In the

Supreme Court of the United States

DELORES NORWOOD, et al.,
Appellants,
v.
D. L. HARRISON, SR., et al.,
Appellees.

No. 72-77

Washington, D. C.
February 20, 1973
February 21, 1973

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DELORES NORWOOD, et al., Appellants,	:	
v.	:	No. 72-77
D. L. HARRISON, SR., et al., Appellees.	:	

Washington, D. C.
Tuesday, February 20, 1973

The above-entitled matter came on for argument at 2:33 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:

MELVYN R. LEVENTHAL, ESQ., 538-1/2 North Farish Street, Jackson, Mississippi 39202; for Appellants

WILLIAM A. ALLAIN, ESQ., First Assistant Attorney General, State of Mississippi, Post Office Box 220, Jackson, Mississippi

C O N T E N T S

* * *

Session of February 21, 1973 begins at page 23.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 72-77, Norwood against Harrison.

Mr. Leventhal, you may proceed.

ORAL ARGUMENT OF MELVYN R. LEVENTHAL, ESQ.,

ON BEHALF OF THE APPELLANTS

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

Plaintiffs-Appellants are black school-age children residing in Tunica County, Mississippi. They filed this lawsuit in October of 1970, and they alleged and subsequently proved that they are attending public schools in Mississippi which were under court order to desegregate under Alexander and under Green, and that despite injunctive orders of the Northern District of Mississippi, their schools remained segregated.

They alleged further that their schools are segregated because there exists the Tunica County Institute of Learning, which is a private segregated and segregationist academy located in Tunica County.

They alleged further and proved that this segregated Tunica Institute of Learning was under the laws of the State of Mississippi receiving free textbooks, and that this textbook aid to the private academy of Tunica County represented unlawful support of racial discrimination

and assisted in undermining public school desegregation.

They challenged the constitutionality of the Mississippi statute which required the distribution of such textbooks to the private academies of Mississippi.

Essentially our complaint is that the state has a duty to avoid aligning itself with racial discrimination.

Q What is the original date of enactment of this textbook statute?

MR. LEVENTHAL: 1942, Your Honor.

Q Has it been materially altered since then?

MR. LEVENTHAL: No, Your Honor, it has not. It was enacted in 1942 and amended insignificantly several times. In 1942 the statute provided aid to elementary school pupils only. And subsequently the statute was extended to provide textbook aid to high school students.

Q What year was that, sir?

MR. LEVENTHAL: I believe two years later, Your Honor.

Q 1944?

MR. LEVENTHAL: Yes, sir.

Q No amendments since 1954?

MR. LEVENTHAL: There have been amendments, Your Honor. But our research indicates that they are not significant amendments. They are amendments dealing with the administration of the statute.

However, along that line, there was a significant change in regulations promulgated in 1970, as pointed out in the Government's brief amicus curiae. The Textbook Purchasing Board in 1970 in effect adopted a regulation which made it possible for private segregated academies of Mississippi to receive textbooks directly from the state agency.

Prior to 1970, a private academy depended upon a local school district to receive textbooks. And under the Emergency School Assistance Act, such public school districts would lose federal money as they continued to provide textbooks to private academies. And, as a result, the state agency adopted a regulation which permitted--which, indeed, required--that the private academies deal directly with the state textbook agency.

This is a class action. And, as a result, the perspective of private schools or a perspective of the present state of public and private education in Mississippi is relevant. There is no controversy on this basic point, Your Honors. There exists in the state of Mississippi a network of private, racially segregated academies. They operate throughout the state of Mississippi, and this system was formed with the purpose and has had the effect of, one, undermining public school desegregation and, two, providing white students with an alternative to public school

desegregation. All of the academies are racially segregated. All were formed concurrently with the implementation of freedom of choice plans or the implementation of Green or Alexander decisions of this Court requiring immediate attainment of unitary school systems. All were formed haphazardly, without significant planning or resources. I should not say all on that. Perhaps one or two were formed on the basis of considerable planning. But the overwhelming majority of these academies were formed haphazardly without planning and without significant resources.

All of the teachers and students in attendance at these private academies formerly attended or taught in the public school system located adjacent to or in the same vicinity as the private academy.

With few exceptions, these academies are all part of a new association called in Mississippi the Private School Association. And, with very few exceptions, all are members of a private academy athletic conference. They are segregated. They were formed in response to public school desegregation. They undermine public integrated education.

Q Mr. Leventhal, if this aid were withdrawn or outlawed, is it your thought these academies would collapse?

MR. LEVENTHAL: No, Your Honor, we can only

speculate as to what would occur if this textbook aid were withdrawn. We know it could not help the private academies. We know it would be denying them in excess of a half a million dollars in basic inventories and it would be denying them the resources of the state.

Q What does the aid amount to per pupil?

MR. LEVENTHAL: It amounts to $6 per pupil, Your Honor. It amounts to five or six thousand dollars per school.

Q Six dollars per pupil per year?

MR. LEVENTHAL: Yes.

Q And you think this would prompt a pupil to go back into the public schools?

MR. LEVENTHAL: Your Honor, given the finding of fact in all of these cases, all of the cases involving private academies, they were formed on the thinnest financial basis; given the widespread poverty in the state of Mississippi, it is not beyond possibility that they will return to the public schools if this aid and other aid is withdrawn.

Again, it is speculative. We have to concede that tuition grants--the withdrawal of tuition grants--after Coffey v. State Educational Finance Commission did not result in the return of white students to public integrated schools.

Q Did you mention other aid? Is there other state aid now being provided these schools?

MR. LEVENTHAL: Your Honor, there is presently pending in the United States District Court for the Northern District of Mississippi a suit to prohibit the state public schools of higher education from permitting the private academies the use of the athletic stadium of our public colleges and universities.

There is, of course, the availability of various state educational agencies and programs which can be used in the private academies of the state.

Basically, however, textbook aid is the outstanding, the major provision of aid to the private academies by the State of Mississippi at this time.

Q What would happen if the aid were withdrawn? Would the parents have to buy the books for the youngsters?

MR. LEVENTHAL: Yes, or the schools would have to purchase them.

Q As one who is old enough to remember that I had to buy my own books all the time, I wonder how much fat this $6 per pupil per year is even in Mississippi.

MR. LEVENTHAL: Your Honor, if the case is viewed as the provision of $6 of aid per pupil, it might appear to be de minimis. But since this is a challenge to a provision of state aid, the question is not how much is each child

receiving but how much is the State of Mississippi allocating and distributing to the private schools of the state.

It is distributing in excess of a half a million dollars of state money.

Q Is it distributing it to the children rather than to the schools?

MR. LEVENTHAL: We do not know if that is relevant in a 14th Amendment context. It is clear that the books are being selected by the school. They are being stopped by the schools. Theoretically the aid is going to the student, but practically speaking the schools are controlling the program.

Q Do we not have cases here that have upheld the supply of textbook aid to pupils attending parochial school?

MR. LEVENTHAL: Yes, indeed we do, Your Honor. And that is one of the issues raised by this appeal, whether the standard for reviewing state support of parochial schools is comparable to the standard for reviewing state support of racially segregated schools. And we submit, of course, that the two amendments are substantially different. And we can get to that immediately.

The Chief Justice in Walz v. Tax Commission, and I quote, stated that an effort to interpret and understand

the establishment or religion clauses of the First Amendment requires that we apply constitutional principles so as to serve, and I quote, "ultimate constitutional objectives as illuminated by history."

In Walz v. Tax Commission, the Court went on to quote Mr. Justice Douglas and said, "When the state encourages religious instruction, it follows the best of our traditions, for it then respects the religious nature of our people and accommodates the public service to their spiritual needs."

In other words, under the First Amendment, when we look at the history of the religion clauses, we find that their objective was not to eliminate any form of state aid for religious instruction. Instead, we find an internal tension or instead, as the Court has observed, we walk a tightrope, and we balance the Establishment Clause against the Free Exercise Clause, recognize that in terms of our history religion has served an important function, and in terms of the religion clauses we must strike a balance and protect the individual in his right, his First Amendment Right, to pursue his religious beliefs.

When we turn to the 14th Amendment, Your Honor, we find instead a history marked by a commitment to the elimination of state support for racial discrimination. This is the fundamental difference between any approach to

aid in the context of the religion clauses and aid in the context of equal protection. We are as a people committed to recognizing the value of religion in American life. At the same time, we are as a people and as a matter of constitutional principle committed to the elimination of racial discrimination and the support of racial discrimination by the state. So, it is of no help to us in this case to refer, as the district court did, to a First Amendment standard.

There are again, in the words of the Chief Justice and in Walz v. Tax Commission, ultimate constitutional objectives as illuminated by history in the First Amendment which are diametrically opposed to objectives as illuminated by history in the context of the 14th Amendment.

The failure of the district court to recognize this represents the basic fundamental error which we bring to this Court.

Again, along the same line, we have since the enactment, the adoption, of the 14th Amendment in our very recent history, had civil rights laws enacted by the Congress in 1957 and '61 and '64 and '65 and '68. All of this legislation, all of the decisions of the Court since Cooper v. Aaron, since Brown v. Board of Education, stand for the proposition that the constitutional objective as

illuminated by history in a 14th Amendment context is the elimination of any state support for racial discrimination.

When the State of Mississippi aligns itself by the provision of half a million dollars of direct subsidy to private academies which discriminate on the basis of race, it is violating this historical--the 14th Amendment as illuminated by history.

Q Do you think it makes any difference that the act antedated Brown v. Board of Education by a dozen years, or how do you think that bears on the subject?

MR. LEVENTHAL: Your Honor, we do not believe that the absence of a specific purpose to discriminate in any way undermines our claim or in any way dilutes or tenuates the state's duty not to align itself with racial discrimination.

In fact, when this statute was passed, we had an absolute dual school system in Mississippi. So, the issue could never have arisen in 1942. If anything, we know that the legislature of Mississippi in 1942 provided textbook aid for segregated academies or for segregated schools. At that time they were public. This is reminiscent of the problem faced in Brown v. Board of Education where we had no legislative history of the 14th Amendment which revealed the intention of Congress with regard to public education.

In fact, there was no public education, said the

Court in Brown, at the time of the adoption of the 14th Amendment. And, given that fact, the Court had to move to other considerations to determine whether there was a violation of equal protection.

So, we have a statute passed in 1942 before the problem arose, and a question of purpose cannot be pursued in the same way that we would pursue purpose with the specific facts available, you see.

In addition to that, the Court--

Q Do you think it contributed to the maintenance of a dual system any more or less in 1942 than in 1972?

MR. LEVENTHAL: In 1942--no, sir. In 1942 we had a dual school system which was lawful. In 1972 we have a dual school system that is unlawful.

What is true, Your Honor, in terms of the statute and in terms of the black children of Mississippi, and this is reminiscent of Wilmington Parr [?], it is of no consolation to the black children of Mississippi or the black population of Mississippi that the legislature in 1942 did not intend to promote segregation. The fact is the effect of the statute is to promote segregation, and that promotion of segregation is the gravamen of our complaint. It is of no consolation to the black children that the state does not intend to do something when the evil is there.

Again, on this First Amendment or this religion issue versus the 14th Amendment issue, in Green v. Kennedy another three-judge district court was faced with the problem of federal tax exemption benefits to the private academies of Mississippi, the same private academies. I remind the Court that a tax exemption was an indirect benefit to these private academies. That is, it was significantly less support for racial discrimination than Mississippi's textbook statute. Here we have a direct grant of at least a half a million dollars or a quarter of a million dollars annually.

And yet the three-judge district court, affirmed by this Court, held that tax exemption is only minimal and remote involvement when compared to the kind of identification in support of religion prohibited by the Establishment Clause. But the governmental and constitutional interests of avoiding racial discrimination in educational institutions embraces the interest of--or precludes even indirect economic benefit to racial discrimination. Again, this juxtaposition of the requirements of the religion clauses versus the requirement of the Equal Protection Clause.

We are of the clear view that the proper standard for reviewing state support for racially discriminatory educational institutions can be found in Cooper v. Aaron.

There this Court held that state support for racial discrimination through any arrangement, through any management, or any fund, is violative of equal protection. When the State of Mississippi provides textbook aid and places itself behind the racial discrimination and in fact encourages racial discrimination, it violates Cooper v. Aaron.

And our second basic theory is that under principles of Green v. New Kent County, Virginia, the state has an affirmative duty to promote racially integrated education that, given its support for racial discrimination in the dual school system in the past, it is duty-bound today to remove itself entirely from racial discrimination. Indeed, it has a duty to quarantine racial discrimination. Anything less than that would be violative of Green v. New Kent County, Virginia.

Q Mr. Leventhal, in your prayer for relief for a judgment of reversal and remand of the case with instructions to enter an order enjoining the appellees from distributing textbooks to the private segregated academies of Mississippi--and I notice in your footnote six on page seven of your brief you have set out the fact that there were 202 private schools operating in Mississippi during the 1970-71 school years, and you concede that 47 of them, being the Catholic schools, and seven others, being the

special schools I guess for handicapped people and so on, are not all that private, they are not segregated.

MR. LEVENTHAL: That is correct, Your Honor.

Q That leaves about 148 which you claim are segregated, but I gather your brothers on the other side say well, no, they are not. Their tuition is high and they happen to be all white, but they are not segregated schools. Would it be your thought that with respect to each one of these 148 there would have to be a separate hearing or what?

MR. LEVENTHAL: Your Honor, we have conducted extensive discovery in this case. We have 104 depositions in evidence. We believe that we have already made a record against all 148 academies.

Q One by one?

MR. LEVENTHAL: Yes, Your Honor. Indeed, we have.

Q To the effect of whites only?

MR. LEVENTHAL: Yes, Your Honor.

Q Or that they were just a device to avoid a desegregation order? Would they admit a black person if he applied and offered the money?

MR. LEVENTHAL: Your Honor, some school administrators, private school administrators, testified that they had an open-enrollment policy. Yes, Your Honor, there are a handful of such cases.

Q What about them?

MR. LEVENTHAL: We believe that the district court concerned and confronted with private academies in Mississippi have already held that all of these academies are segregationist institutions. That question of fact--

Q In this case?

MR. LEVENTHAL: No, Your Honor. Well, by implication in this case. The extensive findings of fact were not made in this case but in other cases, in Coffey I, in Coffey II, in Green v. Kennedy.

Q What did the court find in this case with respect to this type of allegation? Did it pass on them?

MR. LEVENTHAL: By implication it did. It found that they are racially segregated, and it considered the issue before the court as framed by the assumption that they were racially segregated and segregationist; that is, they had a closed admissions policy, that Blacks would be excluded.

Q Did it assume this for the sake of argument or did it specifically find that?

MR. LEVENTHAL: It did not make that specific finding. It assumed it for the purpose of argument.

Q Even on the hypothesis or the assumption that they were segregated, nonetheless this was a constitutionally valid action on the part of the state. But if we should

hold in agreement with you that to the extent they are segregated it is not constitutionally valid, then would it not be necessary to look at each school?

MR. LEVENTHAL: Your Honor, on remand I believe the district court could look at each school and find in the record sufficient evidence to show that they were segregationist. This case involved the taking of numerous depositions of private school administrators who had an ample opportunity to intervene and protect their interest. No such private academy intervened.

Q But several of them did say in your pre-trial discovery that no, we are not segregated, we were high priced but we are not segregated.

MR. LEVENTHAL: That is correct. But at the same time the evidence showed that they were formed at critical moments in critical school districts and that they were in fact segregated schools.

Q Is there not some evidence here about perhaps a dozen or more Orientals and others in this academy?

MR. LEVENTHAL: Your Honor, I believe--I will give you the exact figure. All students are white except for 15 Chinese. This is what school officials said. This appears in footnote three of Appendix A on page 1-A.

"All students and all faculty members are white except for 15 Chinese, 16 Orientals, two Indians, and two

Latin Americans." That is out of a total of 42,000 children. There is not a single black child in any of these academies.

Q Were any of the schools that you listed founded and in operation prior to Brown v. Board of Education?

MR. LEVENTHAL: One or two. Not prior to Brown--yes, one or two prior to Brown, yes.

They could have been founded prior to Brown and after Green and Alexander expanded their program to accommodate whites who were fleeing public integrated schools. And to the extent that they opened their doors added facilities, added grades, they would be demonstrating that they are segregationist and undermining public integrated education and should therefore be subject to an injunctive order prohibiting textbook aid to them.

Q I know nothing about Mississippi, but there are some private schools up and down the East Coast that are not segregated and never have been.

MR. LEVENTHAL: Yes, Your Honor, that is certainly possible. Again, we are not claiming that all private schools should not receive textbooks. Our claim is that a specific type of private academy should not be receiving textbooks.

Q How would you define that one type?

MR. LEVENTHAL: As a private school formed for the purpose of or having the effect of providing white students

with an alternative to public integrated education.

Q That is true about any private school, is it not?

MR. LEVENTHAL: No, sir, not necessarily. It would be true of virtually every private school in the state of Mississippi, but I am referring to a question raised by Mr. Justice Powell about the East Coast of the United States.

Q Let us assume that a private school has been in existence for 50 years. It is very, very high priced. And it has always been all white but which would welcome, in fact would welcome, and be delighted to have Negro students.

MR. LEVENTHAL: They would not be covered, Your Honor. You see, the academy I am speaking of had substantially expanded its enrollment at key moments. In other words, an academy formed in 1935 which enrolled 200 pupils and served grades one through four through the year 1968, Green, and then in 1968 expanded its enrollment to one thousand white students and served grades one through twelve would be a school which was undermining public integrated education.

Q But the kind of school Mr. Justice Stewart just described, if you simply apply your effect test, would have the same result. It could exist in Massachusetts and maybe white people in Mississippi who do not want their kids to go to integrated schools would send their kid up there,

knowing that he would not be integrated if he were up at this particular place in Massachusetts. That meets your effect definition.

MR. LEVENTHAL: I am talking about an effect principle which I am prepared to limit to a formerly de jure school system or a state which operated a de jure segregated system of public education, which subsequent to the substantial integration of schools experienced a substantial loss of white pupils who are presently attending a segregated academy.

Q Let us pursue Justice Stewart's hypothetical. If it was demonstrated that in fact they had an open-admissions policy and would accept a Negro who could pay the tuition, would you say that because the effect was deleterious, it falls under this ban?

MR. LEVENTHAL: Your Honor, we would submit that in the State of Mississippi an open-admissions policy would return the state to freedom of choice. The classic example in the City of Jackson, where we have lost 40 percent of the white students, we have white citizens council schools; assuming that the white citizens council adopted an open-admissions policy, and let us assume further that the very remote possibility that Blacks would attend the white citizens council school came to pass, we would have white citizens councils still undermining public integrated

education.

Q You are saying in effect, then, that in Mississippi children have to go to public schools?

MR. LEVENTHAL: No, Your Honor. I am saying that--

Q That is what it amounts to.

MR. LEVENTHAL: I am saying that if they want to go to private schools, they ought to do so without state support. That is the critical difference.

MR. CHIEF JUSTICE BURGER: We will resume at this point in the morning, counsel.

[Whereupon, at 3:02 o'clock p.m., the Court was adjourned until the following day, Wednesday, February 21, 1973, at 10:00 o'clock a.m.]

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IN THE SUPREME COURT OF THE UNITED STATES

DELORES NORWOOD, et al., Appellants,	:	
v.	:	No. 72-77
D. L. HARRISON, SR., et al., Appellees.	:	

Washington, D. C.
Wednesday, February 21, 1973

The above-entitled matter came on for argument at 10:10 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
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:

MELVYN R. LEVENTHAL, ESQ., 538-1/2 North Farish Street, Jackson, Mississippi 39202; for Appellants

WILLIAM A. ALLAIN, ESQ., First Assistant Attorney General, State of Mississippi, Post Office Box 220, Jackson, Mississippi; for the Appellees

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume hearing arguments in No. 72-77, Norwood against Harrison.

Mr. Allain.

ORAL ARGUMENT OF WILLIAM A. ALLAIN, ESQ.,

ON BEHALF OF THE APPELLEES

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

I think we should first realize what we do have in this lawsuit and what we do not have in the lawsuit. I invite the Court's attention to the Appendix at page 19, which contains the complaint of the lawsuit. The second paragraph thereof:

"Plaintiffs seek a temporary restraining order and preliminary and permanent injunctions enjoining the defendants from providing, or permitting the distribution or sale of, state purchased and owned textbooks to private racially segregated schools and academies."

This case is a fine drawn legal question. It is not a question of whether or not the 170 challenged academies have a racially motivated admission policy. It is one which deals basically with whether or not the State of Mississippi can lend textbooks to the pupils attending racially segregated private academies, regardless of how they got that way.

If the Court will look at the Appendix, page 22, in which the relief requested is that before textbooks can be allowed to--here they say private schools and/or students--there must first be a showing to the district court that the private school is racially integrated both as to student and faculty and, in the conjunctive, has not had the effect of frustrating or impeding the establishment of racially integrated public schools.

That, Your Honors, is a burden that no private school in the United States that I believe, I know of, could carry. It shows the fine line that this particular case takes. They are saying they want relief to this extent. Unless the private schools not can show that they have an open enrollment admission policy but that they must be racially integrated both in faculty and in students.

Q Let me make sure what your position is. Let us assume that you do have some schools that do not have an open admission policy. What about that?

MR. ALLAIN: I do not think that is the question in this lawsuit. But if we did have--

Q Why is it not the question in this lawsuit?

MR. ALLAIN: Because the lawsuit was drafted and framed by the plaintiffs and is shown by the appellants' brief--the question before this Court does not deal with what the admission policy of the school is; it is on the theory--

Q Do you not think that question fairly subsumes the idea that at the very least the Equal Protection Clause is violated in connection with those schools, if any, which do have a closed admission policy?

MR. ALLAIN: No, Your Honor, I do not, for the simple reason--

Q Let us assume that we did not agree with you and that it does subsume that question.

MR. ALLAIN: If it assumed that question, I think we would still be on solid ground with the teachings of this Court's cases in Allen in the Cochran case--

Q Even with respect to schools, if any, that have a closed admission policy?

MR. ALLAIN: That is right, Your Honor, because it is aid to the pupil and not to the school. The same rationale of the Allen case, the Cochran case out of Louisiana in 1930 dealing with textbooks. The Allen case--well, Your Honor, you authored that opinion in 1960--

Q Did you find anything in the Allen case that indicated the schools there had a closed admission policy?

MR. ALLAIN: No, we did not, Your Honor. But the rationale there did not deal with whether or not the admission policy was closed or open. The rationale, as I understand Allen--and I hate to debate with the author of the opinion--but that the mere fact it went to the pupil and not

to the school--

Q Did you read the author's further remarks in Lemon v. Kurtzman?

MR. ALLAIN: Yes, Your Honor, we did.

Q About closed admission policy?

MR. ALLAIN: Right, sir. But the rationale of the Allen case, as we understand it, the Cochran case, Mississippi's Chance case, all the cases, the transportation case, is that it is aid to the pupil and the student or the parent and not to the school.

I do not believe that the issues framed here are as broad as Your Honor addresses himself, for the simple reason that there is no proof in this case, no attempted proof by the plaintiffs to show what the particular admission policy was of the 107 academies.

In fact, the proof is just the opposite, shown by cross-examination by the defendants, that they did have, the 107 have an open enrollment policy. It is even on the minutes. It is oral, verbal, or sometimes it even went so far as to be advertised in the newspapers.

So, I think from the fact that the case on the lower court was not tried on that issue, there was no attempt to show by the plaintiffs that there was a closed admission policy. This case is drawn on the same fine lines of the tuition cases in which the courts held that the mere fact

that they were racially segregated, not how they got there, but that is a different rationale, a different principle, for the simple reason in the tuition cases, Coffey I, Coffey II, the Poindexter case, Griffin case, found that the State of Mississippi and the State of Louisiana and Virginia were operating not necessarily racially discriminatory like academies but they had in one still operating a dual school system, because in that case under, I guess, the rationale of the Burton case, the sifting of the facts, and the circumstances show that they were actually in partnership with the private schools. The tuition was the basic income of the private school.

So, instead of having an Allen case or instead of even having a Burton case, you had a Brown and Griffin case which did not depend upon a finding by the Court, that there was an open or a closed admission policy as far as the private schools were concerned, because the mere fact that they were predominantly white put the State of Mississippi and Louisiana in operating a dual school system, again under the freedom of choice.

We say to the Court that we think that this case, regardless of how it is taken, is controlled by the line of cases of Allen and Cochran, the transportation and textbook cases, and the plaintiff tried to get past the rationale and holding of those cases by saying, "Well, this is a 14th

Amendment case and not a First Amendment."

I say to the Court that the First Amendment, the Establishment Clause of the First Amendment--and I know Mr. Chief Justice has spoken to Tilton about the internal tension between the Establishment Clause and the Exercise Clause--but the Establishment Clause has been held by this Court as absolute. The Exercise Clause is not absolute as to actions of individuals, and that is in the Jacobs case about inoculations, and then I think the Prince case against Massachusetts, the labor, child labor. But you are talking about an absolute in the Establishment Clause. And, therefore, we submit to the Court that the measuring stick for the Establishment Clause of the First Amendment is more stringent and more strict than that of the 14th Amendment whose contours, as this Court has said, have not been concretely established to allow for a flexibility.

The measuring stick, apparently, in the 14th Amendment cases would be the Burton case where we must sift the facts and look at the circumstances to see whether or not a state has put itself in partnership with the academies. And counsel and the plaintiffs go further and say, "Yes, but you are not controlled by Burton for the simple reason Green and Swann say that the State of Mississippi has an affirmative duty."

So, it is actually not the 14th Amendment per se

which the plaintiffs are riding in this particular case. It is the 14th Amendment with the gloss put upon it by Swann and Green, upon any state which has had a dual school system.

Q You referred to transportation a few moments ago. Does the state furnish transportation to the students in these private schools?

MR. ALLAIN: No, Your Honor, there is no--the only benefit given by the state to any individual role in a private school are the textbooks.

Q Could the state, in your view, lawfully furnish transportation to the students in these private schools, assuming now--limiting my question to those private schools that had an exclusion policy?

MR. ALLAIN: I think that they could, Your Honor, on the rationale of the New Jersey case, which held--of course, the Everson case which held--that transportation did not violate the Establishment Clause in the New Jersey case.

But the Affirmative Duty Doctrine has never been completely defined by this Court. How far does a state have to go in order to do away with anything which interferes, as the plaintiffs say that the academies interfere with the unitary school system in Mississippi?

That, taken to its logical conclusion--and the plaintiffs are asking and are saying that the state can give

no aid. That taken to its illogical logical extension would be that they must cut off water, sewer, or electricity. I know this sounds absurd, because Mr. Justice Rehnquist in the Moose Lodge case and Mr. Chief Justice in the Lemon case and Mr. Brennan concurring in the Lemon case, stated that these were benefits which could flow to private schools, to church schools, or anything else. But if we take this Affirmative Duty that the plaintiffs are attempting to urge upon the Court, then how far is it necessary for the State of Mississippi or Louisiana or any other state to go to get rid of what they say are the private segregated schools, regardless of how they get there, which is interfering--

Q Would your answer be, stop giving money for textbooks?

MR. ALLAIN: Your Honor, maybe it could stop there. I would not--what I am saying to the Court--

Q Is that what is in this case?

MR. ALLAIN: That is what is in this case.

Q Has that anything to do with sewers and water?

MR. ALLAIN: Your Honor, what is requested in this case does, because of the rationale and what this case would stand for. And the Affirmative Duty Doctrine--

Q You do not think it could be written narrow enough to be limited to textbooks?

MR. ALLAIN: No, Your Honor, I do not. Because

then you would get into transportation and then you would get into whether or not private schools should be chartered in Mississippi; you would get into whether or not the universities of Mississippi should accept the credits from these private schools; you would get into all types of aid, if you want to call it aid, which is being given to private schools, in which they are participating.

I do not see how any decision in this case could be so limited.

Q I thought you started your argument with saying that this is a very narrow case involving a very narrow issue, and you read on page 19 about textbooks. Are you now saying it is broader than that?

MR. ALLAIN: No, Your Honor. I said it had a fine line drawn as far as a factual situation. And because of that fine line as to the factual situation, it would make any decision adverse to the state a broad holding. The fine line of fact makes the holding broader. If the facts were broader, then you might be able to limit the holding. For the simple reason that they are asking for and underlining that any aid given to the 107 private schools should be cut off. And when I say any aid--let us take, for instance--

Q Would you show me that in the complaint, where they say any aid?

MR. ALLAIN: Your Honor, I am not too sure that is

in the complaint but it permeates throughtout the--

Q I thought you started your argument that we were limited to the complaint.

MR. ALLAIN: No, Your Honor, I did not intend to say we were limited to the complaint. I merely intended to say that the factual situation is framed by the complaint.

Q Where it is for your benefit it is limited to the complaint. Where it is to your benefit to go beyond the complaint, you go beyond the complaint.

MR. ALLAIN: No, Your Honor. In the relief, the relief does state--as you read in the relief, it does go further and talks about until racially integrated both as to student and faculty.

Q Where is that?

MR. ALLAIN: That is on page 22 of the Appendix.

Q Where does it say doing all the sewers and water?

MR. ALLAIN: Your Honor, it is speaking here that unless--

Q It says, "...distributing any state owned textbooks." Is that what it says?

MR. ALLAIN: Your Honor, that is the request at this time. It is not beyond the scope to see the next lawsuit that would be before this Court citing this case as authority.

Q We do not have the next lawsuit. We have this one.

MR. ALLAIN: Your Honor, what I am saying to the Court is, though, because of the fine factual situation, the decision in this Court would precipitate immediately another lawsuit as to any other aid which was given to these private schools. Plus the fact that if--and I think Mr. Justice Stewart said yesterday that maybe this could go back, and if a determination has to be made as to each particular school, it could not be made on this record, sir.

Q Did you say a minute ago that there was no aid other than textbooks given to private schools in Mississippi? Did you say that?

MR. ALLAIN: I said the only aid that was given to students attending private school in Mississippi was the textbook.

Q So, that is all that is before us?

MR. ALLAIN: Sir?

Q That is all that is before us?

MR. ALLAIN: That is all before you--

Q You do not want any advisory opinion as to what Mississippi can or cannot do in the future, do you?

MR. ALLAIN: Your Honor, I do not think--and I do not want to argue with Your Honor on this--I do not think that it is an advisory opinion when it is an opinion on which

a later suit, a later case, can be built on, for the simple reason of what the holding would be in this particular case. But regardless of how these 107 academies came about, regardless of whether they had an open enrollment policy or not, unless they were racially integrated--and I do not know how you get a private school racially integrated anywhere in America, because it is a choice by the pupil; it is usually a tuition that they have to pay; and the people go there because of their choice.

I do not know how anyone could carry the burden which this type of decision by the Court would establish.

So, we say to the Court that even under the Affirmative Duty Doctrine, as the Court addressed itself to in Swann where the Court recognized that even under this the equity power of the Court is limited in what it can do, that they cannot ride that doctrine to the extent of saying that these 107 schools, regardless of their policy of admission, regardless of how it came into being, regardless of their support, the pupils attending are not entitled to textbooks.

Remember, this textbook law came into being in 1940, rather than '42. It was amended in '42 to bring in high schools. It came during a depression. It came with the benevolence of the state in order to help not only just white children in Mississippi but black and white children

who were attending public and private schools. In fact, I daresay that--

Q Were there any black academies in '40 in Mississippi?

MR. ALLAIN: I do not know about that, Your Honor. I do know that--

Q You said so. You said it applied to the black and white.

MR. ALLAIN: I said as to public education.

Q Oh, pardon me. I see.

MR. ALLAIN: Textbooks went to public and private schools. And I daresay that the black community, knowing Mississippi as I do, the effect upon the pocketbook was of more value probably at that time to the black parent than it was to the white parent.

The inconsistency in the argument made by the plaintiffs is the fact that they want to exclude from this holding, one, the Catholic schools in Mississippi. Why? Why, they have something like 12,000 students, 10,000 whites and two to two and a half black. There is no showing that they are integrated. In fact, the record would probably show they are predominantly segregated.

So, if this type of academy is what they are pushing on the Court, what makes any difference whether or not it is the Catholic schools? They have excluded two, I

think, predominantly black schools. Why exclude them? Are they not taking out of the system pupils who should be back into public schools?

They have excluded other academies, I think five other academies. So, why is there an exclusion to be consistent with the principle that the plaintiffs are attempting to urge upon this Court?

These academies are doing the same thing as the 107 academies which they are challenging in this particular lawsuit.

We say to the Court that the statute was enacted in 1940 without any racial motive. It in no way established any dual school system. It in no way established any racially segregated private schools. It has been even-handedly executed throughout the years. And we further say to the Court that there is one finding by this Court, by the district court, which we think that, unless it is manifestly wrong, this Court should affirm. And this Court, I think, has been on record since the Brown decision as saying the district court and the trial court is a court that must look at the factual situation.

This Court recently said in the Wright case--gave great weight to the findings of fact by the district court. And one of the findings in that case, the third finding I believe said that we look at the timing. When was this new

school system created? There is no timing problem in this particular case because it is way back in 1940.

The district court found in its opinion that "since the issuance of free textbooks to students attending private schools has failed to defeat the establishment of a statewide unitary school system in Mississippi and since plaintiffs are themselves receiving their free textbooks, there is serious question as to whether plaintiffs are threatened with the irreparable injury which is requisite to injunctive relief."

Further, the court found, "There is no showing that any child enrolled in private schools, if deprived of free textbooks, would withdraw from private school and subsequently enroll in the public schools now unitary."

Further, there is a finding by the court and the evidence in the depositions that the withdrawal from the pupils of this particular aid would not in any way--which is just $6 a year per pupil--substantially affect the 107 private schools which are under attack in this particular lawsuit.

We say to the Court in closing that we feel that the opinion of the district court is bottomed on the facts in that particular case, and the law has been the teaching of this Court. And that even in the two Poindexter cases which this Court affirmed, Judge Wisdom speaking for the

district court in similar situations--in Louisiana that had a dual school system, in tuition cases--distinguished those particular cases from textbooks and free luncheons and the other benevolent gifts that had been given to charitable and educational institutions throughout the years.

And we say to the Court that we think this judgment of the district court should be affirmed.

Q Mr. Allain, I think the record shows that there are 534,000 pupils in the public schools in Mississippi. Does the record show the breakdown as between whites and blacks among that 534,000, what percentage?

MR. ALLAIN: I do not recall, Your Honor, the percentage. I do recall there was a thousand different schools involved in it and only 35,000 in the private schools, but I am not sure of the particular breakdown of the--the population of Mississippi breakdown is something like 60/40, the 1970 census, 62/38.

Q That is total population?

MR. ALLAIN: Total population breakdown, white to black. I would think that the school enrollment may be somewhat above that. It might be 60/40 or 55/45.

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

Mr. Leventhal, you have about two minutes left.

[Continued on page following.]

REBUTTAL ARGUMENT OF MELVYN R. LEVENTHAL, ESQ.,

ON BEHALF OF THE APPELLANTS

Q I have a question to ask you referring to the complaint, which starts on page 19 of the Appendix. In paragraph two on page 19, you set out what you are seeking, which is a temporary restraining order and so on to prevent the sale and distribution to private racially segregated schools and academies.

And then over on page 22, when you set down your prayer for relief you ask for an injunction against the distribution of textbooks to students in schools unless those schools first establish that the private school is racially integrated both as to students and faculty.

To me those mean two separate things. In other words, I should suppose that a school could in fact have nothing but Negro children, yet not be a segregated school. But certainly it would not be an integrated school. A school could in fact have nothing but white children and yet it might not be a segregated school, although clearly it would not be an integrated school. To me those are two quite--one is a different concept from the other, and they both appear here in your complaint.

MR. LEVENTHAL: Your Honor, we agree with that distinction the Court makes. However, what we are trying to get at is subterfuge, alleged policies of open admissions.

In the Green v. Kennedy case, a three-judge district court established a series of requirements that private schools would have to satisfy in order to be eligible for tax-exempt status. The records show, according to Commissioner Thrower, that there are five or six acadmies which have qualified for tax exemption, which only the most naive would consider truly open.

The Indianola Academy, for example, has satisfied the requirements of Green v. Kennedy. The Indianola Academy is presently a tax-exempt institution. If you look at our brief, page 18, you will find an analysis of what occurred in the Indianola School District. The Indianola Academy presently enrolls all white children residing in the municipality of Indianola. And that academy's enrollment tripled in the middle of a school year immediately upon this Court's decision in Alexander v. Holmes County.

We submit that what we are really getting at here in trying to establish a standard for a private academy is to be certain that the standard of proof of open admissions is very, very high, that there is no excuse for IRS's approval of the Indianola Academy as a school with an open admissions policy.

According to IRS data, there are at least ten schools which are clearly segregationist, which are presently tax-exempt notwithstanding Green v. Kennedy.

Q In Mississippi?

MR. LEVENTHAL: Yes, Your Honor. One of them is the Indianola Academy.

Q That is ten. But you talk about 107.

MR. LEVENTHAL: Right. I am saying that we agree with the Court's distinction that a school can be in fact segregated and not be segregationist. At the same time--

Q It could in fact be all Negro or all white and yet have an open admissions policy.

MR. LEVENTHAL: Yes, Your Honor. We concede that.

Q What do you understand the meaning of racially integrated both as to students and faculty to mean?

MR. LEVENTHAL: We view that as the standard of proof that ought to be required of a school like the Indianola Academy. If the Indianola Academy says it has an open admissions policy, it ought to prove it not with merely the policy but with an integrated student body--

Q Has to have what, has to have at least some students and some faculty of both races?

MR. LEVENTHAL: Yes, Your Honor.

Q At least some, is that your--

MR. LEVENTHAL: Yes, Your Honor. Yes, Your Honor.

Q And is this true not only of the Indianola Academy but every one of the private schools in the state of Mississippi, no matter how long they have been there and how

well established their policy might be?

MR. LEVENTHAL: No, I think we have got to read that requirement in conjunction with other historical data. We have a network of private schools in Mississippi which were formed at a critical moment or which expanded enrollment at a critical moment. And I am referring to a standard to be applied to such academies.

Q Are you using the term in your complaint at page 22, the term "integrated," as synonymous with "desegregated"? I am pursuing that point that Justice Stewart has been on, and I am not quite sure of your answer.

MR. LEVENTHAL: Yes, Your Honor.

Q In other words, that can be read as though the word "integrated" were stricken and the word "desegregated" were inserted; is that the way you want us to read it?

MR. LEVENTHAL: Yes, Your Honor.

Q That is what you intend?

MR. LEVENTHAL: That is what we requested. However--

Q The district court held that it was irrelevant anyway, did it not?

MR. LEVENTHAL: Yes, Your Honor.

Q Is that not what you are objecting to, that the district court said it does not make any difference

whether they have an open policy or a closed policy; books can go to any school?

MR. LEVENTHAL: That is right.

Q That was the holding?

MR. LEVENTHAL: Yes, that is correct.

Q Let us assume that we did not agree with that holding. Are you asking us to say that clear on the other end of the spectrum it is irrelevant whether any of these schools have an open admission policy or not?

MR. LEVENTHAL: No, sir, by no means, by no means. We want to make it clear that our objective is to eliminate textbook aid to segregationist academies or segregated academies. The question of what standard should be applied to determine what is a segregated academy is not essential to our lawsuit, by no means.

Q You concede the possibility that some of these schools might be able to make a showing that they had an open admissions policy? I am simply saying the possibility.

MR. LEVENTHAL: Yes, Your Honor, conceivably.

Q Are you suggesting that a district court, in order to keep an integration order from being frustrated, could order children not to move to a private school, even if it had an open policy?

MR. LEVENTHAL: No, Your Honor.

Q You are not?

MR. LEVENTHAL: No, sir. We are recognizing in this litigation the right of children to attend segregated schools. We are challenging their right to attend such schools with state aid. That is the thrust of our lawsuit.

Q Mr. Leventhal, am I correct is there not in the record an intimation that some 41 schools did not participate in this textbook program?

MR. LEVENTHAL: Yes, Your Honor.

Q Is that of any significance? Were they denominational schools, for instance, that wanted something else or what?

MR. LEVENTHAL: Your Honor, it is conjectural. It is just as the defendant suggested; it means that they are not important. I could suggest one, that several academies received textbooks until recently and, in anticipation of this lawsuit, decided that it would be best to withdraw from the program to avoid the shock of an adverse decision.

So, why these 41 schools do not participate would be--

Q What kind of shock? Not the financial one, certainly.

MR. LEVENTHAL: Your Honor, a school which grows dependent upon a particular type of aid might be reluctant to wait for a decision of this Court which they believe will

be adverse to withdraw from the program. In fact, there is nothing in this record which would indicate that any private school has stated that the textbooks are unnecessary or undesirable. There is no evidence one way or the other on why these schools do not receive textbooks.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 10:41 o'clock a.m., the case was submitted.]

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