In the

Supreme Court of the United States

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, et al., as Appellants and Appellees,	)	Combined Cases
EWALD B. NYQUIST, etc., et al., as Appellants and Appellees,	)	No. 72-929
WARREN M. ANDERSON, as Majority Leader and President Pro Tem of the New York State Senate, as Appellant, and	)	No. 72-791
PRISCILLA L. CHERRY, et al., as Appellants.	)	No. 72-753
	)	No. 72-694

Washington, D. C.
April 16, 1973

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WARREN M. ANDERSON, as Majority Leader and President Pro Tem. of the New York State Senate, Appellant, v. COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, et al., Appellees.	No. 72-753
EWALD B. NYQUIST, as Commissioner of Education of the State of New York, et al., Appellants, v. COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, et al., Appellees.	No. 72-791

PRISCILLA L. CHERRY, et al.,

Appellants,

v. No. 72-929

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, et al.,

Appellees.

Washington, D. C.,

Monday, April 16, 1973.

The above-entitled matters came on for argument at 11:15 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:

LEO PFEFFER, ESQ., 15 East 84th Street, New York, New York 10028; for the Committee for Public Education and Religious Liberty, et al.

MRS. JEAN M. COON, Assistant Solicitor General of New York, The Capitol, Albany, New York 12224; for Nyquist, et al.

PORTER R. CHANDLER, ESQ., 1 Chase Manhattan Plaza, New York, New York 10005; for Appellees Boylan, et al., and Appellants Cherry, et al.

APPEARANCES [Cont'd]:

JOHN F. HAGGERTY, ESQ., Office and P. O. Address, Senate Chambers, Albany, New York 12224; for Appellee Anderson.

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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 the consolidated cases, 72-694, 753, 791, and 929.

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

ORAL ARGUMENT OF LEO PFEFFER, ESQ.,
ON BEHALF OF COMMITTEE FOR PUBLIC
EDUCATION AND RELIGIOUS LIBERTY, ET AL.

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

This is a suit challenging the constitutionality of three parts of Chapter 414 of New York Laws of 1972. That Act consists of five parts. Part 1 provides public funds for the maintenance and repair of nonpublic schools. Part 2 provides funds for tuition in such schools of parents whose income does not exceed $5,000 a year. Part 3 provides for tax credits to parents of children attending such schools, whose income exceeds $5,000 a year. Part 4 provides public funds to public school districts, impacted funds, whose enrollment increases by reason of the closing down of non-public schools in that district. And Part 5 empowers the public school districts in those areas to purchase unused or no longer used nonpublic schools.

The suit challenges only the first three parts under the religion clauses of the First Amendment.

The district court held unanimously that Part 1 and

Part 2 are unconstitutional. By a divided vote, with Judge Hays dissenting, it held constitutional the third part, the tax credit part. And also held that that part was severable from the rest of the statute.

Judge Hays dissented on both points.

Now, taking each of these parts seriatim, the maintenance and repair part, the statute is quite broad in what constitutes maintenance and repair, indeed it's open-ended.

It defines maintenance and repair as"the provision of heat, light, water, ventilation and sanitary facilities, cleaning, janitorial and custodial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commission", that's the State Commissioner of Education, "may deem necessary to ensure the health, welfare and safety of enrolled pupils."

Indeed, I think it is fair to say that except for teachers' salaries this statute permits practically the State, and directs the State to pick up the bill for everything in those schools.

Now, the only qualifications under the statute are that the schools be located in low-income areas. The amount given to the school for that purpose is $30 per pupil in attendance, and an additional ten dollars if the school is

more than 25 years old.

Now, in Lemon v. Kurtzman and Earley v. DiCenso, this Court in 1971 declared unconstitutional State laws in Pennsylvania and Rhode Island which appropriated public funds to pay for the secular teaching in religious schools.

On the same day the Court decided these cases, it decided Tilton v. Richardson, which upheld on its face, not necessarily as applied, indeed, quite clearly not as applied, a Federal statute which appropriated funds to pay half the cost of constructing facilities at colleges.

Now, in Tilton v. Richardson, the plurality opinion, there was no court opinion, distinguished the Federal statute from the statutes in the Pennsylvania and Rhode Island cases. The Court said, in the first place the Federal statute deals with colleges and universities, and there is a real latitude given by the Establishment Clause under such circumstances because the students are mature and they can resist pressure by the teachers, sectarian pressure and other reasons, and therefore the limits of governmental action are somewhat broader, are broader than those in elementary and secondary schools.

Secondly, the Court pointed out that we had there a one-time grant in each of those cases. The money is given, and that's it. Whereas, in the DiCenso and Lemon cases, it was ongoing payment each year, and therefore there was a

greater area of governmental involvement.

Finally, the Court pointed out, that in the Federal grant, the Tilton grant, the statute specifically forbade the use of any of those facilities partly financed with public funds to be used for religious purposes.

And, indeed, in that case, the Court held unconstitutional by a unanimous decision that part of the Federal statute which restricted -- which removed this limitation after twenty years. After twenty years under the statute, those Federally financed facilities could be used for religious instruction; the Court said this is unconstitutional. No funds which come from governmental bodies may be used to finance any facility used in whole or in part for religious instruction or worship.

Now, in the present case, the statute applies to elementary and secondary schools, not to colleges. Moreover, it is not a one-time grant, but it has to be renewed each year. And, perhaps above all, the statute does not forbid the use of the facilities so financed by governmental funds for religious or sectarian purposes.

QUESTION: You're speaking now of Part 1, is that correct?

MR. PFEFFER: Part 1, yes; begin with Part 1.

The same rooms which are financed, whose lighting, whose ventilation, whose upkeep, whose renovation is financed

with State funds, are used for sectarian instruction and religious worship. If there is a chapel in the school, and many of the schools do have chapels, that chapel, too, is part of the cost of maintenance and repair borne by the State.

The statute provides that only 50 percent of the average State cost of maintenance and repair of public schools may be appropriated for these schools; and in no case more than the 100 percent of moneys actually used for these purposes in the parochial schools may be used.

But there is no distinction within the statute between those parts of the building, indeed, it's questionable whether it could be, with those parts of the building used for religious purposes and those for sectarian purposes.

Now, I do not believe, as a matter of fact, as I read the briefs, there is, I believe, implicit admission that if this statute applied to all nonpublic schools, it would clearly be unconstitutional. I don't see how it can be denied.

There is an effort to justify the statute on the police power of the State to provide for the safety and health of students. Well, the police power has to be exercised within the restrictions of the First Amendment.

In Flast v. Cohen, this Court held that there is an express provision in the Constitution, the First Amendment, forbidding governmental financing of parochial schools.

I do not know of any case in which the Court has held that where there is an express prohibition in the Constitution, that can be transgressed under the police power. The police power of a State is inherent in them, it is used to -- the word "police", its origin, it's used for the security and safety of the people, to arrest criminals or those who are charged with crime, to charge them, convict them, and punish them. But that doesn't mean that under the police power a State can violate an express prohibition against double jeopardy, let us say, or trial without jury, or trial without counsel.

Surely, the public has an interest, the State has an interest in the education of children; but it must be exercised in such a way that it does not violate the specific prohibition of the Bill of Rights. No matter how wise, no matter how effective a trial without jury, or double jeopardy, or trial without counsel would be in preventing crime in the streets, that cannot stand, that cannot justify a specific prohibition in the Constitution, in the Bill of Rights.

And in Flast v. Cohen, the whole basis of the decision was that the Establishment Clause is a specific prohibition, the first prohibition in the Bill of Rights, against a financing of the operations of parochial schools.

The State seems to also, indeed clearly bases its position on this, in this Part, that this statute is limited to

schools in low-income areas.

Again I know of no decision of any court holding that to be a critical or relevant constitutional question.

Where the question is equal protection, if the State chooses a certain class as beneficiaries of its action, and excludes other classes, as, for example, if the State provides free counsel in a criminal case, which indeed it must, to poor people but not to wealthy people, or provides free access to the divorce court, as indeed it must, to poor people but not to wealthy people, or in other cases provides the transcript of criminal trials to the poor but not to wealthy people --

QUESTION: Not to poor people, it's to indigents.

MR. PFEFFER: Indigents. To indigent people, well, if the State did that, then, quite clearly, this would not -- this was a rational classification, not to violate the equal protection. But the State could constitutionally provide free access to divorce courts, to bankruptcy courts, to free transcripts, to public defense service, to all, to the wealthy as indeed it does in public schools. Public schools are open to everybody, the wealthiest as well as the most poor.

And it's not a violation of equal protection because a reasonable classification, if the State chooses one alternative, free for all, or the other alternative, free only for the poor indigent. But that never has been used to say

that the State can violate an express provision of the Bill of Rights where indigents are involved, when it cannot violate it where the well-to-do are involved.

So, it seems to me that the first -- the unanimous decision of the court below is entirely correct, that it is a violation of the Establishment Clause for the State to provide funds for the maintenance and repair of schools which are used in part, at least, for religious education and religious worship.

Now, the only case that can remotely justify this statute, and very remotely, is the Everson case in which the Court upheld the constitutionality of paying, reimbursing parents for the expenses of sending their children on the public bus to parochial schools.

Mr. Justice Black, for a majority of the Court, stated that the purpose of this law is to protect the children from the hazards of the road.

Now, we do not deny, we cannot deny because of the prior decisions of this Court would seem to take the position that you cannot go behind what the Legislature states in its declaration of purposes. Therefore, we must assume that the purposes of this statute are secular.

But the effects are entirely different. You do not teach religion or practice religion on the bus. If you did, in a privately owned bus -- in Everson it was a publicly owned

bus system, where simply the parents got paid back for the money which they paid for transportation on the public one. But if you did, under McCollum v. Board of Education, and you're going way back to 1948, which held that no premises publicly owned, publicly financed, can be used for religious teaching or religious worship, even for as much as a half-hour or an hour a week.

If it does that, it's unconstitutional, that's what the Court held in McCollum; and of course it held the same thing in Engel v. Vitale, the prayer case, in Abington Township involving Bible reading, and in Lemon v. Kurtzman.

So we believe that this part of the statute, Part 1, was quite properly held unconstitutional by unanimous vote of the district court.

Part 2 deals with tuition payments.

In fact, it provides that up to 50 percent of the tuition of -- no, I believe -- it does have that, but the basic provision is that $50 is paid per child for the tuition up to, or no more than the tuition actually is; for the tuition paid for enrollment in nonpublic schools.

The question of tuition grants is not a new one, unlike the maintenance and repair and tax credits, which are quite new, which appear to be very recent; tuition grants as a means of avoiding constitutional limitations goes back at least a century.

It has been challenged in the courts in three different contexts: first, as a violation of State constitutional provisions against financing parochial schools; second, under the Establishment Clause of the First Amendment; and, third, under the Equal Protection Clause of the Fourteenth Amendment in a racial segregation context, and the decisions growing out of State appropriations of public funds to pay for the tuition of pupils in racially segregated schools.

Now, my own research, and I'm not warranting that it is exhaustive, indeed, as I will indicate in a moment, I did overlook one case, fortunately which was supporting my position not opposing it. But the research I have done has disclosed not a single decision, and there are many, many which considered the question, not a single decision holding that there is a constitutional difference between a direct grant of public funds to religious schools and paying, in whole or in part, of the tuition of children attending those schools.

The cases, some of the cases, there are many others, supporting my position are in my brief, both under the State Constitution, the Establishment Clause, and the Equal Protection Clause.

In the Establishment Clause cases decided both before and after the Lemon-DiCenso cases, there were three -- I point out three in my brief; there is actually a fourth which, as I say, I overlooked, even though I argued the case, but it

slipped my memory, I was in the case in the district court. There were four cases in which the U. S. District Courts, in these cases they were three-judge courts, passed upon the question.

One was Wolman v. Essex in Ohio, which this Court affirmed without argument; the other is this case; and the third is the case which will be argued after this one, Lemon v. Sloan; the fourth, which I did not cite in my brief, as I say, which slipped my memory, is Lemon v. Sloan where -- I mean is Brusca v. Missouri. Brusca v. Missouri, where a district court in Missouri was faced with a challenge by parents of children in parochial schools to the State Constitution and the State practice of excluding parochial schools from governmental financing.

The parents claimed that this was a violation of religious freedom and equal protection.

The suit was started before the decision in Lemon v. DiCenso -- Lemon --

QUESTION: So that at least the ones I am familiar with, that is the Ohio case and the Pennsylvania case to be argued following this group of cases, those provide for assistance across the board to parents whose children go to nonpublic schools; this one is directed to impoverished families, is it not?

MR. PFEFFER: May I address myself to that --

QUESTION: Am I wrong about that?

MR. PFEFFER: Well, I think -- technically you are right and to some extent this is what the State of New York contends that distinguishes them. But actually, it's only technically right, because Chapter 414 is a single package. It takes care of children, parents of children with incomes under $5,000 through a tuition grant.

QUESTION: Right.

MR. PFEFFER: It takes care of children, of parents of children with incomes over $5,000 through a tax credit grant.

QUESTION: Well, that's Part 3, you haven't got to that --

MR. PFEFFER: That's Part 3. Yes.

QUESTION: -- you're talking now about Part 2.

MR. PFEFFER: Yes. But, as I say, this is one single package, and --

QUESTION: Well, that's another question in this case, whether or not it's severable.

MR. PFEFFER: Yes.

QUESTION: But you haven't come to that yet, either. I'm just directing myself to Part 2.

MR. PFEFFER: Yes. Part 2, if it were -- if it were to be severed from the rest, did apply to parents of children with incomes not more than $5,000.

QUESTION: And in that respect this case is different

from the other three that you've cited to us, is it not?

MR. PFEFFER: That case is different from the other three. It is not, however, constitutionally distinguishable, --

QUESTION: Well, that's the question.

MR. PFEFFER: -- Mr. Justice, in our position, for the reason which I state with respect to Part 1. That, too, limiting itself as it does to schools in low income areas is also so purposed and so applied. But, as I say, it is our position, it's our position, that there you have, as all the cases to ever come before this Court, before any court, have held that you cannot pay the tuition for persons attending nonpublic schools where either equal protection or, more specifically in this case, an express prohibition of Establishment is involved, the fact that it is limited to one particular class of low income does not justify which otherwise would be an express prohibition against financing of religious schools.

QUESTION: How about the categorical assistance programs, Mr. Pfeffer? I'm thinking about AFDC, cooperatively financed by the State and Federal Governments, the amount of the grant to the family with dependent children depends, generally, upon the number of children. And what provision, if any, is made for children in AFDC families that go to nonpublic schools, do you know?

MR. PFEFFER: The AFDC payments are payments for

poor children, indigent children families which are used by those families for their --

QUESTION: Well, I know. I basically know what the program is, I asked you --

MR. PFEFFER: But it's not --

QUESTION: -- what provision is made for children who go to parochial schools.

MR. PFEFFER: As far as I know, there is no specific provision in there for tuition to them. That is, as far as I know, and I believe if it were --

QUESTION: Do you know?

MR. PFEFFER: I do not know, for I believe it would be unconstitutional.

QUESTION: I don't, either; that's the reason I was asking.

MR. PFEFFER: Sure. As far as I know there isn't, there is no such provision. It is similar to the G. I. Bill of Rights, which goes to everybody. But if it were, if there were specific grants in there, and I'm fairly confident there isn't, if there was a specific grant in there for tuition to schools, and that tuition was paid to schools which teach and practice religion, I believe it would be unconstitutional.

QUESTION: What about a grant for, under the G. I. program, that included tuition to go to Georgetown Law School?

MR. PFEFFER: Yes. Well, in the first place, this indeed is pointed out in the various briefs. This case, this question and the question asked by Mr. Justice Stewart have also been considered in many of the cases which I have referred to, considered and passed.

In respect to the poverty, or indigents, as a matter of fact, in this very case, a majority of the court pointed out that the fact that this money in Part 1 goes to indigent schools, schools in indigent or poverty areas, is almost to differentiate this from the tax credits, for the unconstitutionality. It says tax credits are across the board, whereas the low-income housing -- low-income schools are mostly Catholic schools, therefore a specific religious group is benefitted, and therefore it's unconstitutional even though they held tax credit constitutional.

Now, with respect to --

QUESTION: Well, would your position on that point be different if, in a particular area that brought the case to us, if they were 80 percent Lutheran and 20 percent Catholic?

MR. PFEFFER: Not the least.

QUESTION: Would it make any difference if it was 80 percent private nondenominational and 20 percent --

MR. PFEFFER: Not the least. I'm just pointing out the court below was using this argument just the reverse way. I'm not saying that in every case, in every case which came

to the courts, to this Court, Lemon, DiCenso, and to all of the other courts, the argument has always been, and it's stated in the declaration of purposes, that without this money from the government, the poor people wouldn't be able to get an education. That's the basis of the argument in every case, and this Court didn't deem it, even in DiCenso, the law there distinguished between indigent and nonindigent, poor and non-poor schools, it provided that the money could only go to those schools where the cost, the salaries paid to teachers, are less than the salaries paid in public schools.

That is the poor schools, those which had lower payments, therefore, that in poor schools where -- and the arguments are, the argument in this case was that without this money the poor people won't be able to go to private schools.

QUESTION: Well, that's the whole justification for welfare programs, particularly the categorical assistance program for the AFDC, for dependent children in fatherless families, isn't it?

MR. PFEFFER: Yes, it is.

QUESTION: We had a case here -- what was it -- ? Swab v. Lennox, unless I have the caption wrong, saying that a State couldn't cut off aid to a child who is attending an institution of higher learning. Now, do you suppose that case would have gone differently if that institution had been a parochial institution?

MR. PFEFFER: It might very well have.

QUESTION: Do you really think so?

MR. PFEFFER: Except on private, if it goes to colleges; if it goes to colleges.

QUESTION: Well, let's assume it's a high school.

MR. PFEFFER: Yes, indeed, I believe it would. I believe to that extent it would. I think that's something --

QUESTION: Do you think the welfare --

MR. PFEFFER: Because the --

QUESTION: -- funds have to be set, cut down insofar as the children of welfare families --

MR. PFEFFER: Well, not necessarily.

QUESTION: -- who go to parochial schools?

MR. PFEFFER: Not necessarily, because this answers the question which the Chief Justice raised. These moneys go to these parents and they become their funds. They have a certain degree of flexibility as to what they use, it's their money. Also true with the G. I. Bill. In World War I, the G. I. did not get G. I. benefits as they did in World War II, they got bonuses, and they used that bonus for whatever purpose; some of them gave it away to churches, which they had a right to do, it was their money. It was paid to them in compensation for the services which they rendered to this government. It was a "no strings attached".

Now, because many of the soldiers used this money

unwisely, they set up businesses, they gave it away, they gambled it away; in World War II it was decided to put strings attached. It said this, the rationale of the G. I. Bill of Rights: We have taken a group of American young men away from their lives, and we've put them into the Army to serve this nation; during that period their more fortunate, or other contemporaries didn't have to do this and could continue their education in order to make, to earn a livelihood. They could go to college, they could go to trade schools, they could even go to seminaries to become clergymen and make a living that way.

Now, when we sent the survivors of the Armed Forces back, they had lost three or four or five years of their preparatory years, and instead of giving them unrestricted money as in World War I, because of the unfortunate experience there, we're going to say you've got to use this money to give you some possibility of making up in earning a livelihood, and it was to be "only for preparation to earn a livelihood", to give you some money for that purpose.

And you might even argue that it would have been an unconstitutional violation of religious liberty if the States, if the government said "any livelihood you want except being a clergyman". I'm not arguing that one way or the other, it's not necessary.

But that was what was in the G. I. Bill of Rights.

QUESTION: Well, that's the rationale, but how in the world does that affect your First Amendment argument?

MR. PFEFFER: Because the money was used by them for any purpose, it's their money.

QUESTION: But in fact it was used for many of them to go to religious institutions of learning, was it not?

MR. PFEFFER: In this case, in this case the money could only be used for that purpose, unless they come up, unless the parent comes with a receipted bill from a private school, as the record shows, the brief shows, 96 percent of the schools in New York which are private are religious schools.

So, for all practical purposes, it means a religious school.

QUESTION: But in this case you can come with a receipted bill from a private, nondenominational school?

MR. PFEFFER: Yes. Yes. There are about four percent of the schools, and I don't think that token could really save the -- it didn't in Lemon against -- it didn't in the Lemon case, it didn't in DiCenso, it didn't in Wolman case, in the two Essex cases, which one has already been affirmed without opinion, it isn't in any of those cases, in all those cases; no case that I know of.

QUESTION: Since you again emphasize those percentages, what would be the situation in your view if they

were reversed, 96 percent private secular schools and 4 percent private sectarian schools?

MR. PFEFFER: Well, if the money went for tuition, I don't believe it would be constitutionally distinct.

QUESTION: As to the --

MR. PFEFFER: Because it still, it's still money for tuition. It isn't a --

QUESTION: Well, then these percentages aren't of any relevance, are they?

MR. PFEFFER: They're relevant mostly for the third point, and it was pointed out by this Court in Your Honor's opinion in both Lemon and DiCenso, that -- and in Walz, too, Your Honor's opinion in Walz -- that these statutes are all directed to practically one religious group. I am just relying on what Your Honor said in those cases.

QUESTION: Well, in Walz --

MR. PFEFFER: It was --

QUESTION: In the Walz case it wasn't directed to one religious group.

MR. PFEFFER: That's why it was upheld in that. That's why Your Honor upheld it. The Walz decision. Because of that, as the Court pointed out, as you pointed out, that it is not directed at one religious group, and that's how you get around to distinguish.

QUESTION: But we didn't concern ourselves with trying

to weigh and measure the proportions, well, then, why should we here?

MR. PFEFFER: Well, you --

QUESTION: Whether it's 96/4 or 4/96.

MR. PFEFFER: Well, in respect to what the Court pointed out, both in Lemon and DiCenso, the division of the community on religious lines and the entanglement involved in -- political entanglement in bringing in this issue in political areas. Now, this was one of the things which the Establishment Clause was intended to prohibit. And in Walz, it was relevant towards constitutionality, it was relevant in Lemon and DiCenso towards unconstitutionality; and I suggest that it's relevant here towards unconstitutionality as well.

This is not created by me out of thin air. It was brought in by two decisions.

QUESTION: Well, what? I don't understand. That a majority are Roman Catholic, or that a majority are religious?

And of course, in Walz they were all religious by definition; that's what the case was about.

MR. PFEFFER: Yes. And therefore -- yes.

I just add that I believe that even if they were all religious, of all religions, as I think the Court, this Court, in Everson and McCollum, in the Sunday law cases, in Watkins, forbade aiding one religion over all religions, and it made no

distinction. And I think it would be unconstitutional whether it was one religion or all religions.

QUESTION: Then I don't understand how you can concede the constitutionality of the payments made under the G. I. Bill of Rights after World War II.

MR. PFEFFER: The answer, I say, Your Honor, is that this was not even restricted to religion; this was unlimited --

QUESTION: Oh, we know, but a lot of that money went to aid religious institutions.

MR. PFEFFER: Yes, indeed.

QUESTION: Did it not?

MR. PFEFFER: Yes. Just as the bus transportation went to religious and non-religious schools. That's true. But there was no money paid for tuition --

QUESTION: Directly to the schools, nor is there here.

MR. PFEFFER: Well, no. There is not here, in the sense that there was -- it's not paid directly, but there is here, in the sense that the money is paid only if you pay tuition in the religious schools. It's only if you pay tuition in --

QUESTION: No, it's if you pay tuition to private schools.

MR. PFEFFER: Yes. Private schools, --

QUESTION: Nonpublic schools.

MR. PFEFFER: -- 96 percent of which are religious schools.

QUESTION: But under the G. I. Bill, the tuition money went directly to the schools, it didn't go through the hands of the recipient, the student.

MR. PFEFFER: No, well, it did -- it did not originally, but it do go through the hands of the recipients afterwards.

QUESTION: Well, it certainly didn't when I was under the G. I. Bill, which was for some four or five years; the tuition check simply went to the school.

MR. PFEFFER: That was changed afterwards; the question was brought before Congress, and they realized that there was a constitutional problem there, and thereafter they changed the law, so that the tuition went directly to the G.I. and not to the --

QUESTION: Well, the G. I. simply became a conduit then, did he not?

MR. PFEFFER: Yes. The G. I. became -- but it --

QUESTION: It was only tuition money, he couldn't use it for anything else.

MR. PFEFFER: He could use it for tuition money anywhere he wanted.

QUESTION: Yes. But only for tuition in schools.

MR. PFEFFER: Only for tuition. He could use it

only for tuition, but for tuition in any college, public college or private college.

QUESTION: Including -- yes, well, including -- or a trade school.

MR. PFEFFER: Yes.

QUESTION: If he hadn't finished high school.

MR. PFEFFER: That's right, he could use it for any -- any college.

But in respect to tuition limited specifically -- limited specifically, except for four percent -- for four percent, which I believe is tokenism, and I don't believe could purify the other 96 percent. Limited specifically to religious schools, in 96 percent of the cases. I do not believe that could be upheld under any law.

QUESTION: Now, did they not, under the G. I. Bill, have some process of inspection and certification after a period when there were some fraudulent schools, spurious operations, did they not then establish regulations under the statute which required the school to meet a particular standard, so that the government checked on whether this money was being used wisely in that respect?

MR. PFEFFER: If the -- Mr. Chief Justice, if the then inspection, those standards, involved surveillance of the schools, in the sense which Lemon and DiCenso followed, I believe that could not be upheld under Lemon and DiCenso.

QUESTION: Well, there was a certain amount of continuing surveillance of all private schools --

MR. PFEFFER: Yes.

QUESTION: -- is there not?

MR. PFEFFER: Yes.

QUESTION: To see that they meet --

MR. PFEFFER: Well, --

QUESTION: -- standards established by --

MR. PFEFFER: Yes.

QUESTION: -- by the Board of Education?

MR. PFEFFER: Well, the Court pointed that out in Lemon and DiCenso.

QUESTION: Yes. That's not found objectionable.

MR. PFEFFER: Yes. Because -- it's not found objectionable; but when it comes to the use of religious funds, the Court found it objectionable in Lemon-DiCenso. The Court said --

QUESTION: I'm speaking of the general surveillance of all nonpublic schools.

MR. PFEFFER: Yes.

QUESTION: That's not constitutionally objectionable.

MR. PFEFFER: That's not constitutionally objectionable, but, on the other hand, that fact does not, at least, unless this Court overrules Lemon and DiCenso, that fact is not found to immunize the use of public funds for religious --

for schools which would teach both religion and secular subjects. That's what the Court held in Lemon and DiCenso. And the Court, indeed, as recently as last year, in Wisconsin v. Yoder, this Court repeated that statement; the Court repeated it, and I should like to just quote what the Court said, as recently as last year in Wisconsin v. Yoder. It's found on page 14 of my brief:

"Long before there was general acknowledgement of the need for universal formal education, the Religion Clauses had specifically and firmly fixed the right to free exercise of religious believes, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by government. The values underlying these two provisions relating to religion have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance. The invalidation of financial aid to parochial schools by government grants for a salary subsidy for teachers is but one example of the extent to which courts have gone in this regard, notwithstanding that such aid programs were legislatively determined to be in the public interest and the service of sound educational policy by States and by Congress." Citing Lemon v. Kurtzman, Tilton v. Richardson, Everson v. Board of Education.

Then the facts in those cases are no different than

the facts in this case. As I -- and if no different in any of the cases, the four District Court cases, including the one which, Brusca v. Missouri, which I have not cited; all those cases, there were twelve judges, four from the Court of Appeals and eight from the District Court, deciding on tuition grants. Not one, not one of those judges held that tuition grants is constitutional.

QUESTION: You didn't, I think, give us the citation of your Missouri case, uncited in your brief.

MR. PFEFFER: Yes. 332 F. Supp. 275, affirmed 405 U.S. 1050, affirmed last year, in 1972.

Now, let me read --

QUESTION: Would you repeat that last cite again?

MR. PFEFFER: 405 U.S. 1050, 1972.

QUESTION: Yes.

MR. PFEFFER: Let me say, for a moment, what the Court held in the Brusca case. This was the -- the Lemon-DiCenso case was decided after this suit was started, and the Court in that respect says:

Faced with this decision, plaintiffs now argue that some alternative programs, such as tuition grants, could constitutionally be devised which, so they contend, would be free of government entanglement.

The Court rejected that and it said -- and I don't want to read it now because of time -- it said: Lemon violates

that. Three judges --

QUESTION: Isn't that parochial parents' action --

MR. PFEFFER: Yes.

QUESTION: -- to require the State to --

MR. PFEFFER: Yes. Yes.

QUESTION: That's a somewhat different context --

MR. PFEFFER: No, it is -- this is -- well, it's somewhere between dictum and holding.

QUESTION: Yes.

MR. PFEFFER: But the Court said -- the Court said that this would be unconstitutional under Lemon. I will repeat it to you:

Wholly apart from the fact that entanglement comparable to that described in Lemon cannot be realistically avoided, if plaintiffs are granted aid for parochial school purposes, particularly on a continuing basis, it's self-evident that both the purpose and effect of any statute giving tax-raised funds to assist parents in the free exercise of religion would necessarily be to support religion.

So that we have twelve, twelve Federal Court judges, not one of them finding any distinction, and none of the State Courts, as cited in Walz, both in this context and in the equal protection, racial subjects; not one of them finding any distinction between a direct grant and tuition.

Now, I must devote the rest of my time -- unfortun-

ately, I have not been able to go to it. But I must speak about the third part, the tax credit part, which, indeed, is the most important, because that seems to be which way the wind is blowing.

Now, I concede if tuition grants are held by this Court to be constitutionally permissible, then tax credits are constitutionally permissible. Now --

QUESTION: Do you think the reverse of that is true, also?

MR. PFEFFER: Yes. I think the reverse of that is true. I think the reverse of that --.

The reason for that is because tax credits is merely one form of paying for tuition. Now, we're not speaking about tax deductions, I'm not speaking -- that's not before this Court --

QUESTION: Tax exemptions?

MR. PFEFFER: Well, certainly not tax exemptions. We're not speaking of tax exemptions nor tax deductions. Suppose --

QUESTION: Do you think there is a difference, Mr. Pfeffer?

MR. PFEFFER: Between exemptions or between deductions?

QUESTION: Well, is there a difference between -- yes, would a tax deduction make it be a different case?

MR. PFEFFER: It might.

The District Court in the case which was decided after this, which knocked out tax exemption --

MR. CHIEF JUSTICE BURGER: We will let you answer that after lunch, Mr. Pfeffer.

MR. PFEFFER: All right. Thank you.

[Whereupon, at 12:00 o'clock, noon, the Court was recessed, to reconvene at 1:00 o'clock, p.m., of the same day.]

AFTERNOON SESSION

[1:00 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Pfeffer, you have about 15 minutes of your time left.

ORAL ARGUMENT OF LEO PFEFFER, ESQ.,

ON BEHALF OF COMMITTEE FOR PUBLIC EDUCATION

AND RELIGIOUS LIBERTY, ET AL. - [Resumed]

MR. PFEFFER: I just wanted to complete my answer, then I'll reserve the rest of my time for rebuttal.

The District Court in Ohio, the case cited in -- the Kosydar case, and Professor Freund, among others, are of the opinion that there is no difference between tax credits and tax deductions, as they are equally unconstitutional.

I am inclined to think that a fairly good case could be made of constitutionality of tax deductions for tuition paid to parochial schools. I think there was a wall of difference between credits and deductions, for reasons which I don't want to -- which I state in my brief and which are stated by the court below, Judge Gurfein, in his opinion, stated the reasons why there's a difference between tax deductions and tax credits.

But I think a good, a reasonable argument could be made that if a payment for tuition to parochial schools were treated as a contribution to the parochial schools, in other words it would be deductible to that amount and to no more,

and treated like contributions to a church, which are tax exempt, or to --

QUESTION: Or medical deductions for --

MR. PFEFFER: Or medical deductions --

QUESTION: -- for service to you in a Catholic hospital.

MR. PFEFFER: Anything. If it were treated as a deduction.

QUESTION: Right.

MR. PFEFFER: Then I think that a reasonable argument could be made for it, that it's constitutional.

I know that, as I say, the court disagrees with me, and I of course respect his preeminence in the field of constitutional law; but I believe it can be made.

But where the, as in this statute, you simply reduce the tax liability by a certain amount, and instead of paying the government what you owe it, you would reduce the amount which is set forth, which is determined by the statute, and it has nothing to do with how much you deduct, how much your tuition is, it depends upon your income status.

And I can see no difference between a situation where you owe the government X dollars for taxes, and you pay the government that amount, and the government sends you an independent check for tuition which you owe, which you pay to a parochial school. I see no constitutional difference between

that situation and the situation where, instead of paying the government what you owe them on your income tax, you send instead a receipted bill for your tuition, and you deduct that amount, to make --

QUESTION: Of course, whether it's a credit or a deduction, neither does any good unless you have income; unless you have enough income to make it worthwhile.

MR. PFEFFER: Well, if you don't have, then you get it under another technique, they'll give you the money in the form of tuition.

QUESTION: That's right --

MR. PFEFFER: Under this statute. So you get the money from --

QUESTION: But a deduction wouldn't do anybody any good without income.

MR. PFEFFER: That's right. That's right. That's no good without income, and therefore in this State, in this statute they give you the cash in the form of tuition. In Ohio and some other States, they give you a negative income tax, where they pay you the money even though you don't pay it.

I'd like to reserve the rest of my time for rebuttal.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Pfeffer.

Mrs. Coon.

ORAL ARGUMENT OF MRS. JEAN M. COON,

ON BEHALF OF NYQUIST, ET AL.

MRS. COON: Mr. Chief Justice, and may it please the Court:

To freshen the perspective here, we think that the validity, constitutional validity of the statutes here at issue revolve not solely around the precise language of the statute, but the intent and purpose with which the New York State Legislature enacted them.

The Legislature, in 1972, undertook to meet certain specific needs of children attending nonpublic schools and their parents. It was confronted with a growing clamor for tax reflief on the part of parents who paid tuition in the nonpublic schools on behalf of their children, and who also additionally support public schools in the form of tax payments.

It was faced with the problem of increasing safety hazards in nonpublic schools, which particularly in low-income areas had been unable to meet the cost of maintenance and repair, essential to health and safety structures.

Further, the State had become increasingly cognizant of the problem faced by low-income parents in paying the tuition necessary to the selection of a nonpublic school education for their children.

And finally, although not directly relevant to this

appeal and still part of the same legislative enactment, in those areas where the financial crisis in the nonpublic schools had forced their closing, the public schools had been faced with increased costs of education in general, and particularly in the cost of additional physical space for the increasing enrollments.

Consequently, in an attempt to meet or in part to alleviate what the District Court here indeed recognizes were basically secular problems. The Legislature of the State of New York adopted Chapter 414 of the Laws of 1972.

I will address myself initially in this argument to the problem with which Mr. Pfeffer left off, that of the income tax portion of the legislation, then to the health and safety grants, and finally to that portion of the statute relating to the tuition reimbursement to low-income parents.

The tax portion of this statute provides not for a tax credit but for a modification of adjusted gross income for the purposes of New York determining the New York State income tax payable.

For New York State income tax purposes, the adjusted gross income is the same on both the Federal and State returns, with the exception of a number of State modifications. There are additional modifications of gross income, which are provided solely in State law qad not under the Federal tax return.

For example, a deduction is not allowed on the State return for income tax, State income taxes which have been paid, although it is allowed on the Federal return; and on the State return an additional modification is allowed for life insurance premiums paid, although they are not allowed on the Federal return.

QUESTION: Is there a limit on that?

MRS. COON: Yes, there is. It's -- I don't remember what it was this year, but it had been $150; it's now less than that.

This Court has indeed recognized that the States have an inherent power and authority in enacting tax legislation. The powers of the State to tax its citizens are co-equal with those of the Federal Government, and are only limited by the specific limitations on the State's power found in the Federal Constitution.

QUESTION: Mrs. Coon, --

MRS. COON: Yes?

QUESTION: -- are you going to address yourself to the precise manner in which this New York tax, the portion of the statute dealing with tax, operates? It came up, I know, in questioning during Mr. Pfeffer's argument, as to whether it's a credit or a deduction or an exclusion. Are you going to address yourself to the precise manner in which it operates?

MRS. COON: Yes, Your Honor, I am.

We think it is particularly significant here that in the cases involving the constitutionality of the Federal income tax law, that this Court upheld the validity in the face of arguments that there were differences in the classes of income tax deductions or exemptions that were allowed, that they were not uniform as to all taxpayers and that some could claim ones which others could not.

We submit that the New York Legislature, in selecting and enacting tax legislation, has the power to select what income to tax, how much of the income it wishes to tax, and to provide for deductions and exemptions in whatever amount and for whatever purpose it elects.

QUESTION: But a credit is different in New York?

MRS. COON: A tax credit is different, yes; a tax credit comes off at the tail end.

QUESTION: It's just a forgiveness of what you owe the government, --

MRS. COON: Yes.

QUESTION: -- it's a setoff.

MRS. COON: Right.

QUESTION: It's like paying you money directly.

MRS. COON: Now, in this particular instance, this comes off at the top. This is a modification of income for the -- prior to the determination of the amount of tax owed. It comes off at the beginning of the tax return; it's a

reduction of the income subject to tax. We submit that this is equivalent to, in legal principle, to a deduction or to an exemption, because it is a thing which reduces your income that is subject to tax, not a forgiveness of tax owed.

QUESTION: But it isn't -- if you pay $300 tuition, under the New York plan you don't get a $300 deduction from your income, do you?

MRS. COON: No, you do not.

QUESTION: No, you do not. So it's not a deduction as that term, at least, is generally understood in tax law; is it?

MRS. COON: No, it is not.

But it also is not a tax credit, as that term is generally understood, because the tax credit also amounts to a precise dollar amount.

QUESTION: Well, a tax credit is just a reduction of the amount of money you owe the government directly, that's what a credit is.

MRS. COON: Right, that's what a credit is. And this is not, this is, we submit, equivalent in legal principle to a deduction or exemption, even though in terms of the actual mechanism by which it operates it doesn't come out the same way.

QUESTION: Well, isn't it closer to an exemption that you get for dependents on your Federal income tax return;

isn't that the closest analogy?

MRS. COON: Well, it is closest in analogy, because your exemption is not related to an actual expenditure. It's a fixed amount. So it is closest to an exemption.

QUESTION: Yes, but that, the exemption comes out of -- it serves to reduce your taxable income; in that extent, it's like a deduction.

MRS. COON: Yes. And to that extent this is precisely the same way; that this does reduce your taxable income. This comes off --

QUESTION: I thought it was geared to operate to actually reduce your taxes directly.

MRS. COON: No, no. It comes off the top.

QUESTION: Well, maybe you'll explain it, as Justice Rehnquist suggested in an earlier question.

MRS. COON: New York State has actually had a history of tax credits which have not been related to specific purposes. They have been a tax credit to single and married people, which is directed at reducing the tax owed. It was, for example, for a single person, $12.50, for a married couple $25 in the reduction; and up until this past year we have taken off, as a tax credit off the income tax, after it has been computed. This --

QUESTION: And that's a true credit.

MRS. COON: Right. That's a true credit.

QUESTION: That's a forgiveness of part of what you owe in taxes.

MRS. COON: Yes.

Now, this, on the other hand, the modification of gross income provision, starts at the top of the income tax return, this comes off before you compute your tax liability, it comes off --

QUESTION: You mean like the box that goes over, how many exemptions you have, this would be like another box right there.

MRS. COON: Yes, except that it's figured slightly differently, since it's figured differently in amount. But it comes off at that part of the tax return, it comes off in the --

QUESTION: But it is a flat amount?

MRS. COON: No, it varies based upon income.

QUESTION: That's right, that's what I --

MRS. COON: For persons with an income of less than -- of $9,000 or less, it's $1,000; if your income is between, I think it's between $20,000 and $23,999, it's $100, and above that it's a zero amount.

QUESTION: Yes. Yes.

MRS. COON: So that the --

QUESTION: But it would be up in that level?

MRS. COON: Yes, right.

QUESTION: On the return.

MRS. COON: Yes, it would be up at that point; it's up in that part of the return, before you start computing your taxable income and the tax liability. And to that extent we say that it operates much the same as a deduction or exemption, and probably much closer to an exemption simply because exemptions themselves are set as fixed amounts which are unrelated to the purpose for which it's granted.

In other words, you're exempt, your present exemption under the Federal income tax is $750 --

QUESTION: But that's the same for everybody, be his income $5,000 or $500.

MRS. COON: Yes, but it's also unrelated, it's unrelated to the actual expenses necessary to live, for the beneficiary, for the dependent for whom it's claimed.

QUESTION: This is a very appropriate day to be discussing this.

MRS. COON: Yes.

[Laughter.]

MRS. COON: Although actually in New York State we're entitled to an additional day because the Internal Revenue District office in Massachusetts has a legal holiday today.

But an exemption also varies, can be claimed additionally; there are additional purposes of exemption for

persons over 65 or blind, and so forth; so the exemptions do multiply to some degree not directly related to the number of persons involved.

But to that extent, because it is also not directly involved in the question of the actual amount spent, we say that this is closer to an exemption than to a deduction, but is a legal principle equivalent to either a deduction or exemption, rather than a tax credit. Because it relates to the modification of taxable income prior to the computation of the tax due.

We submit that the addition of a modification of gross income, allowable to tuition-paying parents of children in nonpublic schools, was no more and no less than an exercise of the State's inherent power to determine the measure of personal income subject to taxation by the State.

QUESTION: So one thing -- but, in any event, on the deduction, if it's an exemption or a deduction it has a differential effect, then, depending on how much money you make?

MRS. COON: Yes.

QUESTION: I see.

MRS. COON: I should also point out that in the medical deductions, for example, in the Federal income tax, there is a difference there, really, as to whether or not you can claim them, depending upon your income; the higher your

income is, the less likely you are to ever get a medical deduction on the Federal income tax.

QUESTION: Yes.

MRS. COON: This initial portion of the statute, we submit, is not only simply an exercise of the State's power of taxation, but also meets the secular purpose and effect test which was set forth by this Court in the Schempp case.

The purpose of this statute, as was specifically found by the district court, was to provide tax relief to tuition-paying parents of children in nonpublic schools. It was not to provide aid to the schools themselves.

The primary effect, also as found by the district court, would not be a benefit to the nonpublic schools but rather to the tuition-paying parent.

The court recognized the fact that by the time the parent's income tax liability is fixed and determined and he files his return, the tuition has long since been paid. And that any benefit he gets out of this reduction, and the eventual reduction in the tax which would most likely be pocketed by him and used for his own personal purposes rather than turned over to the school.

That it is chronologically unrelated to the time of paying tuition, and therefore not be considered to be using the parent here as a conduit to paying money to the schools.

Without payment to the schools or any contact with

the schools attended by the parent -- incidentally, on the New York State income tax return, in claiming the modification of gross income, a parent is not required to state what school he sent the child to. He simply adds this in as an item off of his return, and only if he is subsequently audited would there be any question raised, would he ever have to prove to what school the money was paid.

QUESTION: Is there anywhere in these papers a tax form that shows us how this works out?

MRS. COON: No. I can get you one, there might be someone in the Court who might, but -- all right.

MR. CHIEF JUSTICE BURGER: It would be helpful to all of us. I suggest, with copies to your friends, that if you would submit some illustrations as to just how that works, it might be helpful.

MRS. COON: Okay. I know I have them at home.

Now, without payment to the schools or with any contact with the schools attended by the children, we submit that there can be no entanglement between government and religion, let alone excessive entanglement.

The provision of tax relief to parents can in no way be construed as an unconstitutional aid to religion. There is here no First Amendment violation and the district court's judgment on that should be affirmed.

As to Section 1 of the --

QUESTION: Now, is this a choice a person makes between getting a tax benefit or getting the tuition grant?

MRS. COON: No, only if his income is less than $5,000. Then he would have to make the choice.

And the purpose of that, of course, is simply to see that they don't get a double benefit.

QUESTION: Well, but a person with -- I suppose a person could have too little income to get any benefit out of the credit or the deduction?

MRS. COON: That's true. That's entirely right.

QUESTION: In which event he would take the tuition.

MRS. COON: I would assume that would be true.

QUESTION: Yes.

QUESTION: Could it possibly be true if he had too much income?

MRS. COON: Well, --

QUESTION: Does it function at any point the way the medical deduction does in the Federal, you had an analogy to that, and I'm not sure I followed it.

MRS. COON: Well, if over -- if your income is over $24,000 a year, you cannot take --

QUESTION: It comes off --

MRS. COON: -- you can't take the tax relief. And if your income is over $5,000 you can't take the tuition.

QUESTION: You're eligible for the tuition relief

only if your income is below $5,000?

MRS. COON: Yes.

QUESTION: Is that correct?

MRS. COON: Yes.

QUESTION: Well, I take it if your income is under $5,000 you'd have no tax to pay anyway, would you?

MRS. COON: Well, that's -- I would assume if that would be --

QUESTION: As a matter of fact, that's why the provision for direct reimbursement to the extent it is --

MRS. COON: I would think so, because there would be no --

QUESTION: -- for people under $5,000. The over $5,000 simply wouldn't work for the under $5,000.

QUESTION: But your deduction, your deduction or exemption, whatever you call it, or credit, whatever you call it, doesn't go progressively down up to 24, does it? Or does it --

MRS. COON: Yes, it does. it goes progressively down.

QUESTION: It goes progressively down and then ends at 24.

MRS. COON: Yes.

QUESTION: Right.

MRS. COON: That apparently assumes that if your income is over $24,000 you can afford to send your children to

nonpublic schools without needing any tax relief. I am sure there are parents who would disagree with that, but that was the legislative philosophy behind it.

Getting to Section 1 of the statute, the so-called health and safety grants, the Legislature specifically found that the financial crisis of nonpublic schools in low-income areas would result in deferred maintenance and repair programs, and it had also resulted in an increase in health and safety hazards to the children attending those schools.

Here, too, the district court in this case found that the conditions and problems set forth in the legislative findings were valid, and expressed a secular legislative intent.

The bill provides, as Mr. Pfeffer said, for specific dollar amounts per pupil, with an additional dollar amount for pupils attending schools in buildings constructed prior to 1947, and would be paid to the schools as a partial reimbursement for prior expenditures for repairs and maintenance.

The expenditure of the money, we submit, is safeguarded in two ways: first, the amount may not exceed 50 percent of the statewide average cost of maintenance and repair in the public schools; and may not exceed the actual amount paid by the nonpublic school in the preceding base year.

Further, not all nonpublic schools will qualify for grants under this program. Only those schools will qualify which have been certified as serving a high concentration of low-income pupils for the purposes of Title 4 of the Federal Higher Education Act of 1965.

Title 4 involves the specific grants to teachers who agree to teach in -- for educational purposes, for persons in educational institutions who are preparing for teaching, who agree to teach in low-income areas.

The schools involved in this will be approximately -- approximate some 250 out of the 1400 nonpublic schools in the State of New York.

In perspective, we must observe that this Court has never held that all direct payments to nonpublic schools are unconstitutional. And we must also state that there is a long tradition of Federal as well as State aid to the nonpublic schools in the form of special benefits and direct payments to either the schools or their students. I use as an example the school lunch program, tax exemptions, the G. I. Bill of Rights, and the programs and benefits under the Federal Elementary and Secondary Education Act of 1965.

We cite many other instances in our brief on this appeal.

It must be assumed that the payments and benefits so provided have been considered not to aid religion but rather

to have some other public and secular purpose.

The statute here at issue, we submit, was adopted in the exercise of the State's police power, to protect the health and safety of children of the State.

Contrary to the argument of Mr. Pfeffer's seemed to advance, we do not consider and we do not believe that the Court's decisions have ever considered that the police power was directly related to what we normally consider as crime policing.

The police power has had its purpose and activity in various fields of health and safety, far beyond the normal criminal justice system.

The latitude which has been ascribed to the police power by the courts is very great. This Court has indeed held that the State has a sovereign right to protect the welfare of its people, and while most of the cases cited in our brief relate to regulatory statute adopted as an exercise of the police power, we submit that there is no essential legal or constitutional difference between statutes which regulate and statutes which provide money to accomplish the desired police power purpose.

In fact, the Everson case, as Mr. Pfeffer stated, we submit, supports this. Because this Court, in Everson, upheld bus transportation on the basis that as a police power measure is designed to get children safely to nonpublic

schools, to protect them from the hazards of, as this Court said, either hitchhiking or walking on highways.

QUESTION: Well, that really doesn't answer your problem here, though, does it? I mean, if it's a valid exercise of the police power, that means you've got to first conclude it doesn't violate the First Amendment. And if it doesn't violate the First Amendment, it is a valid exercise of the police power.

MRS. COON: Well, yes, Your Honor, that's a correct statement. I would think it does not violate the First Amendment.

QUESTION: But to say it's the police power, I don't see how that really advances your argument.

MRS. COON: Well, I think, in this respect: this was the purpose of the statute, it was a police power statute. It had a -- it was not intended to benefit religious schools, it was not intended to benefit religion, it was not intended to benefit the schools essentially as institutions. It was intended, as an exercise of the police power, to protect the health and safety of the children, the State's citizen children who were attending these nonpublic schools.

QUESTION: Well, as Justice Rehnquist said, it might be a perfectly valid exercise of the State's reserve power, or police power, that power compendiously known as the police power, so far as the Due Process Clause goes, or something like

that, but that doesn't, that begs the question of whether or not it violates the First Amendment, doesn't it? The First and Fourteenth Amendments.

MRS. COON: No, I think this is -- this is what we get to from there.

QUESTION: Well, let's pursue that for a moment. It might be perfectly valid, as applied to a secular school, a private, nondenominational school, and I take it Mr. Pfeffer would not question that, if the State decided to make grants. It runs afoul of the First Amendment, as Justice Stewart and Justice Rehnquist suggested, if it runs afoul, as soon as you introduce this other element.

MRS. COON: Well, we advance the police power argument, I think, as a -- to demonstrate the secular intent of the legislative purpose of this. Contrary to Mr. Pfeffer's argument, we do not see, in the language of the First Amendment, a direct prohibition against aid to parochial schools.

QUESTION: Well, what if, for example, Mrs. Coon, the school was, the building was condemned, it was in such a bad state of repair, it was condemned because it was hazardous to the health, the safety of the stairways, it was a fire hazard, and a lot of other things; in your view, could the State of New York contribute the money to build a new building under the exercise of its police power?

MRS. COON: I would think that they could at least contribute the money to rehabilitate the structure. The State does this now, not in the --

QUESTION: Well, that's this --

MRS. COON: Not in terms of facilities.

QUESTION: That's this case, but I'm speaking now of a new building; could they say, we now condemn it, we tear it down, we're going to put up a new building, and we, the State of New York, will pay for it. Do you think they could do that?

MRS. COON: No, I don't think we go -- I don't think it goes that far, because what we're saying here is that we're trying to protect the safety of children in the buildings they attend.

Now, if the building were in such a case that it had to be condemned, to be torn down, it could not be rehabilitated; to that extent, then, there is no question of the safety of the children in the building in which they're attending. That would be a -- that's a different question.

QUESTION: Well, suppose they found a seminary that was -- all the seminaries were in complete need of rehabilitation. The same findings that they made here as to the elementary and high schools. Would you say the State could contribute toward that?

MRS. COON: I would think no. I think that the

difference, the difference is one of the State's interests in protecting children who are, for whom the State acts in a different plane than certainly from the adults who would be going there.

QUESTION: Suppose they found that all of the church schools were in need of rehabilitation, where all they taught was religion; would that be all right?

MRS. COON: Where all they taught was religion?

QUESTION: Yes.

MRS. COON: I would think no, because we're talking here about --

QUESTION: So that the First Amendment does limit the police power.

MRS. COON: Well, it limits the police power, because, in that extent, I suppose we would say that the money would be going directly to the aid of religion, if all the school taught was religion.

Here we're talking about schools which meet the --

QUESTION: Well, don't let me get to the half and half, 40/60 now; don't let me get to that.

MRS. COON: No, I don't think we get into that; I don't think it is half and half or 40/60; I think it's a question of what the State is doing is relating to the children who attend schools which meet the requirements of a secular education, for whom the State takes this interest,

for whom the State has this interest in -- relating to their education.

QUESTION: Well, on the interest of the State in supervising the private schools, what does the State's reason for that, other than the enforcement of its compulsory attendance law? What other reason does the State have to supervise these schools?

MRS. COON: I think that's the sole reason. It's the enforcement of the compulsory attendance laws, and the compulsory attendance law does more than just say whether the student goes to school on a particular day.

QUESTION: That's right. And that's the State's only interest.

MRS. COON: Precisely. In this case the State's interest is that these students have a right to go to these nonpublic schools for the purpose of complying with this compulsory education law, for the purpose of attending these nonpublic schools, for the purpose of getting a secular education. To that extent, that the State has the, not only the power of supervision of the schools but also the right to get into the issue of the health and safety of the structures which they attend.

To this extent, we say that this is a -- that the primary intent and effect of the statute was not aid to religion, did not violate the First Amendment, that it did,

in the health and safety grants also complies with the constitutional mandate in the intent of the First Amendment.

Briefly, I should like to mention the tuition reimbursement portion of the statute. It is --

QUESTION: That's Part 2, isn't it?

MRS. COON: Pardon me -- that's Part 2 or Section 2 of the statute, yes.

First of all, that the tuition reimbursement provides for a payment to low-income parents of the lesser of two amounts, either 50 percent of the tuition paid to the nonpublic school or $50 per child per year in elementary school or $100 in secondary schools; the lesser of those two amounts.

We say that this is equivalent to the -- to those other public measures which enable parents, in which the State participates in the assistance of low-income or indigent parents, or indigent persons.

Before lunch, Justice Stewart asked the question concerning the ADC payments. New York State, as the Court may be aware, has the flat grant system of payment to the ADC, to welfare recipients; but prior to that time, prior to the time that the flat grant system was introduced, where there were categorical grants for various things, such as rent, heat, food allowances, clothing allowances, and so forth, the State Education Law required payments for the educational expenses of children, and this was interpreted

to include not only tuition to nonpublic schools but also the expenses of books, clothes, which would include uniforms for nonpublic schools, educational supplies, and so forth.

So that prior, and since the flat grant deduction, the pressure increased upon the Legislature for the benefit of the low-income parents, directly related to the fact that they no longer were getting this assistance which they had in the past for the purpose of tuition reimbursement as well as other expenses of children attending nonpublic schools.

Along with that, and there has been an additional feeling within the Legislature that since low-income parents as well as upper-income parents have a constitutional right to send their children to nonpublic schools, that they should not be deprived of this right solely because of their lack of income.

We have equated this to some degree with the welfare system, with the provision of low-income housing, with the State's provision of certain benefits in the way of transcripts of administrative hearings, and so forth, to persons who have low income or who are poverty-stricken.

To this extent, we submit that the low income portion of the statute was itself intended not to benefit the schools, it is paid to the parents long after the tuition has been paid, it is not -- they are not used as a conduit for the payment to the schools. There is here no direct aid to the

schools, and the only indirect aid results from the fact that the attendance at nonpublic schools may be made easier for some children; a benefit which this Court has held does not constitute an unconstitutional aid to religion in and of itself.

QUESTION: Mrs. Coon, under the New York system of government, does there have to be an appropriation for this periodically, or once the law is enacted does it just automatically --

MRS. COON: No, there would have to be an appropriation periodically. All moneys to be paid out of the State treasury are subject to appropriation.

QUESTION: What, bi-annually or annually?

MRS. COON: Annually.

QUESTION: Annually?

MRS. COON: Annually.

QUESTION: Yes. So that this law is self-executing from the point of view of its financing?

MRS. COON: No, it is not; no, it is not. By the effect of the State constitutional provision which prohibits any payment out of the State treasury unless there is a specific appropriation for that payment.

QUESTION: An annual appropriation?

MRS. COON: Yes.

QUESTION: Mrs. Coon, is there any limitation on the

kind of a parochial school that could benefit under this New York statute?

MRS. COON: Yes, to this extent: the school must of course comply with the State's compulsory education law; it may not discriminate on the basis of race; it may not discriminate on the basis of religion, except as to its own -- if it is a religiously oriented school, as to its own religious denomination. In other words, if a Catholic school determines to accept non-Catholic, any non-Catholics, it could not discriminate between groups of non-Catholics. So there is that limitation.

QUESTION: But yet it may still benefit in the program, even though it limits its admissions to Catholics?

MRS. COON: Yes, as to persons of its own religion.

QUESTION: And even though one of the requirements of going to this school is that you study religion?

MRS. COON: Yes, that would be true. It's not something that the statute looks at; the statute is -- the statutory enactment is not concerned with those requirements of the school.

QUESTION: Right.

MRS. COON: But it would, if that is the type of school to which the parent determines to send a child, as to be permissible. The only prohibition is against racial discrimination. And then, as I said, discrimination between

religions other than what they have at the school.

We have covered, I think, the issue of severability of this statute in our brief, and I will leave that part of the argument to that.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Coon.

Mr. Chandler.

ORAL ARGUMENT OF PORTER R. CHANDLER, ESQ.,

ON BEHALF OF APPELLANTS CHERRY, ET AL.,

AND APPELLEES BOYLAN, ET AL.

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

I am here representing two groups of parents, one are parents with taxable incomes of less than $5,000, who are eligible for tuition refund under Section 2 of the Act; the other group of parents have adjusted gross incomes of less than $25,000 and are eligible for the tax modification provided in Sections 3 through 5 of the Act.

The emphasis that I want to make from the start is that this statute is aimed to help parents, not schools, and that we represent parents who are directly affected.

Now, what kind of figures are we talking about? I realize, from questions this morning, that the percentage of one or the other is not of particular importance. But we're talking now about the children in New York State who

go to nonpublic schools, and there are about 750,000 of them, as compared to about 3.2 million in public schools.

The 750,000 nonpublic school children attend schools of all categories, the only requirement of the school is that it should give satisfactory education in secular subjects, and that it should not discriminate on race and so on, as indicated in what Mrs. Coon just said.

QUESTION: I gather it can't be a profit-making school?

MR. CHANDLER: It can't be a what, sir?

QUESTION: A profit-making school.

MR. CHANDLER: It can't be profit-making, you're right, Your Honor. A nonprofit school that comes within the requirements of the compulsory education law.

There are a total of something around 2,000 such schools in New York State, and the figures roughly are that are 1400 of them are affiliated with the Catholic Church, 300 or a little more are affiliated with, I think, some dozen or more other religious bodies, the largest one next to the Catholic is the Jewish school; and about 300 more are non-religiously affiliated. A total of about 2,000 and accounting for 750,000 children.

While I'm on the subject, which has been injected again and again, in some of these cases, I want to correct certain misapprehensions as to what the Catholic school, at

least, is or is not. It is not a school for rich or medium well-to-do, it is increasingly becoming a school of the poor and of the minority races. The figures show that in New York City alone there are 70,000 families with children in Catholic schools who have incomes at or near the poverty level.

The figures show that Catholic elementary schools in the Bronx and Manhattan have 31,000 non-white children attending, out of 65,000 total. More than 60 percent of the children in Catholic schools in Manhattan are black or Spanish-speaking; over 30 percent in the Bronx.

QUESTION: That would be, as a matter of just fact, that would be largely the Puerto Rican community, would it?

MR. CHANDLER: Largely Puerto Rican. Well, New York has a rather large Spanish, other than Puerto Rican, community. If you lump the rest of Latin America and from Spain itself, yes, the others would be primarily Puerto Rican.

Now, the statute comes before you with very strong legislative findings as to each of the sections involved, and the statute recognizes the burdens that are now being borne by parents who send children to accredited nonpublic schools and relieve the State of that tax burden, under Sections 2 to 5.

Concentrating first on the tuition reimbursement, the requirements for admission to that ballpark are that you

should have an income of less than 25 -- of taxable income of less than $5,000; that you should have children in a non-public school; and that you shall have paid tuition for having them there. And the tuition, as Mrs. Coon pointed out, the tuition that is ultimately reimbursable can in no case exceed half what was actually paid; it's half what was actually paid, or $50 per annum for elementary school pupils, $100 per annum for high school pupils.

I mention that because, with all respect, I think Mr. Pfeffer misquoted it this morning; he said that you could get up to the full amount of tuition, which you can't.

On the tax reimbursable -- on the tuition reimbursable provision, the trial court found that there was a good secular legislative purpose, and the effect is actually, we submit, neither to advance nor to inhibit religion. It's to nurture a pluralistic society, to see that all segments of the society have a right to mature and develop and be adequately represented.

New York, with its tradition of over 200 years of a single system of education, both public and private, under the Board of Regents, has always laid stress on promoting plurality and diversity. And the refund, as I have emphasized, is for the benefit of parents, it goes to parents only. There is no question of a conduit here. The parent has his child in a school, to get him in he has to pay tuition at the

beginning of the year; he pays it, and he's parted with that money. Some months later, after he's filled out the necessary forms, he gets back from the State a check representing a small fraction of what he may have paid to the school. He doesn't -- that's his money, he's already paid the school, there is no connection between the two of them, it is perfectly open to that parent to say, I don't like this shool any longer, I won't bring my child back next year, I'll take him out.

And it's all right for him to say, I've got $50 here from the State, it's a windfall, I'll go spend it at the races. Or if he's feeling more charitable, he will say to his wife, In view of the price of steaks, I'm going to give you this money, you can go downtown and buy a good, nice steak to celebrate with.

In the session this morning --

QUESTION: You of course recognize that he knew about that when he paid the money to the school?

MR. CHANDLER: That he knew that the money was coming?

QUESTION: Yes. Of course.

MR. CHANDLER: Yes, yes, that's right.

QUESTION: I mean I don't want to take advantage of your argument, but I think you ought to --

MR. CHANDLER: Just as the parent who paid the bus company in -- in --

QUESTION: Everson.

MR. CHANDLER: -- Everson; he knew he was going to get it back.

QUESTION: Sure.

MR. CHANDLER: But when he got it back, it was his money, I think, Your Honor.

There was discussion this morning of the G. I. Bill of Rights as an example of this tuition business. We have listed in our brief various other, similar items, such as the Regent's scholarships and the scholar incentive programs in New York State; and I shan't develop those further.

As to entanglement, this tuition refund requires a minimum of entanglement. There must be a verification that the children are actually enrolled at schools, no entanglement there; the verification that tuition has been paid; and a verification that the individual in question is not telling different stories to the people whom he is asking for the tax refund and the tax authority. In other words, if he says he has an income of $,972, they will check with the Federal Tax Commission -- the State Tax Commission, to see if that is right.

Turning now, in the very brief moments left, to the tax relief business. We have discussed in our brief the question of tax credit versus tax exclusion versus tax deduction and so on. A typical tax credit is the $12.50 that

every New York resident is entitled to take off of his income tax after he has figured it all -- he figures it all out, and he figures that he has to owe $483.97; and then, just for being a taxpayer, he's allowed a flat cancellation of $12.50 of that money, whether he's a millionaire or whether he's a pauper. That's an example of a tax credit.

Tax exemption, I think the best example is what Your Honors held in Walz, namely a particular person or institution that just doesn't have to pay any taxes, or doesn't have to pay a particular category of taxes.

This is just what the statute describes it, a tax modification; and it comes off, as Mr. Justice Stewart observed, it comes off the top rather than at the bottom.

Section 5 comes to the Court with this legislative, strong legislative finding, which I'm going to read:

Such educational institutions -- and that refers to all of the institutions covered by the Act, religious and non-religious -- Such educational institutions not only provide education for the children attending them, but by their existence relieve the taxpayers of the State of the burden of providing public school education for those children.

That finding was adopted almost ipsissimes verbes in the district court.

As with the tuition reimbursement, I emphasize that

this is only partial relief, the beneficiary is the parent and not the school. There is no grant from the treasury. There is a secular intent, namely equity. And the benefit is not to the -- if any, to religious schools is so remote as not to involve impermissible entanglement. And there's a minimum amount of administrative entanglement.

All those were specifically spelled out by the district court as reasons for sustaining the constitutionality of this Act.

I don't think I need to say, to repeat, that the State has wide authority in classifications in tax things, and there is no precedent that I know of for holding this unconstitutional.

The district court said, in holding that the secular purpose as well as its effect were strong, the lightening of the tax burden of those who contribute to public education, while deriving no benefit from it for themselves, albeit theirs is a voluntary choice, is a legitimate legislative purpose.

I accordingly request, Your Honors, that the judgment of the district court be reversed as to tuition refund section, and that that section be held constitutional; and that the judgment of the district court as to the tax modification be affirmed, and that likewise be held constitutional.

Thank you, Your Honors.

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

Mr. Haggerty.

ORAL ARGUMENT OF JOHN F. HAGGERTY, ESQ.,

ON BEHALF OF APPELLEE ANDERSON

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

An attack on a particular aspect of the State's effort in education fails, unfortunately, to look at the State's responsibility and commitment for education in its total aspect.

This is somewhat what has happened today. It's my purpose to outline the New York State Legislature's commitment and responsibility for education. Article XI, Section 1 of the New York State Constitution fixes the primary duty to provide for the education of all children in New York State on the Legislature. It requires that the Legislature provide for a system of free schools, wherein all the children of the State may be educated.

We educate four million children in the elementary and secondary schools of New York State each year. Approximately 18 percent, or 750,000 of these, attend the nonpublic schools.

The cost of State financing of public education rose to over $2.5 billion in the 1972-73 fiscal year, and increased to $500 million over the 1969-70 year.

The cost to the State of educating the 750,000 non-

public schools is virtually non-existent. The cost of educating -- the total cost of education in the State of New York is $5 billion, another $2.5 billion contributed by the localities.

The support of the nonpublic school education is, in the main, from contributions, endowments, and, of late, approximately but not quite one-third, through tuition payments by parents who, in addition to making these tuition payments, also have a normal taxload.

QUESTION: But the people under $5,000 aren't paying -- in New York City, do the people under $5,000, with five children, pay any taxes to the State of New York?

MR. HAGGERTY: No, they don't. But what I'm attempting to do is to put into the total perspective of the educational aspect --

QUESTION: But they're paying sales taxes, --

MR. HAGGERTY: They're paying sales taxes, --

QUESTION: -- and other things.

MR. HAGGERTY: -- and they're paying, if they own real property, some type of real property tax.

They do pay some type of real estate tax if there's a chargeback by the landlord to a tenant in an apartment.

The greatly increased cost of nonpublic education, plus ruinous inflation, plus ever-increasing taxes on all levels of government, including education, has precipitated a

danger within the nonpublic school system in New York State.

I have delineated, in pages 11 through 15 of my brief, why this is of such great consequence; to wit, there is not a tax base to which the public schools can look in a number of our cities, to increase their total commitment towards education.

To fulfill its responsibility in the public sector, the State contributes cash grants-in-aid, general cash assistance on a per capita basis, and on a formula derived through weighted average attendance as the primary form.

Faced with the crisis in the public schools, and mindful of their responsibility for the education of all children, including the children in nonpublic schools, the Legislature enacted the program which is here under review.

They determined that it was in the public interest and that it was important that not only the nonpublic school system of education in New York continue to exist, but that there be available a plurality of educational opportunity in New York State.

When talking about the children in the nonpublic schools, we're talking about New York State citizens, about our own children. So, just as we provide for cash assistance on a per capita aid basis in the public schools, the Legislature responded by overwhelming proportions in the private sector by enacting a program of moderate, minimal, and

varied assistance to low-income children and their parents, and to middle-income parents, to support their voluntary effort in education.

This is not a special isolated program, it's part of the general program of assistance to education by New York State. Indeed, it would seem that if New York could so determine, it could acquit itself of its educational responsibility by total grant-in-aid assistance to all of the parents, both public and nonpublic.

If that be the case, and allow those parents to determine what schools they wanted to send their children, whether it's public or private, if that be the case it would appear that New York, having made its choice of its machinery or mechanism, to strike down the nonpublic sector, would be to put form before substance.

New York's minimal program of aid reflects the appropriate and the required governmental neutrality toward religion. It neither governmentally establishes a religion, nor governmentally interfers with the religion. Our task in enacting the omnibus Act was, we felt, to reach that neutral ground between the Establishment Clause and the Free Exercise Clause.

The New York program does not encourage attendance at nonpublic schools, indeed, in any event, it's going to be more costly. The State is simply not involved in the parent's

choice of what school the parent chooses for their children.

While the program may enhance the ability of the parent to exercise his choice of which school his child will attend, it is nevertheless completely neutral in that it does not favor religion over non-religion, it does not sponsor a particular sect, nor does it try to encourage participation in or abnegation of religion.

The question of whether or not a distinction should be made for programs of aid to poverty area schools, to low-income parents, should distinguish it from an over-all program.

In enacting legislation, it was felt strongly that a program of aid, of health and welfare grants to low-income, impoverished areas, which had certain restrictions, did fall within the welfare assistance benefit program, and should be considered as a welfare benefit program.

These restrictions are as follows: The schools to be benefitted -- and, incidentally, about 280 out of the total 2,000 nonpublic schools are benefitted by Section 1 -- the schools to be benefitted must be schools which have a substantial proportion of children attending whose parents receive ADC. In addition, under -- that's required by Title IV.

In addition, under Title IV, teachers in those schools who had gone to higher education on loans would receive a forgiveness from the Federal Government because they are teaching in these type ghetto-area schools.

The school cannot be in violation of the Civil Rights Act of 1964. To avoid the question of entanglement, we require that the school provide a private audit, there's no involvement of the State going in there; the school provides a private audit, and that private audit is forwarded to the State.

QUESTION: You say this comes to about 280 schools out of a total of around 2,000?

MR. HAGGERTY: Yes. There are 2,000 nonpublic schools in the State, and 280 of the schools are benefitted by Section 1.

QUESTION: That's almost -- under 15 percent.

MR. HAGGERTY: Under 15 percent, it's about 12 percent, I believe.

The question arose as to whether or not the chapels could be painted. The answer to that is clearly no. The legislative findings are restricted to expenditures which are clearly secular, neutral, and non-ideological in nature.

Expenditures for a chapel clearly could not fall into that restrictive criteria.

The Commission of Education in the State of New York is given the authority to promulgate rules and regulations where he could not approve, as a result of getting this private audit, --

QUESTION: I take it, that if the heating system

broke down, under the statute the entire heating system, which also heated the chapel, could be replaced, could it not?

MR. HAGGERTY: The heating system could be replaced, to the extent that it would fall within the definition of a secular or non-ideological --

QUESTION: Well, I know, but if you have a central heating system in the school and it collapses and it has to be replaced, and it heats every room, including the chapel, --

MR. HAGGERTY: Yes, --

QUESTION: -- and under this statute it could be replaced, could it not?

MR. HAGGERTY: It could be replaced, but we have built into the statute what we considered a statistical requirement of neutrality, and that is that --

QUESTION: I know, but --

MR. HAGGERTY: -- not more than 50 percent --

QUESTION: -- as to my question, it could be replaced, could it not?

MR. HAGGERTY: It could be replaced, but our preposition in formulating the legislation was that we would never get to a position where we would pay the total amount of the repair or replacement of the heating system, because in no event can the cost reimbursed by the State be more than 50 percent of the comparable cost in the public sector. And

that we tried to build in as a statistical degree of neutrality.

QUESTION: Well, my only point was, you may not be able to paint the chapel under this, but you can repair the heating system that heats that chapel, can't you?

MR. HAGGERTY: That's correct, but our purpose was not to provide for the total cost of repairing the heating system.

QUESTION: But I suppose implicit in your answer is that in every few schools would the chapel exceed 50 percent of the total heated space; is that a reasonable assumption?

MR. HAGGERTY: That's correct, yes.

In answer to Mr. Justice Marshall, the answer as to the question of whether we could provide such services or such repairs to schools where all they teach is religion, the answer is no, because, again, it must be only those areas which are non-ideological, secular, and neutral.

QUESTION: I wasn't talking about this statute, I was talking about the one you're going to pass next year.

MR. HAGGERTY: Hopefully we won't have to do that.

The number of schools that are sectarian were incorrectly stated in that 96 percent. There's approximately 82 percent of the nonpublic schools in the State of New York are sectarian.

And finally, with regard to the modification of gross,

adjusted gross income, and whether or not that distinguishes from any other type of income tax change. Section 612(c) of the New York State tax law provides for some 15 or 16 modifications, an example of which, you can modify your adjusted Federal gross income by subtracting therefrom any amounts of income derived through United States Savings plans; this is a modification.

Well, what we do is add to Section 612(c) an additional modification which would provide, on a reduced, graduated scale, as you go up the line to an income of $25,000, an amount which would be taken away or reduce your Federal adjusted gross income for your New York State income tax liability.

The purpose of this was that we would benefit the parent who is benefitting the State by their voluntary effort in the nonpublic or private school arena. And we are doing it on the first level so that we benefit the parent before it becomes involved in any types of State money.

Finally, I would suggest that, on the question of modification of tax income, the Court look to the decision of the majority below upholding the modification program, where it points out that it does not involve a subsidy or grant of money from the State treasury, it has a particular secular intent, one of equity, to give some recompense by way of tax relief to our citizens who bear their share of the burden

of maintaining the public schools and who, because of religious belief or otherwise, send their children to nonpublic full-time schools, as is their constitutional right, the benefit to the public -- parochial schools, if any, is so remote so as not to involve impermissible financial aid to church schools.

And lastly, there is a minimum of administrative entanglement with the nonpublic schools, nor is ongoing political activity likely to cause division on strictly religious lines.

It was out intent to reach the neutral point between the Establishment Clause and the Free Exercise Clause, and we submit that the judgment of the court below, with regard to the health and safety grants be reversed; and with regard to the tuition reimbursement be reversed; and with regard to tax modification be affirmed.

Thank you.

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

I am going to limit myself to one question to you on your rebuttal, Mr. Pfeffer.

REBUTTAL ARGUMENT OF LEO PFEFFER, ESQ.,
ON BEHALF OF COMMITTEE FOR PUBLIC EDUCATION
AND RELIGIOUS LIBERTY, ET AL.

MR. PFEFFER: Yes, sir.

QUESTION: Suppose you had -- I start with your

comment this morning that there's no constitutional barrier to the State of New York providing funds and tax credits to private secular schools. Suppose you had such a private secular school maintained by anti-religious people, and all these credits were given, does that give rise to any possibility of violation of equal protection or possibly the Free Exercise Clause?

MR. PFEFFER: I think it may even give rise to a question under the Establishment Clause as well.

QUESTION: I said the Free Exercise Clause.

MR. PFEFFER: Well, you can move on Free Exercise -- free exercise and establishment, because the Establishment Clause has been defined by this Court in a number of cases, equally forbids aid to religion and aid to anti-religion. The classic expression --

QUESTION: Well, in my hypothetical, I wasn't assuming that they had a sign on the building that this is an anti-religious school, I'm simply assuming it's a secular school --

MR. PFEFFER: It's a --?

QUESTION: A secular school.

MR. PFEFFER: Oh, I thought you said an atheist school. No. I'm sorry. If it's a secular school, it --

QUESTION: Patronized by people who do not want their children to have a religious education.

MR. PFEFFER: Oh. Oh, I'm sorry. I misunderstood. I thought you said atheist school.

No, if it's a purely secular school, then it's a public school, because that's what this Court held under McCollum and Engel v. Vitale and the Schempp case.

QUESTION: Does that give you any equal protection problem in that respect?

MR. PFEFFER: Well, I don't see -- I don't see how -- as a matter of fact, this Court has so decided in the Brusca case, in affirming the Brusca case. That was the argument of the plaintiff in the Brusca case, that there was a violation of equal protection because --

QUESTION: What case?

MR. PFEFFER: The Brusca case, which I cited this morning, with respect to a suit brought by parents of children attending private schools, parochial schools, who claimed there was a violation of free exercise, because the private schools were excluded.

The district court unanimously rejected, and this Court affirmed without any dissent.

There is no -- let me put it this way: There is no violation of equal protection in a classification which the First Amendment compels. That's what this Court held, the First Amendment compels, this Court said in Lemon-DiCenso, compels non-support, in whole or in part, of parochial schools.

And if the First Amendment compels it, then a State complying with it, obviously is not -- is not following equal protection.

I should like to address myself primarily to what I wasn't able to do this morning, the tax credit provision.

It is our contention that this is a tax credit statute. Mrs. Coon has conceded that's not a tax deduction statute. The court below called it a tax credit.

Now, it's not a tax deduction statute for obvious reasons. In a tax deduction you deduct from your gross income the amount you contributed; that's what you do if you make a contribution to a hospital, to an art museum, to a church. Here you do not deduct that.

The State figures out for you, and in our brief and in the jurisdictional statement of all the parties in their briefs, the State figured out -- on page 6 of my brief -- the amount you will get, benefit you will get by the deductions. And it's clear that the deduction, the benefit starts where the tuition grant stops; $50 per child.

Now, if you make -- if I make a contribution of $1,000 to a church, to an art museum, I deduct from my gross income $1,000; and then my income tax is determined on the balance. If I pay tuition of, let's say, $50 for each child, then that -- I don't deduct $50 from my gross income, I deduct up to $1,000 a child, up to $3,000 from my gross income. Why? In order to get the $50 which would be allowed to me,

per child.

And the State has done that itself, this is the analysis given by the State Legislature. It is simply using the device of a tax system to achieve a payment to the parents of children in the public school. That --

QUESTION: Mr. Pfeffer, you say this is a tax credit.

MR. PFEFFER: Yes.

QUESTION: Now, how do you define a tax credit, as opposed to a deduction or an exemption, when you're using that term?

MR. PFEFFER: All right. I do it in several ways. First, a deduction is one in which it is a uniform one in respect to all contributions, there is no difference between a grant, how much you contribute to an art museum, to a scientific institution, to the ASPCA, from the amount you deduct you contribute to a parochial school.

Here there is a difference. If you contribute $50 to the art museum, you deduct $50 from your taxable income. Here, if you pay $50, you don't deduct $50 from your taxable income, you deduct $1,000 for each child.

QUESTION: Then your definition of tax credit is a broader one than one which would simply say a tax credit is an amount you subtract from the otherwise computed tax due.

MR. PFEFFER: I say that the First Amendment --

QUESTION: Will you answer my question?

MR. PFEFFER: Yes. Under -- in this context, yes. In this context, this is a tax credit. It would be a tax credit if -- let me --

QUESTION: But then it is a broader definition than the one I just mentioned to you?

MR. PFEFFER: It is a broader definition, yes, indeed. And, indeed, Mrs. Coon conceded that. She said this is not a tax deduction.

QUESTION: Well, Mr. Pfeffer, suppose that New York says for every child below the age of 18 you get 500 bucks' deduction, and for all such children in private schools you deduct 550?

MR. PFEFFER: I would deem that unconstitutional. I would deem that unconstitutional, because that's an obvious preference of -- within the class of tax base.

In -- in --

QUESTION: I'm still waiting for your answer.

MR. PFEFFER: I said -- I said I deem that unconstitutional.

QUESTION: Why?

MR. PFEFFER: Because this constitutes a benefit exclusively limited to those who send their children to parochial schools.

QUESTION: Is that equal protection?

MR. PFEFFER: It would be both equal protection and establishment.

In any event, what this statute does, it recognizes, Mr. Justice Rehnquist, that's not a tax deduction because it allows you this money, even if you deduct, if you had deductions, or even if you take a standardized deduction, if you don't itemize, you've already got the benefit of the deduction, whatever it is, ten percent, whatever it is. The statute specifically says that you still get it, you still get this amount, even if you've already gotten the benefit of the deduction.

QUESTION: But what you get is something that you're entitled to subtract from your adjusted gross income, not something which you're entitled to subtract from the tax that you've already computed to be due.

MR. PFEFFER: The only thing I can answer to that is that this means elevating form of substance, it merely pretends, and it is clear because, as the court below pointed out, that this is a tax credit; and as all my opponents say, that the purpose of this statute was the recognition of the serious finance conditions of the private schools, and the nonpublic education, they put it in one statute, all these things.

The whole purpose of this is to get money into the private schools, or else the whole purpose of the statute fails. Else the provisions regarding the impacted aid have no --

QUESTION: But you could make that same argument if you were simply here dealing with an orthodox tax deduction, that the whole purpose was to get money to the private schools.

MR. PFEFFER: No, sir. Oh, no. Because an orthodox tax deduction applies equally to every type of beneficiary, and the courts have answered that in Walz, that where you have a uniform gift, a uniform treatment of all non-profit organizations, museums and so on, then you avoid entanglement.

QUESTION: But supposing you weren't dealing with a gift, that you're dealing with someone who is obviously a payment for services rendered, tuition, and the State made that simply deductible?

MR. PFEFFER: I think that -- for tuition rendered, for services rendered in all instances?

QUESTION: Yes.

MR. PFEFFER: If it were deductible as a deduction, in other words, the amount you paid is deducted? Well, I think if it's deducted from your gross income, I think, as I've indicated before, it may be constitutional; if it's deducted from what you're liable for, I think it would be unconstitutional.

And that's what this has done here. You aren't deducting the amount of your tuition, you're deducting it in the amount which the State figured out would give you back

your tuition. A thousand dollars per child. You pay tuition of $50. You get a deduction of $1,000 up to $3,000, in order to what? In order that you can get your tax liability reduced 50 -- even if you've already gotten the deduction in the form of a standardized deduction. And the State says, the statute says you've got to make a choice. If you want to get this money, you can get relief in two ways.

You can get it through a benefit of this, or you can get it through a benefit of the tuition grant section. They're both for the same purpose. You take your choice. We're going to give you your $50 back. One way or the other.

You can take it through a tuition grant, assuming you're under 5,000; you can take it through a tuition grant, you can take it through this.

But, obviously, the purpose in both cases is saying the same.

Now, I just want to make one point about what Mr. Haggerty says about the fact that the money can't be used in respect to the maintenance and repair, it cannot be used to repair the heating system, as far as the chapel is concerned, and so on.

Assuming that's so -- it isn't so; but assuming that's so, that brings you back into the problem of entanglement. That propels the State into checking how your money is used. And an average is not enough, because in granting only 50 percent

of governmental funds, 50 percent in government funds, the other 50 percent came from the college, yet the Supreme Court said that you cannot use those premises for religious purposes, even after twenty years; even for one lecture in religion, even for one mass, it said, after twenty years. Even though the government pays only half.

But the fact that the government pays only half here does not remove the constitutional taint. The government cannot, under the First Amendment, pay in whole or in part for the maintenance of institutions which teach or practice religion. The Court said, long before Tilton, the Court said that in McCollum v. Maryland, where only a few small portion of the school, for a half-hour or an hour a week was used for religious education.

Thank you.

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

The case is submitted.

[Whereupon, at 2:14 o'clock, p.m., the case in the above-entitled matters was submitted.]