In the

Supreme Court of the United States

GEORGIA THERESA GILMORE, et al.,

Petitioners,

vs

CITY OF MONTGOMERY, ALABAMA, et al.,

Respondents.

No. 72-1517

Washington, D. C.
January 15, 1974

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v.	:	No. 72-1517
CITY OF MONTGOMERY, ALABAMA, et al., Respondents.	:	

Washington, D. C.,

Tuesday, January 15, 1974.

The above-entitled matter came on for argument at 2:36 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JOSEPH J. LEVIN, JR., ESQ., 119 South McDonough St., Montgomery, Alabama; for the Petitioners.

JOSEPH D. PHELPS, ESQ., 815-830 Bell Building, Montgomery, Alabama; for the Respondents.

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 72-1517, Gilmore against City of Montgomery.

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

ORAL ARGUMENT OF JOSEPH J. LEVIN, JR., ESQ.,

ON BEHALF OF THE PETITIONERS

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

This civil rights litigation comes before this Court on a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, and it follows a reversal in part and an affirmance in part of an opinion and an injunction issued by the United States District Court for Middle District of Alabama.

Now, although only two rather narrow issues remain for consideration by this Court, the litigation started out as a rather complex set of suits and motions which were aimed at solving the problem of resegregation of public recreational facilities in Montgomery, Alabama.

Prior to 1959, all public recreational facilities in Montgomery were segregated as a matter of law, as a matter of city ordinance. In 1959 the District Court, the Middle District, in the initial Gilmore case, the first stage of this case, entered an order requiring desegreation of all public recreational facilities.

Now, the city's response to this order was to close all of the parks, all of the recreational facilities in the city.

At about that same time, 1958-1959, the city first began to cooperate with the local private segregated YMCA by entering into a coordination agreement, turning over many public recreational programs to the YMCA.

Other changes, throughout the Sixties and the early Seventies, in the recreational programs of the city brought about a situation which the original Gilmore plaintiffs sought to correct.

The desegregation of recreational facilities, ordered in 1959, had been effectively negated, in our opinion, by increasing resegregation throughout the decade of the Sixties.

Now, with three interrelated suits and motions which were filed in order to try and do what could be done to undo what we term resegregation:

First, in 1970, the District Court, in response to a complaint filed against the private YMCA, found that defendant to be conducting, in concert with the city, extensive segregated recreational programs. The court determined that the YMCA was inseparable from the city itself, and ordered desegregation of the YMCA.

Second, in 1970, the present petitioners, in another aspect of the Gilmore case, reopened Gilmore, alleging vast

inequalities in the provision of public recreational facilities to blacks in the community, compared to what whites received.

After one day of trial, at which the court made a preliminary finding that petitioners, plaintiffs then, had made a strong case or a strong showing of denial of equal protection, the city entered into an agreement which, if followed, would significantly and vastly improve recreational facilities in black neighborhoods in Montgomery.

Third and finally, in 1972, the District Court entered the injunction, the order and opinion, which really forms the basis of this particular stage of the litigation. There the District Court said, and actually issued a two-pronged injunction enjoining the city from authorizing private segregated school use of public recreational facilities, and also enjoining that same use by private segregated non-school clubs and organizations.

The Fifth Circuit affirmed the segregated school aspect of the case only in so far as the use by the school proved to be what the Fifth Circuit termed an exclusive use.

QUESTION: Well, that's most of that issue, isn't it?

MR. LEVIN: Exclusive use is this entire issue, that is really what is before this Court. That's true.

QUESTION: I mean, so that there's really a --

they affirmed the District Court almost entirely with respect to the schools, didn't they, really?

MR. LEVIN: Yes, sir, with the exception of exclusive use, they affirmed the District Court entirely.

QUESTION: Right.

MR. LEVIN: We consider exclusive use to be a major problem in the enforcement --

QUESTION: Yes, but the Court of Appeals said that non-exclusive use by segregated academies should not be banned. Is that what it said?

MR. LEVIN: That's correct. That's correct.

QUESTION: So, like going to the zoo, or in a park.

MR. LEVIN: Well, I don't know that going to a park or going to a zoo is recreational activity in the context of this particular case.

QUESTION: Well, give me an example.

MR. LEVIN: For example, I think if you were to look at the agreement that was actually entered into between the city and the YMCA in --

QUESTION: I'm just trying to find out whether this is a serious issue in the case at all or not.

MR. LEVIN: Yes, sir, we believe it's a very serious issue, and I think if you were to look at the agreement that was entered into, which is in our reply brief Addendum, page 134a --

QUESTION: This occurred in what year?

MR. LEVIN: This is 1965, when this agreement was entered into.

QUESTION: Well, what is the situation right now? What public facilities are available to the non-public schools and their students concerning which you complain? Could you just say, one, two, three, four, what they are?

MR. LEVIN: I cannot, because the only issue that the Fifth Circuit spoke directly to was private -- was private segregated school use of football fields; and then it said "and similar uses" or something to that effect. So that I don't know what other uses would be banned, would be forbidden.

Presumably --

QUESTION: Well, this is on football fields, and that's what you're challenging, that exclusion made by the Court of Appeals?

MR. LEVIN: We're challenging the exclusive use doctrine that the Court of Appeals --

QUESTION: Yes.

MR. LEVIN: For example, if you get away from the football field factual situation which the Court of Appeals had before it, what do you do in a situation where there are six basketball courts available and the private segregated academy is only using one of the courts, is that an exclusive

use?

QUESTION: You're challenging the non-exclusive use doctrine, in the sense that the segregated schools should be banned from so-called non-exclusive use as well as exclusive use.

MR. LEVIN: What we're trying to say is that exclusive use is not a definition that you can deal with in this situation. What you have to look to is whether or not you're enhancing the program or the curriculum of the private segregated academy, and whether the use is exclusive or non-exclusive is immaterial.

QUESTION: Mr. Levin, as I understand it, these private segregated academies may not use public football fields.

MR. LEVIN: That is -- that is correct; may not exclusively use a public football field.

QUESTION: Beg pardon?

MR. LEVIN: May not exclusively use --

QUESTION: I thought they couldn't use them at all. Am I wrong?

MR. LEVIN: Exclusively. I --

QUESTION: No, no. Not at all.

MR. LEVIN: Well, presumably, since the Fifth Circuit says that exclusive use is the only use that's barred, then if you could figure a way to use a portion of that football

field --

QUESTION: Well, if the public high school -- if the non-segregated public high schools use the football field Monday, Tuesday, Wednesday, and Thursday, under this order may a segregated academy use them on Friday?

MR. LEVIN: I would think -- I'm not sure you can gather that from the order. I know, as a matter of fact, the city is not permitting that use.

QUESTION: Well, maybe I haven't read that correctly. I thought --.

QUESTION: Well, I suppose, under the Court of Appeals order a segregated academy, a team -- a segregated academy team could play a non-segregated academy team.

MR. LEVIN: Possibly so. The question is what is exclusive use. You get right back to the problem of defining exclusive use.

I might point out that the Fifth Circuit itself runs up against the problem, because in a portion of the Stipulation of Facts submitted to the Fifth Circuit, one of the stipulations was to the effect -- I don't have it right before me -- but it was to the effect that the -- that there was no exclusive use. We stipulated that there was no exclusive use of these recreational facilities by private segregated academies.

And yet the Fifth Circuit's own opinion upholds the

injunction against segregated academies' use of these football fields.

We're saying it's an unworkable definition, and that that's not the issue that you should look to.

What one has to look to is whether or not this private segregated academy's program, curriculum, whatever, is being enhanced -- very much in the vein of Norwood, of the Norwood case. Is the program being enhanced in some way by what, by the city service that's being provided. And it --

QUESTION: Let me ask you a hypothetical relating to that. Suppose these were not matters of segregated schools, but suppose you had a Catholic academy run by the Catholic order, could, in your view, judicial power enjoin the city from letting the Catholic school play on that field because that had a tendency to enhance the operations of a Church-operated school?

MR. LEVIN: No, sir, I don't believe so. And I believe Your Honors spoke to that very kind of point in the Norwood case, when you discussed the difference between religious activity, which is -- if I can be so bold as to say -- considered generally to be a good activity, not something that's banned by the Constitution, and segregationist activity, which is something that's spoken directly to in the Thirteenth and Fourteenth Amendments, where, I hate to use a good-and-evil type definition, but that's essentially what

I think this Court was saying in the Norwood case.

And however, now, a different situation might be presented if the school, for example, were a segregated Catholic academy, then the fact of its Catholicism would have no effect on the segregated aspect of the school.

QUESTION: Mr. Levin, you were satisfied with the District Court order, weren't you?

MR. LEVIN: Absolutely, yes, sir.

QUESTION: Now, what is it that the Court of Appeals allows that the District Court prohibited?

MR. LEVIN: The Court of Appeals allows non-exclusive use by private segregated academies of public recreational facilities.

QUESTION: So what you object to is letting the private academies make use of any public facility where, in your view, its use contributes to the mission of the private academy?

MR. LEVIN: Yes, sir. But I think that it's important in this context to make note of the factual situation that we find in Montgomery, Alabama. We're not talking about any other section of the country or any other part of the country. We're talking about a city that has a history of segregation in recreation. And I don't want to get off into other public facilities, because I don't feel that this case deals with other public facilities. It deals

with public recreational facilities in Montgomery, and there's a unique factual background there. And I think that's where the equal protection violations, if any exist, and we contend that they do, must be viewed from that point of view.

QUESTION: Well, for example, if there's a public park with six basketball courts, I gather, in your view, the private academy should not be permitted to have, for example, one of its teams practice on one of those six courts?

MR. LEVIN: Absolutely.

QUESTION: Right. Now, but suppose just students who attend the private academy go and just have a pickup team to play on one of the courts; is that permitted?

MR. LEVIN: The issue there is completely different. We believe that what --

QUESTION: Well, no, would you say that that should be prohibited?

MR. LEVIN: Only -- only if the activity is school-initiated. If individual citizens --

QUESTION: Well, my hypothetical was: here's a bunch of kids that, the school day is finished, and they stop by and they want to have a pickup game.

MR. LEVIN: They are perfectly -- that would, indeed, be a constitutional violation in and of itself, to prohibit those children in a non-school-connected capacity from using

public recreational facilities.

QUESTION: Well now, non-school-connected, that implies that it's a part of the curriculum of the course of instruction or something --

MR. LEVIN: A program of the school.

QUESTION: -- and if it's any school program, or part of the school program, it's your view that that ought to be prohibited?

MR. LEVIN: Yes, sir.

QUESTION: Mr. Levin, your case is not restricted to schools here, is it?

MR. LEVIN: No, sir, it is not restricted to schools.

QUESTION: Let me ask you a question, then, apart from the school background.

Suppose a group of Black Muslims wanted to have a picnic in the city park some Saturday morning, under the Court of Appeals decree, is this possible?

MR. LEVIN: Once again, granting that a picnic is recreational in the context of this case, which I really don't believe it is, but let's assume that it is, I suppose it would depend on whether or not Black Muslims closed their membership to whites. Or do they have, under the rule that the District Court had promulgated, do they have a policy of segregation in admission.

QUESTION: Suppose they do, and -- to get away from

the picnic -- suppose they wanted to use a basketball court?

MR. LEVIN: That is a much better example, because there we're dealing strictly with recreational activities that have gone on in the past in this case, and in that situation, if you can apply the Fourteenth Amendment to segregated black groups -- and I'm not at all a hundred percent certain that you can -- but if you can, then the black group with the policy of segregation in its admissions policy would be treated the same as a white group with a policy of segregation. Because the whole purpose of this series of lawsuits since 1959 has been to desegregate recreational facilities in Montgomery, Alabama.

QUESTION: Mr. Levin, in the Court of Appeals opinion that's set out in your petition for certiorari, and at page 13a of the petition, there's a footnote to the Court of Appeals opinion, footnote 12.

MR. LEVIN: Yes, sir.

QUESTION: Where Judge Clark said: "The district court made no findings about the history, frequency, or effects of public recreational facilities by such non-school affiliated private organizations. Furthermore, in this case which was tried on stipulated facts nothing was stipulated which would support this prong of the injunction."

I went back over your motion for supplemental relief, your stipulation, the answers to interrogatories, and

was inclined to agree with Judge Clark's observation. And I would think if that's the case you never reach a constitutional question on your so-called second prong, the non-school-related thing.

MR. LEVIN: This is private --

QUESTION: And you simply, the Fifth Circuit could have reversed that prong of it simply because the traditional grounds for an injunction, whether you've got a constitutional violation or any other violation, are not made out.

MR. LEVIN: Yes.

QUESTION: What's your answer to Judge Clark's footnote?

MR. LEVIN: I recognize that problem. I'd first like to point out that the court, at the same appendix, 15a, made a finding, which seems inconsistent with that footnote, that there was a periodic, and I quote, "a periodic use of recreational facilities by private clubs".

Now, there was evidence in all of the pleadings which the District Court considered, that is, the complaint, the answer, the motion, which was a verified motion; there was evidence that all private -- that no one was excluded, that all private clubs and all private organizations were indeed permitted to use these facilities.

QUESTION: But there was no showing, no indication at all, as I read, as to what the policies of these groups

were with respect to whether or not they had open admissions or didn't say much about it, or what. That issue was really never focused on in your pleadings, I thought, nor really by the District Court.

MR. LEVIN: Much of the addendum to our reply brief deals with that very problem, and we recognize that it's a problem.

QUESTION: But, your stipulation was to submit on the stipulation of facts, the answers to interrogatories, and the pleading, without any reference to prior hearings in the case.

MR. LEVIN: I think, though, that submitting on a stipulation of facts, which we of course did, and perhaps all of this is the result of an over-familiarity by us as lawyers and by the court with this case, because there's been so much litigation in the past few years in it. But the District Court did have before it, at the district court level, a great deal of evidence in the Gilmore case of 1970. That was the motion we filed on behalf of petitioners to equalize recreational facilities in the City of Montgomery, for both blacks as well as whites.

Now, I would like to point out, before I get into that, and I do want to talk about what was before the court, that despite the Circuit Court's contention that there were insufficient facts in evidence, it nevertheless has now

affected a rule of law, which controls every District Court within its jurisdiction.

QUESTION: But it didn't rule on that ground, did it?

MR. LEVIN: Sir?

QUESTION: It didn't finally dispose of the case on that ground, did it?

MR. LEVIN: Yes, it did. That's my understanding --

QUESTION: But didn't it reach a -- didn't it say as a matter of law that the injunction was --

MR. LEVIN: Oh, I see. It finally said as a matter of law that the right of association was such --

QUESTION: That's right.

MR. LEVIN: -- an overwhelming right when compared to any right that -- to any Fourteenth Amendment violation.

QUESTION: Yes.

QUESTION: To reach the constitutional issue.

MR. LEVIN: They reached the constitutional issue.

And so we have with this -- if there was never a fact in the case, we still have a rule of law that exists in the Fifth Circuit that we think needs corrected.

QUESTION: Well, it wouldn't exist if this Court affirmed that prong of the Fifth Circuit judgment, not on the basis which the Fifth Circuit took, but on the grounds that no showing of an equitable nature was made out to

support such an injunction.

MR. LEVIN: Yes, sir. Or Petitioner's suggestion would be, rather than that, this is a situation where the District Court should have an opportunity to reexamine the factual situation on remand, and it might turn out to be administratively burdensome, in that the District Court is going to make findings of fact based upon evidence that it did have before it that was not included in the record going to the Fifth Circuit.

QUESTION: Is this too simple, Mr. Levin, is it, what you think ought to be held here is that whether this is a private academy or a private club, social club or anything else, that provided it has a problem with segregation, of excluding Negroes' participation in its affairs, that in that circumstance no public facility should be open to it -- no public recreational facility should be open to it for the furtherance of any program of that organization?

MR. LEVIN: That would be an accurate statement of our position.

QUESTION: How about art galleries?

MR. LEVIN: Once again, I don't know that -- an art gallery has never been in issue in any of these recreational cases.

QUESTION: Well, let's suppose, let's suppose the academy, the private segregated academy says that on Saturday

morning, or Friday afternoon the third and the fourth grades will go to the Gallery, as part of our enhancing your appreciation of art.

MR. LEVIN: Right.

QUESTION: Do you say they can't get in?

MR. LEVIN: I think this, and again this is a little bit away from the recreational area, that in my opinion, aside from this case, that they should not be permitted the use because it's an enhancement of the curriculum of the school. And it's a school-oriented, school-initiated program, it's of vast benefit to the school. It is certainly something that should not be permitted --

QUESTION: Does it benefit the school or does it benefit the students?

MR. LEVIN: It's a benefit to the school. It enhances the school, it makes the parents --

QUESTION: Well, use of the streets would be beneficial to the school --

MR. LEVIN: Well, we have suggested two possible --

QUESTION: -- with the sewage systems, and the lighting systems, and so on.

MR. LEVIN: We have suggested two possible exceptions: one Mr. Justice Rehnquist promulgated in the Moose Lodge case, and that is the necessities of life. And that was once again mentioned in Norwood.

And the other is any bar that might totally ban the existence of the school, in reliance on something -- in reliance on Pierce vs. Society of Sisters.

Those are arguably exceptions, and streets, public sidewalks, sewerage facilities, those all come within, I think, at least the necessities of life exception that we've suggested.

QUESTION: Well, doyou really distinguish recreation from culture in this context, that is, the art gallery, the symphony concert? Suppose, for example, the city maintained or engaged a symphony orchestra to come and play, or a ballet, and they issued free tickets to all the students at public schools, but refused to issue free tickets to students attending private schools; do you think no equal protection question would arise there?

MR. LEVIN: I think that's very much like the Norwood case, where you issue free textbooks to all students in public schools, but not free textbooks to --

QUESTION: But textbooks are not quite like art galleries and theaters, because other people than students use them. These are public facilities I'm talking about, open to the public generally, but under the hypothesis of my question the students in the private schools would be excluded because they were students in private schools. Do you think that --

MR. LEVIN: Suppose they were students in private segregated schools --

QUESTION: Yes.

MR. LEVIN: -- and because the permission to use these facilities would enhance the school itself, and would be of great benefit to the school.

QUESTION: But, as I understand it, you don't go so far as to say that the schoolchildren should be barred the use of the public streets to get back and forth to the private schools, the private segregated schools?

MR. LEVIN: No, sir. We have specifically written to that several times, or at least tried to, in the --

QUESTION: How about lunch programs?

MR. LEVIN: Lunch programs. I don't see any distinction between lunch programs and textbooks. That may be the most analogous situation that --

QUESTION: Even free milk?

MR. LEVIN: We're getting far afield from recreational facilities, but --

QUESTION: Well, I'm not sure that -- they may not be recreational facilities, but don't we have to find some relief under --

MR. LEVIN: I could not draw a distinction between the milk situation and the textbook situation, because it's available from another source, you can buy milk from another

source.

QUESTION: How about inoculation against contagious diseases?

MR. LEVIN: Might well -- might well come under the --

MR. CHIEF JUSTICE BURGER: Well, we'll pick up at that point in the morning.

MR. LEVIN: All right. Thank you.

[Whereupon, at 3:00 o'clock, p.m., the Court was recessed, to reconvene at 10:00 o'clock, a.m., Wednesday, January 16, 1974.]

IN THE SUPREME COURT OF THE UNITED STATES

GEORGIA THERESA GILMORE, et al., Petitioners,	:	
v.	:	No. 72-1517
CITY OF MONTGOMERY, ALABAMA, et al., Respondents.	:	

Washington, D. C.,

Wednesday, January 16, 1974.

The above-entitled matter was resumed for argument at 10:07 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:

[Same as heretofore noted.]

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll resume arguments in No. 1517.

Mr. Levin, I think you have about seven minutes remaining.

ORAL ARGUMENT OF JOSEPH J. LEVIN, JR., ESQ.,

ON BEHALF OF THE PETITIONERS -- [Resumed]

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

I have only two further points I'd like to make with respect to this case.

We have provided the Court with an Addendum to Petitioners' Reply Brief, which is some 152 pages in length.

Now, all of this evidence found in this Addendum was introduced in Judge Johnson's court, in the District Court, in the 1970 phase of the Gilmore case, that's the phase that dealt with equalization of public recreational facilities in Montgomery.

This present litigation, that is, this motion for supplemental relief in the Gilmore case, was initiated less than eight months after the order of the Court approving the agreement between the Petitioners and the city in that Gilmore case.

These facts are material because they were before Judge Johnson by virtue of his authority to take judicial

notice of his own court records. And because the testimony therein would have clearly supported the injunction with respect to private segregated clubs and organizations' use of public recreational facilities.

I think the key word in examining these facts is "shift". There was a shift of white recreational programs which were formerly in the province solely of the city, in the Recreation Department, to private clubs and organizations. So that the city maintained control only over the black recreational programs.

Now, Mayor James himself, at the Addendum page 19a, who was the Mayor at the time that all this went on, admitted that the YMCA city coordination agreement, which we discussed yesterday, and this is a quote, controlled, quote, "not only the YMCA, but also the Boys Club and all of the others."

So that the shift was not only to the segregated YMCA, but in the Addendum, 75a to 84a, you'll see it was to a white Babe Ruth League, to a white Dixie Youth League, parallel to the Little League, which was a black league, to the white Civic Club softball teams, and to the white Church League softball teams.

That these private segregated clubs were making use of public recreational facilities, extensive use.

The result is a resegregation of recreational

facilities in Montgomery.

And even if one ignores the specific finding in Smith vs. YMCA that this was done with the intent to avoid desegregation of public recreation facilities, certainly the foreseeable result of these activities would have been to resegregate those facilities.

I'd like to make one final comment on exclusive use, which we discussed with respect to the private segregated school situation yesterday, and that is that it's not simply some abstract theory that the Fifth Circuit discussed in support of a legal doctrine.

The District Court was specifically instructed to include the exclusive-use doctrine in its new injunction on remand, and this it did, and that's found at page 29a of the Appendix.

QUESTION: I suppose that reflects the traditional practice of this Court, following Brown vs. Board of Education, of entering orders making parks and like public places open to members of minority races?

MR. LEVIN: I'm not -- I'm not sure what Your Honor means.

QUESTION: Because in, probably before you were born -- we had cases here involving the, a park or a swimming pool where a racial minority couldn't go to play baseball or walk or have a picnic or swim, and our decrees in those cases, as

I remember, merely forbade the city from barring him from --

MR. LEVIN: Excluding racial minorities.

QUESTION: Yes. And I suppose that's reflected in the Court of Appeals approach that up to that time many of the parks, in some areas of the country, had been turned over exclusively, as you know, to the dominant race.

MR. LEVIN: Well, of course that was the same situation that existed in Montgomery in 1959, when the initial Gilmore case was brought.

QUESTION: Yes.

MR. LEVIN: However, the Fifth Circuit, as best I recall, did not discuss -- that may have been an underlying reason, but it was not discussed in the opinion. And exclusive use seemed to be directed more at insuring that individual students or individual citizens did not become subjected to an exclusion from public recreational facilities.

But, of course, the District Court's order never -- was nothing in the District Court's order which would have done that, anyhow.

And that was why I couldn't understand the reason for the exclusive-use doctrine being incorporated into the Fifth Circuit's opinion. I think that as a matter of law that it's erroneous. But it is the law with the Fifth Circuit now, and it is --

QUESTION: I think historically it was the practice that this Court, in its earlier decisions on recreational facilities, and the Fifth Circuit, struck down.

It's not exclusively, it's everybody.

MR. LEVIN: I agree. With the exception of private segregated -- when you're assisting private segregated schools and thereby detracting from the public school system, in the peculiar situation that you have in the South and in Montgomery, then of course you enter into another area, where you can't give support, you can't enhance the programs of these private segregated academies.

QUESTION: Well, if I understood you correctly yesterday, counsel, and perhaps this could be cleared up: If five or six young men, or eleven young men came down, individually, to play football or volley ball, or whatever, they could come in. But if they came down in the uniforms of the private school, playing in connection with an intramural athletic program, they could not use the facilities. Is that right?

MR. LEVIN: Not if it were a school-initiated activity.

Individually, there's no difficulty, and we've never -- would certainly never make any attempt to keep any citizen out of public recreational facilities. That's never been the point.

But as a school-initiated program, either curriculum or athletic program, it would be prohibited under our theory, yes.

QUESTION: Well, counsel, I take it that the District Court would have barred the exclusive use of public recreation facilities by any private club that had an express discriminatory policy, and the Court of Appeals reversed that.

MR. LEVIN: It would have -- the District Court would have barred the use, period.

QUESTION: That's right.

MR. LEVIN: The use by a private segregated club, and the Fifth Circuit reversed that in full.

QUESTION: In full. And the effect of that is that a private club with an expressed discriminatory policy may use public recreation facilities?

MR. LEVIN: Yes.

QUESTION: Whether it's exclusive or non-exclusive?

MR. LEVIN: That's correct.

Well, I see that my time is up. If there are no further questions.

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

Mr. Phelps.

ORAL ARGUMENT OF JOSEPH D. PHELPS, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

At the outset, I'd like to clarify just a little bit concerning the record in the case, and specifically the Reply Brief that the Petitioners filed last week, in which they attached depositions or parts of depositions as Addendum.

Now, these depositions were taken, as Mr. Levin pointed out, in 1970.

Well, I think maybe it may be well to go and look at the sequence or chronology of this case.

It was -- the original complaint, as pointed out by Mr. Levin, was December 28th, '58; order closing the case by the District Court on April the 22nd, 1964. Then in 1970, on August the 12th of 1970, the Petitioners filed a motion to cite for contempt and for relief.

And in that August 12, 1970 motion, they did raise the issue of this resegregation. They raised the issue of the YMCA case, which had been decided a month before. It was pursuant to that hearing that these depositions were taken, or it was pursuant to that motion that these depositions were taken.

And that case resulted in the joint filing of a

plan for extensive improvement of recreational facilities throughout the city. In Montgomery, as many other communities, we had recreation facilities in one part of town that wasn't as good as another. So, I mean the black community wasn't as good as some in the white, some portions of the white wasn't as good as other portions of the white.

But, be that as it may, the city, by joint motion, agreed to equalize all facilities. We had just finished a Community Center at the time of the filing of the petition. It was completed about that time, in a low-income and Negro area.

But, be that as it may, we say that facilities ought to be as good as we can possibly make them all over town. We agreed to do that, and Judge Johnson approved this plan and found that that was disposing of all of the issues before the court. And that was in December of [sic] 1971, when the District Court said that the joint plan disposed of all issues before the court. And that is in the Appendix, in the very outset, when the chronology of the case is set forth.

Then, following that, and after all those issues were disposed of, in September of 1971, the Petitioners came along and filed a petition for supplemental relief, and that's the basis of this present proceeding.

Now, the basis for the supplemental relief was

largely, and I think a fair reading of it discloses that it dealt with private schools, and private academies.

Let's go for a moment and look at the deposition that Mr. Levin attaches to his Reply Brief, and he includes, and I think very significantly in this case, if you look back at those depositions, they skip from page 20 to page 40 in some instances, and a whole lot of them are omitted.

Now, we didn't have an opportunity -- he didn't designate these as part of his appendix, and of course we had no opportunity to counter-designate, so we have delivered to the Clerk's Office the entire depositions, and we then ask the Court: If they do need these depositions, that the Court deems these depositions are appropriately before the Court, all of them should certainly be considered.

For example, he talks about segregated Babe Ruth, well, on page 15 of the deposition of Mr. McKeen -- and he omitted this from the part he put back in this Addendum -- as far as Babe Ruth is specific in here, it says: "No distinction made between black and white; absolutely not. There has never been any distinction as far as Babe Ruth Leagues nationally or from the State. No distrinction with regard to race."

That's omitted from what he's got here, but we have delivered it to the Clerk's Office.

Mr. McKeen said they put out notices at all schools

for children who want to play Babe Ruth, for boys that want to play Babe Ruth, to come and attend.

Dixie Youth. He mentioned that this morning. He mentioned that in his Addendum. He attached some depositions of Mr. Marshall, but he didn't attach them all. And the parts that he didn't attach says this, on page 16: "No restriction against blacks playing. All Dixie Youth Leagues invite black boys to come out. No boy is excluded because of race."

"These are formed on a geographic population basis, in which black neighborhoods and communities are included." On page 26.

Page 30: "Blacks are in fact on Dixie Youth teams."

On page 30: "Solicitation done for Dixie Youth in black neighborhoods."

Page 32: "For the coming year, more blacks were urged and hopefully would come out."

And in point of fact they did. In point of fact, Babe Ruth Leagues, athletics in Montgomery, Alabama, and throughout the State of Alabama, encourage participation by all people without regard to race or color.

Alabama, as a matter of fact, is proud of the black athletes that play for our colleges throughout the State. The University of Alabama, for example, has many, many black players on the starting basketball team that played the University of Mississippi the other night.

But, be that as it may, the depositions that he attaches here are not complete. And these were submitted in August 1970, prior to the plaintiffs and the city agreeing on this joint plan for improvement.

Why were they able to agree on the joint plan for improvement and not go into the issue of, quote, "resegregation" in their "disposing of all issues"?

I submit to you that the depositions that were on file in the District Court and there were left out, however, from what he sends up here, establish why they did that: because they saw that there was no distinction in this Babe Ruth, Little League, or anywhere else.

As far as the City of Montgomery is concerned, he attaches a deposition, parts of a deposition from a Mr. Bozeman. What he doesn't attach shows that there is integrated participation in public recreation throughout the spectrum of Montgomery, Alabama. Football, basketball, baseball are integrated, you have integrated teams playing integrated teams; and predominantly white playing predominantly black throughout, on page 49, 50 and 56 of Mr. Bozeman's deposition, which significantly he didn't attach.

So we think, first, that the issues on which --

QUESTION: Mr. Phelps, I'm sorry -- I don't know that I follow you. Are you -- is this an argument, that this case has already been settled between the parties?

MR. PHELPS: No, sir, it's an argument that the depositions that he refers to establish that the City of Montgomery does not discriminate in recreational activities and programs because of race or color. And it is an argument, too, sir, that this was before the District Court in 1970, when the District Court approved a joint motion for improvement. The issue was before the court on this alleged resegregation.

QUESTION: Well then, yet the District Court entered the injunction that then was modified or aversed, as you please, by the Court of Appeals?

MR. PHELPS: Yes, sir.

QUESTION: Notwithstanding this, all this material was before the District Court in 1970?

MR. PHELPS: Yes, sir. The District Court, in the order forming the basis of this appeal, if it please the Court, however, made no finding of resegregation.

And we're saying to the Court that the reason he made no finding of resegregation is because, in point of fact, there was none.

He said this, when this joint improvement petition was approved, he said --

QUESTION: On what, then, did he rest the injunction? Judge Johnson.

MR. PHELPS: I think he rested the injunction on the

fact that,the pure and simple fact, that an all-white private school should not be able to use a municipal facility, one. And then, secondly, on the issue of private organizations, without resegregation, private organizations shouldn't use municipal facilities if they have a racially discriminatory admissions policy.

I don't think, and the point I'm hoping to make, and maybe I'm not doing it too clearly, is that the issue of resegregation was not part of the District Court's order. It was not part of the District Court's order.

The District Court, in the order that forms the basis of this writ, found that the city made facilities available to all on a non-discriminatory basis. When he had these depositions before him, back in 1970, what did he say when we filed the joint motion for improvement?

The District Court said: It further appears that the implementation of said agreement and plans will dispose of all of the issues involved in this litigation.

And what were those issues?

Those issues included the issue of this alleged resegregation.

QUESTION: Well, are you suggesting, Mr. Phelps, that in light of that finding that is, in itself, enough to suggest error in the injunction that he granted?

MR. PHELPS: No, sir. I think that tells us this:

Mr. Levin, on his Reply Brief and in this Court, contends that there has been some type of resegregation. He says the District Court is bound to have known that.

We state to you that the District Court knew to the contrary, because of the portions of the testimony that was already before him, he knew to the contrary. Resegregation didn't enter into it. As --

QUESTION: But my problem, Mr. Phelps, -- perhaps I'm not following it -- I don't quite understand, assuming that this all quite so and that, indeed, there was no question in resegregation. Nevertheless, the District Court entered the injunction.

MR. PHELPS: That's right.

QUESTION: On what basis? On what was it predicated?

MR. PHELPS: I think it was predicated on the District Court's feelings and understanding of the law, that because a private club had a racially discriminatory admission policy, that private club should not be permitted to use a public recreational facility.

I don't believe that the District Court intended to imply by that that the city was guilty of any evasion of a prior court order. As Judge Clark pointed out on footnote 14, in the Circuit Court opinion, this case does not involve any evasion of the city's responsibility to operate recreational facilities on a desegregated basis by the

subterfuge of converting such facilities to private control.

The District Court had been presented with substance for that finding, and even the plaintiffs themselves, in the Fifth Circuit, on page 12 of their brief in the Fifth Circuit, took the position in the Fifth Circuit of racial neutrality on behalf of the city.

The fact that the State officials have presented a racially neutral policy, and that the actual discrimination has occurred at the hands of private individuals has never been viewed by the courts as a significant factor in determining the constitutionality of State action.

Mr. Justice Brennan, the purpose of my going into this was that this matter that we're here today on was not tried before the District Court on an issue of resegregation. It was not presented to the Circuit Court of Appeals on an issue of resegregation.

We submit to you that it could not have been, because such is not the fact. And we don't go out in thin air and just say that without support. We say it is not the fact because the depositions that were actually before the District Court, as Mr. Levin points out earlier, when this issue was raised, they asked more than just improvement in August 1970, they asked for contempt, and they asked that we be enjoined from allowing these private groups to do it.

The District Court didn't order that. He approved

the improvement of the facilities without finding, as Judge Clark said, any involvement of the city's responsibility.

QUESTION: Mr. Phelps, what's your position with respect to the footnote 12 in Judge Clark's opinion, the Court of Appeals saying that the District Court made no findings about history, frequency, or effects of public recreational facility use by such non-school-affiliated organizations; and the case was tried on stipulated facts, nothing was stipulated which would support this prong of the injunction?

MR.PHELPS: I think Judge Clark is correct, sir. And I think the posture of the case is, was it, as it was presented to the Court of Appeals and the District Court is such that you really could never do it.

They asked for a broad spectrum, an order affecting every private club of every nation, if they've got a discriminatory admissions policy. How would you ever be able to go into the history, frequency, or effect of more than a hundred, and, gosh, it's literally hundreds of private organizations that use municipal facilities.

QUESTION: Well, as I understand Judge Clark, he's saying, you know, even if you could have done that, or even if you could have done it by a representative sampling, in fact they didn't do it in this case. Neither you nor your opponent.

MR. PHELPS: It wasn't done in this case. It was presented to the District Court on a stipulated facts, that all of the facilities were open to all on a non-discriminatory basis.

Now, I don't think that this case is the proper vehicle to go down and have a blanket order in Montgomery, Alabama, applying to all types of private clubs, regardless of their size, regardless of the purpose, regardless of the frequency of use; a blanket order is, what Judge Clark says, that they was too broad.

And I think that that's well supported by the law. I think we can't speculate, we can't guess about the involvement vel non, I don't believe that's this Court envisioned in Burton, and I think, as this Court said in Norwood, you can't just assume that all of these things are invidious. And that's what they're asking in this case is an order, a blanket order, saying any club with a discriminatory admissions policy can't use municipal facilities.

QUESTION: Well, was this -- did this order we have here arise -- it arose from a supplemental petition in a case that had been long filed in the District Court?

MR. PHELPS: Yes, sir.

QUESTION: And the original order in '59 was that the city was segregated in its recreational policies?

MR. PHELPS: The '59 order ordered all facilities

open to all.

QUESTION: Yes. Yes. Now, do you -- would it have been proper, as part of that order, as an effective remedy, to say that private clubs couldn't use, if they had a discriminatory policy, could not use city recreational facilities?

MR. PHELPS: I don't believe so, Mr. Justice White. And I feel strongly that it would not have been, for several reasons.

One, I don't believe that the city is under an affirmative duty to require desegregation in private clubs.

And, secondly, these private clubs, as pointed out by the Court of Appeals, are entitled, we think now as well as then, in the periodic use of public facilities. They wasn't found here and assume they wouldn't --

QUESTION: Well, did Judge Johnson ever articulate any reason or basis for entering this supplemental injunction that included this prohibition against use by private clubs?

MR. PHELPS: No, sir. As Judge Clark commented, no findings were made on any evasion of the city's responsibility. There wasn't any finding that these private clubs were places of public accommodation or any nexus between the private clubs and the municipality.

QUESTION: Mr. Phelps, you said that returning to resegregation was not the issue before Judge Johnson; what was

the issue?

MR. PHELPS: The issue before Judge Johnson, Mr. Justice Marshall, was whether or not, just because a club has an admissions policy that excludes either whites or blacks, whether that in and of itself would preclude that organization from the use of municipal facilities.

QUESTION: And that's what is before us now?

MR. PHELPS: As I understand it, Mr. Justice Marshall, that's the question before you.

Now, I'd like --

QUESTION: The reason you're here, Mr. Phelps, if I may say so, is to defend the judgment of the Court of Appeals, isn't it?

MR. PHELPS: Yes, sir.

QUESTION: The modification of Judge Johnson's order.

MR. PHELPS: Yes, sir.

QUESTION: And I think perhaps some of us have been confused as to why this background, how it related, closely at least, to the modification made by the Court of Appeals.

MR. PHELPS: The background, sir, was necessitated, I thought it was, becasue of this Reply Brief that was filed last week in which they attached only portions of some depositions, and I thought it appropriate to call to the attention of the Court that there was a great deal more

that was brought out, even back then, that he didn't see fit to include; and that was the purpose of my going into that portion of the background.

QUESTION: Mr. Phelps, may I come back to this paragraph 3 of Judge Johnson's order that says that -- it refers to the use of these facilities by any private group, club, or organization. Is there any definition in the record anywhere of a club or an organization or a group?

MR. PHELPS: No, sir.

QUESTION: Would this embrace a ladies' bridge club or --.

MR. PHELPS: I think this would, if YOur Honor please, would embrace the spectrum from Muslims to Mormons, with Lions Clubs and Civic Clubs and Ladies' Garden Clubs and Bridge Clubs, and just everybody; from a group of five to five hundred.

It would embrace the Moose Lodge, the Shriners, the -- every conceivable type of private club: political, social, fraternal, charitable. All are embodied, as we see it, under this order.

QUESTION: What's a group?

MR. PHELPS: I imagine a group would be two or more people, that would have some type of club relation between them. And that would be up to the two or more people to determine what that was.

I guess three of us could form a group.

QUESTION: And there's nothing in Judge Johnson's order that sheds any light on what he may have meant by using those words?

MR. PHELPS: Not that I can see, if the Court please; there's nothing in his order that discusses any type of use or how they go about using it. And I think Judge Clark, in the Fifth Circuit order, points that out.

QUESTION: Mr. Phelps, getting back to what Mr. Justice White asked you earlier. Really, to decide this case, doesn't one have to go back to the 1959 order and its underpinning at that time?

MR. PHELPS: I think this, Mr. Justice Brennan. We have to see, of course, that there was an order as to prohibit segregation in municipal recreational facilities.

QUESTION: And that was the 1959 order?

MR. PHELPS: That's right.

QUESTION: And might one look at this 19- -- what is it, '70, '71 order of Judge Johnson as simply a sequel, a supplement, as a further remedy to redress the situation that he found in 1959?

MR. PHELPS: I think so. I think it has to be looked at in the context, though, Mr. Justice Brennan, that no resegregation has been written to at any stage, and I think the record is barren of any support of resegregation.

QUESTION: Well, what I meant to suggest was -- and perhaps it doesn't stand up -- but what I meant to suggest was, if it were that this later order is simply a supplement to the original order, then the issue of resegregation is rather irrelevant, isn't it?

MR. PHELPS: I'm not sure I understand --

QUESTION: Well, I don't see what resegregation -- if this later order is just a further order, adding to the 1959 order, in order to give effect to the 1959 order, then is the issue of resegregation very relative?

MR. PHELPS: Let me say this, sir. I don't feel that this present order is even germane, really, --

QUESTION: I see.

MR. PHELPS: -- to the 1969 [sic] order, because that opened everything up. And now they're coming along and the petitioners asked that it be closed to a particular group because of the racial admissions policy of that particular group.

QUESTION: Well, then, why did you -- do you concede that the Court of Appeals was correct in affirming Judge Johnson with respect to the schools?

MR. PHELPS: Yes, sir.

We make no issue about private schools in this proceeding, we don't think that it's even an issue, the affirmative duty on the school boards in the municipality to --

QUESTION: But the -- you agree the city may not make -- may not make public recreational facilities available to a private school in the manner that they can make it available to a private club?

MR. PHELPS: I think that -- well, let me say --

QUESTION: Well, isn't that a yes or no question?

MR. PHELPS: I'm not sure, sir. I'm not --

QUESTION: Well, did the Court of Appeals, with whom you say you agree, said that the city may not make its recreational facilities available on an exclusive basis, even periodically, to a private segregated school; whether it has a racial discriminatory policy or it's just all white.

MR. PHELPS: Yes, sir.

QUESTION: Didn't it?

MR. PHELPS: Yes, sir.

QUESTION: That's what it -- and you said you agreed with that?

MR. PHELPS: We do not contest that, we think that's a different situation.

QUESTION: Well, why is the situation different with respect to a private club that has an expressed discriminatory policy?

MR. PHELPS: Because the city, as we understand it, has no affirmative duty to maintain desegregated or --

QUESTION: Well, it has an affirmative duty

because it is under an order of the federal District Court affirmatively to quit discriminating. It's under an order.

QUESTION: That's the '59 order.

QUESTION: That's under the '59 order.

MR. PHELPS: That's right.

QUESTION: And you're still subject to that order.

MR. PHELPS: Yes, sir, and we say we abide by it.

QUESTION: And it may be that generally, absent such an order, you -- that the city -- that pure neutrality would be unexceptionable.

But if they're under an affirmative duty, under an order, how do you distinguish between schools and clubs?

MR. PHELPS: All right. I read the '59 order to say: open up your recreational facilities, open them up without regard to race or color. Don't keep any group out -- sir?

QUESTION: And keep them open.

MR. PHELPS: That's right. And keep them open. And don't turn a Negro group away or a white group away.

And I don't think that the '59 order, or any decision of this Court, puts a burden on a municipality to delve into the racial composition of these groups.

We think we are strict accord with the '59 order.

QUESTION: Because you're not running them, yes. But you do have to -- you do have to inquire about schools?

MR. PHELPS: Yes, sir. I think you have to go --

QUESTION: Why with the schools?

MR. PHELPS: I think you have to go into racial composition there, because we have to see that desegregated education is not interfered with and not retarded, as this Court pointed out in Norwood vs. Harrison.

But I don't think that government at any level should be placed with the responsibility of delving into the membership policies of church clubs, social clubs, and political organizations. We think that -- we don't believe the '59 order or Watson vs. Memphis, or any other decision, requires us to do that.

Now, I'd like to say this. Mr. Levin says that Montgomery, Alabama, should be treated apart from other parts of the country, and he says that for some reason there's something different about the situation here.

This community and this area has struggled with problems of desegregation and removal of discriminatory practices, and we feel that when we come before this Court and say that we're open, that our facilities are open to all, it's not an empty promise or just a statement, it's documented by the facts as they exist right in Montgomery.

For example, two members of the Respondent Board that are before this Court today are black leaders in Montgomery. They were appointed without any court compulsion,

and they are there and a part of this case. A black man is presently the Recreation Director for the entire program.

There have been extensive construction of facilities throughout the City of Montgomery; some by virtue of the joint proposal filed in 1970 and '71, and some go far beyond that. It's without dispute. And they don't dispute this in their Reply Brief, that Montgomery is commencing the construction of a municipal golf course, with swimming pools being opened. Swimming pools being opened that will be available to black people and white people and everyone, without regard to race or color.

There's desegregated participation in muncipally sponsored recreational activities, as pointed out in the portions of the record that he did not include, and also in the Appendix itself, on pages 55 and 53, 17 of those 31 football games involved desegregated teams playing desegregated teams.

The August the 1st Stipulated Facts, on which this record is before this Court, says and states and agrees between the parties that all recreational facilities throughout the City of Montgomery are open to all on an equal basis, with all persons of the community having equal access thereto, without regard to race or color.

That's not just an empty statement, if the Court please, it's supported by the actual facts that are living and existing in Montgomery, Alabama, today.

A comparison of the style of this case from the Appendix, of how it started out, with the parties that are there now, show that there's been a complete change in the Park and Recreation Board. We've got a new Mayor. We've got new members on a bi-racial Park and Recreation Board there in Montgomery. The leadership now in this area is coming from bi-racial groups.

QUESTION: Doesn't Judge Johnson live in Montgomery?

MR. PHELPS: Yes, sir.

QUESTION: Doesn't he know all of that?

MR. PHELPS: Yes, sir.

I think that he does. I think, in answer to Mr. Justice Marshall's comment, that he decided this case prior to this Court's decision in Irvis, I think he thought that if a group had a policy of allowing only blacks or only whites in there, that, in and of itself, as a matter of law --

QUESTION: No, I'm talking of all this about how great Montgomery is on the race question. I mean, Judge Johnson knew that, but he still put this order out.

MR. PHELPS: Yes, sir. And what I say to the Court is true --

QUESTION: He knows it better than we do.

MR. PHELPS: Well, these facts are true, if the Court please. We've got these participants down there, and we state to the Court that discrimination in recreation in

Montgomery, Alabama, as Mr. Justice Brennan mentioned, the [sic]
1969 order, we say we're in strict compliance with it.

Any discrimination on behalf of the City of Montgomery, Alabama, has been removed, we respectfully submit to the Court, root and branch.

MR. CHIEF JUSTICE BURGER: Mr. Phelps, the electronics system is not functioning again today; you have two minutes left. There won't be any light signal.

MR. PHELPS: Mr. Justice Marshall, the District Court, in the order that's before this Court, made the finding that the respondents allowed all persons and groups to use recreational facilities specifically, and I quote Judge Johnson, --

QUESTION: Well, why did he issue the order?

MR. PHELPS: I don'tknow, sir. I think because he understood the law to be that we had to go into the racial composition and see what kind of admissions policies all types of --

QUESTION: Did he say that?

MR. PHELPS: No, sir. He said this, and I quote: "The City of Montgomery makes football, basketball, and baseball facilities available to all on a non-discriminatory basis to any private groups who apply for them." "On a non-discriminatory basis."

I agree with you, sir, that the District Court does

know that we've got two black members on the Board, and it comes out and publicizes in the press that a black man is heading all of the recreational programs throughout the City of Montgomery.

Now, in conclusion, let me say this: They want to use the vehicle of this desegregation case to go into all of the admissions policies of various groups, regardless of the size, composition or purpose of the group.

We don't feel, in this case, on remand or otherwise, that this is the proper vehicle to do it.

They had a group that they brought before the Court in the YMCA, and the Court found that the YMCA really wasn't private because of their all-encompassing membership, and therefore, in the connection that city and the white cooperating, an order was entered.

If they have any examples that they feel like the city is using or is using the city for subterfuge, those parties, as Mr. Justice Black said in Palmer vs. Thompson, ought to be before the Court.

We respectfully submit to the Court that the two he mentions today, the Babe Ruth and the Dixie Leagues are not discriminatory, as is evidenced by the portions of the depositions that he didn't include.

But this case is not the vehicle, we respectfully submit, to go in and to put a municipality on the basis of

defending its relation with all types of private groups. We think that in Burton the Court envisioned a sifting, an analysis of circumstances; and with the broad spectrum that they seek here, we say that this case is not the vehicle.

As Mr. Justice -- Chief Justice Burger stated in Norwood vs. Harrison, no presumptions flow from mere allegations. No one can be required, consistent with due process, to prove absence of violation of the law.

If they've got a specific, they've got judicial recourse.

But, better than that -- better than that, if they've got something that they feel like is resegregating, if they'll bring it to the attention of the Park and Recreation Board of the City of Montgomery, if they'll bring it to the attention of the bi-racial Park and Recreation Board, I think it will be remedied. And I state that it will be remedied, without the necessity of judicial intervention.

I think that's the posture of this case, that's the posture of what Montgomery, Alabama, is trying to do. We've made progress.

He says in his brief: We applaud it.

We are proud of the progress that we've made. We think that the facts, undisputed and documented, speak for themselves, that public recreation -- public recreational facilities in Montgomery, Alabama, are open to all, without

regard to race or color.

And we ask this Court to allow us to continue to keep them open to all.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 10:47 o'clock, a.m., the case in the above-entitled matter was submitted.]

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