wolman v. Essex, which was affirmed last fall?

MR. REATH: There are several very fundamental differences. I think the most important, Your Honor, is that this bill, as has been pointed out previously, is self-executing.

QUESTION: It uses 23 percent of the cigarette taxes, right?

MR. REATH: Yes, sir.

QUESTION: It doesn't require an appropriation.

MR. REATH: That is correct.

QUESTION: Anything else?

MR. REATH: Well, there are other differences in the structure of the Act. In Wolman, it was part of a total educational appropriation, which I guess comes back to the same point of one year, and I confess that I'm not familiar, Your Honor, with the intimate workings of the Ohio case, but I think that essentially, that that is the basis that Ohio was turned down in the lower court was on the concept of entanglement.

QUESTION: And divisiveness in the later --

MR. REATH: And divisiveness. And here that has

been completely eliminated.

QUESTION: Thank you.

QUESTION: Mr. Reath, --

MR. REATH: Yes, sir.

QUESTION: -- is the statement of Mr. Brewster, which you read, in the papers filed with the Court?

MR. REATH: The -- my closing statement?

QUESTION: The one you -- no, the statement you read from the President of Yale, Mr. Kingman Brewster.

MR. REATH: No, sir; it is not. It was in the record below, and I read it at the time of oral argument. I have a copy, and I'd be happy to furnish the full statement to the Court, if that was desired.

QUESTION: Well, if it was in the record below, the record is here, then.

MR. REATH: Well, it was read, I mean the document itself wasn't offered, but it --

QUESTION: Oh, I see.

MR. REATH: -- it was read and used in the oral argument below.

QUESTION: Is that his Annual Report?

MR. REATH: It was in the --

QUESTION: The President's Annual Report?

MR. REATH: Yes, sir. It was in the President's Annual Report for -- the Report of the President for Yale

University, 1970-71.

QUESTION: I see.

MR. REATH: Thank you, Your Honors.

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

Mr. Mann.

ORAL ARGUMENT OF THEODORE R. MANN, ESQ.,

ON BEHALF OF THE APPELLEES

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

May I first express my deep appreciation to the Court for having found sufficient play in the joints of the First Amendment to have accommodated the religious sensibilities of several of us by extending argument to 3:30 today, which I trust is not a violation of the wall between separation of Church and State.

And I will try to repay that kindness by taking considerably less than my full time.

If it please the Court, it is our judgment that Act 92 is unconstitutional in purpose, in effect, and because of the political divisiveness that it causes.

Very briefly, it's our judgment that it passes none of the standards that the Court has recently set forth.

I will take just a moment on purpose. I am, of course, well aware that this Court, in the last Lemon-Pennsylvania case, found that the legislative purpose must be accorded

appropriate deference. But I call to the Court's attention that the legislative purpose in the last Pennsylvania statute, the statute whereby secular educational services were being purchased by the State, was to enhance, and I quote, "the quality of the secular education in all schools covered by the Compulsory Attendance Law."

Now, clearly, the State has a comprehensive and pervasive interest in advancing the quality of secular education in all schools, and that is clearly a legitimate public purpose. It is not the same purpose, it is nothing like the purpose, set forth in Act 92.

Act 92 purports to have several purposes, several that are secular and one that is clearly not; the several that are secular, of course, is that it aims to make sure that our public school classrooms do not get too overcrowded, and that is an obviously appropriate purpose. It aims to keep a large tax load, an additional tax load off the back of the public in Pennsylvania, and that is obviously a legitimate purpose.

But it means to do this, and I read, sirs, from the legislative finding, and what they say essentially is that should parents of children now enrolled in non-public schools be forced by economic circumstances to transfer any substantial number of their children to public schools, it would be an enormous additional burden to the taxpayer;

wherefore, that in order to reimburse parents partially for this service so vitally needed by the Commonwealth, this Act is passed.

What is this service so vitally needed by the Commonwealth?

It is the service, in quotes, "performed by parents in sending their children to non-public schools" which, in the main in Pennsylvania, are sectarian schools.

So that the State, through the payment of money, undertakes and in the purpose sets forth that that's what its intention is: undertakes to encourage parents to keep their children in the parochial schools so that they will not overcrowd the public schools.

And I submit that in the evolving standards, and this Court has said recently that these standards are evolving, that this Court might now adopt the definition of "primary purpose" used by Justice Frankfurter, concurring with Justice Harlan, in the McGowan case. And what he said there was that if the primary end achieved by a form of regulation is the affirmation or promotion of religious doctrine, primary in the sense that all secular ends which it purportedly serves are derivative from, and not wholly independent of, the advancement of religion, then the regulation is beyond the power of the State.

And I submit that whatever proper secular purposes

are found in the legislative finding are entirely derivative from the improper sectarian purpose set forth in the legislative findings to which I have referred.

And of course, coming to the second portion of our argument, we say that this legislation is unconstitutional in effect. First of all, because, to the extent that it effectuates its invalid purpose, of course it is unconstitutional.

Appellants argue,and all of them have argued, that since the money does not go to the school treasury but rather to the parents, that this makes a difference. And we hold with Professor Freund, when he said, and I quote, "the sharp dichotomy between pupil benefit and benefit to the school seems to me a chimerical constitutional criteria." And chimerical indeed. Because the question of whether the money goes to the church or to the parent should not be, and I don't think ever has been, the focal point of inquiry when what we're trying to find is whether a legislative scheme has a primary effect of advancing religion. Religion; not a church.

And the First Amendment talks about religion; not a church.

Of course, Tilton --

QUESTION: How about the Everson case?

MR. MANN: The Everson case, sir, is probably the

only exception to the analysis I was about to make --

QUESTION: Well, --

MR. MANN: -- and with Your Honor's permission, because I think it's quite distinguishable; but in Tilton vs. Richardson, of course, this Court made clear to all of us that indeed a State can provide money directly to a church institution, provided that the purpose is proper.

In the end, to determine whether the primary effect of a law advances religion, what must be examined is the character of the aided activity. That's what the lower court said, and that's what this Court has said in the past.

And if we examine the character of the aided activity in the recent cases decided by this Court, whether it is secular textbooks, in Allen, provided to parochial schools, or adding, giving 15 percent salary supplement to secular teachers in religious schools, or whether the State is purchasing secular subjects in math and science and foreign language from the parochial schools; in every case, except for Everson, which I will come to in just a moment, in every case the character of the aided activity is primarily secular education.

In every case, the character of the aided activity is ideologically neutral. Here what we're dealing with is a legislative scheme which is reimbursing general tuition to parochial education, and I don't see how we can argue with the

point that the character of the aided activity is parochial education, which this Court has defined. In Lemon and DiCenso, this Court said the various characteristics of the schools make them a powerful vehicle for transmitting the Catholic faith to the next generation; and in the case of Jewish parochial schools or Lutheran parochial schools, the identical thing could be said.

And the Court went on to say, in short, parochial schools involve substantial religious activity and purpose, so that the point of the matter is that the character of the aided activity under Act 92 is religious activity, and therefore it is invalid.

The only exception, I think, to that kind of analysis is Everson. Because I think in Everson, although the bus ride is ideologically neutral, it can, I think, more accurately be said that the effect of reimbursing parents for transporting their children to parochial schools comes closer to being the primary effect which aids religion than any of these other, more recent cases that I've noted.

But Everson is distinguishable not only because a bus ride is non-ideological, it's distinguishable, too, because there is a very finite point, a bus ride in terms of a parochial school's budget can never account for more than a small fraction, and if the legislative scheme is played out to the end, it has, it comes to an end, and it comes to an end

early.

When we're talking about reimbursing tuition, we're talking about reimbursing the total cost, really, of operating a parochial school, there is no end. If this Act is constitutional, then why not five times the amount?

But the -- let me just close this portion of the argument by saying it's clear to me that the State has no more power to help a parent give his child a sectarian education than it has to help a church give the children of its parishioners a parochial education, because it's not a church which the First Amendment forbids from being aided, it's religion.

QUESTION: Well now, in both Everson and in Allen, did the Court not say very explicitly that the fact that the program, books in one case, bus rides in the other, encourages more people to send their children to a church-related school or private school is not controlling?

MR. MANN: Yes, they did. And I think the Court was absolutely correct. If a legislative scheme has an incidental effect, such as Your Honor has described, that in itself is -- I think what we're really dealing with is the definition of primary effect.

The primary purpose of this legislation, however, is to achieve all of its ends through purposely encouraging as many parents as possible to keep all of their children in

a parochial school.

That's a far cry from saying, well, just because a piece of legislation might have an incidental effect of encouraging somebody --

QUESTION: Well, the Attorney General, of course, put it a little differently, perhaps not as roughly as I'm about to restate it, but it was to keep as many as possible of the children out of the overcrowded public schools.

MR. MANN: I think it's two sides of the same coin.

I must say, the statistics I've read don't -- I think indicate that the overcrowded conditions of the public schools are improving quite on their own without respect to this problem in the last several years. But I think they're two sides of the same coin.

What the Legislature is trying to do is not get the schools overcrowded by encouraging parents,purposely encouraging parents, not incidentally; purposely, that's the whole basis of the scheme, to continue to give their kids a sectarian education. And if that isn't violative of the First Amendment, I don't know what is.

QUESTION: But can't you equally say that the purpose is to continue to give their kids a private, non-public education rather than a sectarian education? Since I take it it isn't dependent --

MR. MANN: Yes, you can equally say that --

QUESTION: -- on sectarian to get this reimbursement.

MR. MANN: Yes, as a matter of fact, it's true that the State -- if 100 percent of the children went to non-sectarian, private schools, the State's purpose would be accomplished in the same way; that is absolutely correct, sir.

Now --

QUESTION: If it were 20 percent, to say that that was a valid State purpose --

MR. MANN: I'm sorry; I didn't hear you.

QUESTION: Would it need to affect 100 percent of this 20 percent -- if 20 percent of these children are in non-public schools.

MR. MANN: Yes, sir.

QUESTION: Now, must the program, in order to pass muster on your view, cover all of the 20 percent?

MR. MANN: Well, if --

QUESTION: What if half, that is 10 percent, were in private, secular schools and half in sectarian schools?

MR. MANN: In terms of whether it passes constitutional muster on the primary effect test, I don't think it makes any difference whether 50 percent of the kids are going to private, non-sectarian, and 50 percent to private sectarian, or whatever the percentage is. I don't think it makes any difference.

In terms of passing constitutional muster on the third

test that has been announced by the Court, the question of political divisiveness, which I will come to in a few moments, I think it makes all of the difference in the world.

One of the arguments that Mr. Ball has made is that -- all the appellants have made, and we've heard it all day today -- is that there is somehow a difference here because the parents are getting the money at the end of the school year, and they may spend it for a vacation or for a down payment on a car, any way they want. And it's just like any other -- so the argument goes -- it's just like any other general purpose, general welfare legislation.

I want to address myself to that directly. Before I do, I want to address myself to it factually, because I think it is factually incorrect, although none of us, myself included, have made this point in our briefs.

This is not a true tuition reimbursement law. If Your Honors will look at the Appendix, pages 60 and 61, which contains the Act, it says that to become eligible to receive this reimbursement, $150 for a high school child, $75 for an elementary school child, the parent must produce and show to the authority a receipted tuition bill or a copy of an executed contract, under which the student attended the non-public school.

And in the next paragraph, when it talks about receiving the money, the amount a parent receives, the parent

receives the lesser of $150 or, and I quote, "the actual amount of tuition paid or contracted to be paid by a parent".

Well, let's understand the legislative scheme. It is not at all necessary for a parent to have paid this tuition and then at the end of the year get it back from the State. The parent need only execute a contract at the beginning of the school year; at the end of the school year he must only show the contract, and upon showing the contract he gets his $150 and then he may or may not pay his overdue tuition bill.

But I wouldn't want this case to go off on that factual difference. But I wanted to make the point, because it seems clear to me that even if this were a true tuition reimbursement bill, it isn't so much the receipt of money by a parent for last year's attendance, which encourages that parent to send his child to parochial school next year; indeed, in the case of a high school senior at a parochial school, that's not so at all. The parent gets the money for the twelfth grade, at the end of the twelfth grade; and he's not going to use that money for the parochial education of his child.

But it seems to me that's not pertinent. It is in fact the promise of reimbursement made by the State at the beginning of the school year, when the parent is deciding whether to go to a -- to send his child to a public or parochial school. It's through that promise, the statutory

promise, by which Pennsylvania is encouraging parents to send or to continue to send their children to non-public schools which, in the main in Pennsylvania, are sectarian schools.

This is nothing like general welfare legislation. Of course the recipient of a Social Security check can decide to use it to send his grandchild to a parochial school. The recipient of an Unemployment Compensation check can turn it over to his parish priest.

QUESTION: So your argument remains much the same if Pennsylvania said, We will give you half your tuition but never any more?

MR. MANN: Yes, sir. By all means. By all means. I --

QUESTION: Although, to the extent that his entire tuition is paid, you say necessarily, then, the State is financing that part of the education, that that is religious also?

MR. MANN: Well, clearly here, where the State may be paying the entire tuition, because of less than -- if the entire tuition is $150, the child gets $150.

I understood Your Honor to be asking the question: What if the statute said never more than half the tuition, and made a legislative finding that at least half of the budget of the parochial school was spent for secular educational purposes.

QUESTION: Your argument would remain much the same?

MR. MANN: My argument would remain the same, yes, sir.

QUESTION: And your constitutional argument would be the same if it was ten dollars?

MR. MANN: Yes, sir. Yes, sir, it makes no difference at all.

QUESTION: Then the differences in the Everson case and the Allen case, textbooks and buses, what about that?

MR. MANN: I'm not --

QUESTION: Well, then you are in trouble with Everson, aren't you?

MR. MANN: Well, I don't know that I'm so much in trouble --

[Laughter.]

MR. MANN: As you know, any attempt, sir, to take all of the Court's previous decisions and apply them in a symmetrical way to every Church-State case that comes before the Court is going to meet with some trouble. And I'll grant Justice White that.

But I think the Everson case gives me some problems, it gave the Court problems, and, as I understand it, some of those who voted in favor of it that now sit on this Court have indicated that if they had to do it over again they

wouldn't.

The point of the matter, of course, is that Your Honor, Mr. Chief Justice Burger, in the Lemon-DiCenso case, said that Everson, a decision which was thought to take us to the verge of constitutional permissibility really began us on what might be a downhill thrust. And, as I understood the context in which Your Honor, Mr. Chief Justice was talking in that case, it was an effort to say we've got to be careful in each decision as to where it's going to lead us.

And Everson, I think, led the Court, led the society into a great many legislative schemes that have had to pass constitutional muster or failed to pass constitutional muster before this Court before.

I was making the point just a moment ago that the difference between the fellow who gets his Unemployment Compensation check and turns it over to his church, and the parent who gets reimbursement here, is that that fellow who gets his Unemployment Compensation check didn't get it because he performed some religious act or did something that advanced religion, he got it for entirely different reasons, and is free to use it as he will.

But Judge Lord, in the lower court here, I think was precisely correct when he defined this issue by saying it is whether individuals may receive State funds solely because they have paid tuition at a church-related school.

If I may paraphrase what the Court said in Lemon-DiCenso, if Rhode Island may not supplement teachers' salaries without being certain that those teachers do not teach religion, then it seems to me, a fortiori, that Pennsylvania may not reimburse tuition to parochial school parents when they are absolutely certain that that tuition is being used to advance and to teach religion.

QUESTION: What about a returning veteran who has not had a high school education and goes to a Catholic high school at age 18?

MR. MANN: What I am reminded of, sir, is some of the Court's opinions or concurring opinions, or dissenting opinions, I don't remember now,which years ago used to cite Bible reading in the public schools, which had not yet been declared unconstitutional, as saying: Well, how about Bible reading in the public schools? We've been doing that for years, so doesn't it justify the next process.

And of course when Bible reading in the public schools finally came before the Court, it was unanimously declared unconstitutional. I only make that point to say that I don't believe that the G. I. Bill of Rights has ever come before this or any other court on First Amendment grounds. I am not suggesting which way it should go, if it should come here, and I hope it doesn't come here.

But it seems to me that -- and, by the way, that is

saying something significant, too. I think that since the G. I. Bill has been in effect for so many, many, many years, and nobody has ever challenged it, indicates that it's something that the society has fully accepted and will not, and would never, cause the political divisiveness that some other types of legislation will, such as this.

It seems to me that to take -- there are distinctions, of course; but to take the kind of statute that a nation passes after a war, in which it feels it owes so much to those people who fought the war for them, and say we're going to repay this by making your education possible, here's the money, spend it any way you will, but for education; it seems to me that that is not precedent for anything that we have before the Court today.

I mentioned a moment ago -- well, I have reached the point in my argument and, if I may, it's the last point in my argument, it's political entanglement, and I want to spend a few moments on it, with the Court's permission, and I will close.

If this legislation were validated, it seems to me that all of the fears expressed by the Founding Fathers and Justices of this Court, Justice after Justice, of divisiveness along religious lines, sect against sect, each sect attempting to use whatever political muscle it can garner to get its fair share of the pie, deal-making between sects in order to

get that muscle, all of those fears, it seems to me, realistically would spring back to life again.

And our political process would be corrupted, and, I submit, our religions would be demeaned.

Mr. Ball has said in his reply brief that that is a constitutionally malevolent argument, that to permit blacks and other groups within the society to seek financial aid of various sorts, for various reasons, but not permit parochial school advocates to do the same thing is constitutionally malevolent.

And I suppose that it's true that every effort by any group in the society to obtain funding is opposed, in a society as large as ours, by some other group and to that degree, of course, is divisive.

But Mr. Chief Justice Burger made it abundantly clear in Lemon-DiCenso that the attempt to obtain funding for religious purposes has always been meaner, has always been more divisive, and is likely to strain a society like ours to the breaking point. And that is why, in Schempp, this Court said: the very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, religion being one of them; they depend on the outcome of no elections. And the Court went on to say that religious freedom was first in the Bill of Rights because it was first in the forefathers' minds, and it was set forth in

absolute terms and its strength is its rigidity.

So that when the appellants are offended by the political divisiveness argument, their quarrel is not with me and is not with the Court, it is with the very underpinnings of the First Amendment; and I take it we do not have before us today the question of whether it ought be repealed.

The point is, if I may for just a moment, it's difficult to talk about even a little bit of history before this Court, which has expressed so much on it. The point is that we were an enormously diverse people in the first place, and that's why we made the separation experiment and Europe did not. It was an American experiment, because, you know, it strikes me that Thomas Jefferson and James Madison, they weren't the only two gentlemen who understood in their bones that when the power of religion -- when religion is backed by the power of government, that it corrodes both processes, government and religion.

Their European contemporaries must have known it better than they, but they didn't experiment with separation, we did. And why did we? Because we were nation-building, and we were building a nation of diverse religions and ethnic groups.

And it's not a question of ancient history, as Mr. Ball implied in his brief, Mr. Brennan, Mr. Justice Brennan pointed out in his separate Schempp opinion, that our

religious composition in this country today is far more diverse than it was several hundred years ago. And I think that the point must be made, that there is an enormous unity that inheres in a European society which, for a thousand or two thousand years, has shared a common soil, developed a common language, undergone common terrible trauma, a unity that we didn't have two hundred years ago, and which I suggest contemporary events can lead us all to believe we still don't have.

So, perhaps Europe survived the strains of establishment, but we couldn't. The judgment was made by the forefathers that we couldn't. And that is what I think Justice Frankfurter was saying in McCollum when he said: the great American principle of eternal separation is one of the vital reliances of our system for assuring unities greater than our diversities.

Given an already -- well, let me conclude.

This legislation, Act 92, I don't understand the distinction between this situation and Wolman vs. Essex, I don't understand this argument about annual appropriations, because there really is not the slightest doubt that this law, the identical, if validated, would come up year after year after year -- not in some administrative body where, after all, there isn't much entanglement, but in the Legislature of Pennsylvania where there is a great deal, there is no reason

in the world to believe that $150 per high school child and $75 is the end of the road.

Your Honor, Mr. Chief Justice Burger noted in Lemon vs. DiCenso about that Pennsylvania law -- Lemon vs. Kurtzman, about that Pennsylvania law passed in '68, that under it $5 million a year went to parochial, to non-public schools, most of which were parochial.

I call to Your Honors' attention that that law was invalidated in June of 1971; that this law was passed less than two months later; that Attorney General Packel has noted in his brief that under this law up to $75 million will be paid to parents of non-public school children. A 15-fold increase in several years.

It reminds me of Mr. Chief Justice Burger's comment in Walz that if tax exemption can be seen as the first step in the establishment of religion, then the second step has been long in coming. That may very well be in respect of tax exemption; it most certainly is not in respect of aid to sectarian education.

The second step came within two months, and it was a 15-fold increase.

QUESTION: Mr. Mann, what's the balance of the cigarette tax go to?

MR. MANN: I'm not sure.

QUESTION: Do you know?

MR. MANN: The Attorney General does know --

[Laughter.]

QUESTION: It's 77 percent.

MR. MANN: A 77 percent balance. I don't know where -- it goes for other purposes, and I don't know what they are.

QUESTION: Well, what did this -- where did this 23 percent of the tax used to go?

MR. MANN: I believe -- oh, let me -- I can't answer that, because I believe, but I am not certain, that the 1968 law that was invalidated by this Court --

QUESTION: Right.

MR. MANN: -- was initially funded through the harness racing recipts. And then was funded by the cigarette tax, which I think was increased for that purpose; but I'm really not certain, and I'm not helping the Court by --

QUESTION: I was going to ask you if there had been an increase in the tax.

MR. MANN: I think there was, but I'm not sure. I'm sorry.

I want to simply say this, on political entanglement, and then I will sit down.

In the lower court I was joined by amici, who joined in my brief, many, one of them was the State Council of Churches, which is organized, mostly organized Protestantism

in Pennsylvania; another was Pennsylvania Jewish Community Relations Conference, which is most of organized Jewry in Pennsylvania. And I have to ask myself, take Protestantism, for example, because I think this comes to the nub of it, I think we have to deal with it, why shouldn't Protestantism be bitter, angry, and frustrated when legislation like this comes up for consideration and is indeed passed?

This legislation represents an enormous change, if I may say it this way, in the rules of the game. After one side has committed itself to the old rules and has changed its position irretrievably; by that I mean that it's 130 years ago when every State in the Union already had, as part of its fundamental law, that the State could not support sectarian education. All those cards were on the table, everybody knew that, and at that point in time Protestant America decided to let its religious schools become public schools, and Catholic America decided to start on the process of building the great and complex parochial school system that it has today.

For the government to come along, 130 years later, and say, Now we're going to begin funding sectarian education, is, it seems to me, the grossest kind of interference of government in the competition between creeds, which Justice Douglas, in Zorach, said that in that competition between creeds, the government must be absolutely neutral.

This isn't some peripheral thing we're talking about, we're talking about parochial education, which this Court has said, and which many educators have said, is singularly the most effective way of passing on a religious heritage from one generation to another.

For the State to come along and begin to support only those religions, and there are a number of them, which have parochial schools, but none of the religions, and this is most of them, which do not have parochial schools is laying the heavy hand of government on that competition, and for that reason will cause enormous and has caused enormous divisiveness.

And for all of these reasons, I respectfully request the Court to affirm the judgment of the court below.

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

Your friends have three minutes remaining and, Mr. Ball, do you wish to use that?

MR. BALL: If I may, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: You may.

REBUTTAL ARGUMENT OF WILLIAM BENTLEY BALL, ESQ.,

ON BEHALF OF APPELLANTS DIAZ, ET AL.

MR. BALL: May it please the Court: --

MR. REATH: May I have thirty seconds?

MR. BALL: I'll save you thirty seconds, Mr. Reath.

Mr. Mann spoke first of all about the character of

the aided activity. The aided activity here, in spite of every effort to call the aided activity a parochial school, the aided activity here is an act of will of the parent.

I don't believe the bridge was crossed. We have talked about conduit throughout this case, but nothing that Mr. Mann said, in spite of all appeals to questions concerning religious controversy, got him across that legal point. Nothing can change the Act.

The Act in fact does grant money to individuals who have total disposition over that money.

His whole case depends on the conduit, except for his remarks concerning religious divisiveness.

Now, I beg the Court, where is there a record of this? It is fine to talk about what no historical research supports the Founding Fathers as having said.

But we have to live in today's day, and when we look at the record, which the plaintiffs could have made below, which they neglected to make below, where is the religious divisiveness? Does it consist in the fact that some people decide to go into the forum and make a religious issue out of something?

We didn't even have it in spite of the intervention of religious groups in their own names in Pennsylvania. We have shown we have been willing to show that the record, the voting record was on both sides of the aisle in favor of this

Act and opposed to this Act; that Jews, Protestants and Catholics voted against the Act, voted for the Act. There's absolutely no foundation for this perfectly ludicrous charge of a holy war going on in Pennsylvania.

The G. I. Bill of Rights is perfectly justified in the same way that this Act is justified. Certainly people could have made a religious issue out of it, two thousand people were educated at divinity schools under a G. I. Bill of Rights which at that time required that the check go directly to the school.

You can't violate the Constitution because somebody is coming back from war. If that Act which was generally accepted, just as the Pennsylvania Act is generally accepted, if that Act were unconstitutional, it would be a very strange thing in our history. It was broadly accepted, just as this Act is being broadly accepted today among the people of the State, in real life, in actual Pennsylvania.

I thank the Court.

MR. CHIEF JUSTICE BURGER: Mr. Reath.

REBUTTAL ARGUMENT OF HENRY T. REATH, ESQ.,

ON BEHALF OF APPELLANT CROUTER

MR. REATH: If Your Honors please, just to supplement what Mr. Ball said in response to Mr. Mann's statement about the character of the aided activity:

He said the character of the aided activity was

parochial education. I submit there's not a scintilla of evidence in the record to support it.

To the contrary, the parent gets the money not because he sends his child to a parochial school but because he has assisted the State in meeting the State's requirement for compulsory education.

Secondly, with respect to political divisiveness, I agree, again, there is nothing in the record; and, furthermore, I would point out that Mr. Chief Justice in the Lemon and Tilton cases, when he spoke of political divisiveness there, we're dealing again with the problem of aid to an institution, where the institution had an ongoing call for the funds, here you have payment to a parent; a parent is an individual person. He has individual constitutional rights and one of those rights is the right of free speech, the right of freedom of petition, the right to go to his legislative assembly and say, I want this because I'm entitled to it.

I think the difference again highlights the essential distinction between payment to a parent, which we have here, and payment to institutions, which we had in Lemon v. Kurtzman.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 3:33 o'clock, p.m., the case in the above-entitled matter was submitted.]