In the

Supreme Court of the United States

SYLVIA MEEK, et al.,

Appellants,

v.

JOHN C. PITTENGER, etc., et al.,

Appellees.

No. 73-1765

Washington, D. C.
February 19, 1975

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v.	:	No. 73-1765
JOHN C. PITTENGER, etc., et al., Appellees.	:	

Washington, D. C.,

Wednesday, February 19, 1975.

The above-entitled matter came on for argument at 10:51 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, 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; on behalf of the Appellants.

WILLIAM P. THORN, ESQ., 12th Floor, Packard Building, Philadelphia, Pennsylvania 19102; on behalf of the Appellants.

WILLIAM BENTLEY BALL, ESQ., 127 State Street, Harrisburg, Pennsylvania 17101; on behalf of Appellees Jose Diaz, et al.

APPEARANCES [Cont'd.]:

J. JUSTIN BLEWITT, JR., ESQ., Deputy Attorney General of Pennsylvania, State Capitol Annex Building, Harrisburg, Pennsylvania 17120; on behalf of Appellees Pittenger and Sloan.

HENRY T. REATH, ESQ., Duane, Morris & Heckscher, 1600 Land Title Building, Philadelphia, Pennsylvania 19110; on behalf of Appellees Chesik, et al.

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C O N T E N T S

[Afternoon session - pg. 49]

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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 73-1765, Meek against Pittenger.

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

ORAL ARGUMENT OF LEO PFEFFER, ESQ.,

ON BEHALF OF THE APPELLANTS

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

This case is a challenge to three statutes enacted by the State of Pennsylvania in 1972.

This Court, in 1971, in the case of Lemon v. Kurtzman, had previously declared unconstitutional a statute providing for the practice of secular services by non-public schools; and the Court held that that violated the Establishment Clause.

Thereafter, the district court in the Eastern District of Pennsylvania held unconstitutional another statute which provided for reimbursement for tuition paid by parents for their children attending non-public schools. That was declared unconstitutional as a violation of the Establishment Clause.

And while that case was pending before this Court, on an appeal to this Court, the Pennsylvania Legislature enacted a package of three statutes: Acts 194, 195 and 204.

Now, Act 204 can be disposed of very briefly. It

increased the amount which had originally been appropriated for the tuition grants payment, although the law had already been declared unconstitutional by the Eastern District Court, and whether that case is now moot, that part of our case is now moot because this Court confirmed the District Court; so that part of the complaint which we alleged is now moot.

But before this Court is the constitutionality of Acts 194 and 195.

Briefly, Act 194 provides for financing of tax-raised funds, or what are called auxiliary services, in non-public schools.

I don't want to spend time reading the definition, it's contained in the -- certain jurisdictions contained in the Appendix, also contained on page 4 of our brief.

Act 195 has three separate provisions, all providing for tax-support of services in non-public schools. One provision provides for textbooks, another for instructional materials, and a third for instructional equipment.

The definitions of each are in our brief.

Now, the amounts appropriated in 1972 was $31 million, and then the following year it was increased to $35 million per year, which is where it is now subject to further increases which we may assume will take place.

The District Court, by a vote of two-to-one, held -- upheld the constitutionality of the auxiliary services

provisions unanimously, although Judge Higginbotham was quite reluctant, obviously reluctant to go along, but he did, for reasons I frankly am not able to understand, upheld the constitutionality of the textbook provision. On the instructional materials, again we had a two-to-one split, with Judge Higginbotham dissenting. On the instructional equipment, we have sort of a compromise.

Part of the statute was declared unconstitutional unanimously, and part of it was declared constitutional in respect to, and this Court read this into the statute, "to such instructional equipment which from its nature cannot be readily diverted to religious purposes and is particularly designed or designated for secular educational purposes provided for in the statute and its duly-promulgated guides for the administration of such statute."

Now, as far as the appellants are concerned, there are no contested-fact situation in this case. We believe the statute, on the basis of decisions of this Court, is unconstitutional on its face.

We would like to put this case in proper perspective.

We do not challenge the right of -- we do not challenge the right of pupils in non-public schools to obtain these services, all of them; we challenge the right to obtain these services as part of the over-all program of religious education in religious schools.

Now, we concede, we recognize that it is more convenient to bring the services to the children than to have the children come to the public schools -- we're not talking about requiring children to enroll in public schools for the complete program -- but to come to the public schools for these additional services and benefits.

Now, we recognize that it's more convenient the other way.

But it's our contention that the values protected by the religion clauses of the First Amendment, which this Court spelled out and emphasized again in Wisconsin v. Yoder, and again in the Nyquist case last year or the year before, that these values are so dominant in our democratic concept and hierarchy of values that the inevitable, somewhat -- were an inconvenient method of delivering these services through requiring the children to come to the religious schools, as they do in released time practices, which this Court upheld in 1952.

Now, that is undoubtedly less convenient than the other way, but the high estate in which both the free exercise and the Establishment Clause, as the Court has pointed out, which has held in our hierarchy of values, requires this somewhat modest sacrifice.

Now, there's another fact which we deem of vital importance, and we deem it may be the heart of this case.

Now, this case does not come to this Court, this la raza _____, which faced the nature of the educational system in Pennsylvania in relationship with the non-public to the public schools and the religious schools, among the non-public schools, was before this Court in Lemon v. Kurtzman and then again in Sloan v. Lemon.

Now, it is uncontested -- this was uncontested -- that in administering the law, and we have the Appendix citation, page 847 or 48, the Commissioner of -- who has had the obligation to enforce -- will agree that in administering the law there are certain eligible requirements, requiring the curriculum of the school and so on.

But not included in these eligible requirements and not deemed to be disabling is the fact, for example, that the schools restrict admissions on the basis of religion, or that the schools require all students to participate in religious instruction as condition for their continuance in the school.

Or that the schools serve a major religious purpose in their functions.

Now, the State of Pennsylvania takes the position that these are not disabling factors, that, notwithstanding these facts, the schools and the students attending those schools are entitled to the full benefits of the Act.

Now, there's one constitutional provision, there's

one which, to me, is as close to a categorical imperative in constitutional law as we can get.

I submit that whether you look at it from the First Amendment, the Fifth, the Ninth, or the Fourteenth, it is simply not within the concept of our constitutional concepts, of our constitutional dictations, that a service which is financed with funds raised to compulsory taxation of all citizens, from such service any citizen can be barred because of his religion or because of his race.

This is as close to a categorical imperative I can see.

And only second to that is that such a school can condition -- can condition participation in the benefits universally financed upon the students participating in religious services or religious sectarian instructions.

This is, if Your Honors please, to me the heart of the case. And, as I say, it is as close as I can see to a categorical imperative.

The Court pointed that out in Norwood v. Harrison, in which it held that textbooks, through one of the provisions of our law and one of Act 195, could not be appropriate, could not be sent to private schools which discriminate on the basis of race.

And in Norwood v. Harrison, the Court pointed out to the dissenting -- or partly dissenting, partly concurring

opinion of Mr. Justice White in the Lemon v. Kurtzman case, that if a school discriminates or restricts admissions either on race or religion, or requires participation in sectarian instruction for students, that the services such as textbooks or other services, and the Norwood case dealt with textbooks, could not be made available in that school.

So that it is our opinion, it is our view, that on the basis of that alone, of that principle, the constitutionality of this statute cannot be held as interpreted in the previous cases of Lemon v. Kurtzman and Sloan v. Lemon.

Now, between the time that the district court handed down its decision in our case and the time, the present time, this Court affirmed the decision of the district court from the Third Circuit, in New Jersey, in the case of Marburger v. Public Funds for Public Schools. And the Supreme Court has since then affirmed, per curiam, that decision.

Now, the statute in that case, in the Marburger case, as far as I can read it, is -- there are some differences in detail, which I believe are secondary -- as far as the constitutional issue was concerned, presented in this case, I do not recognize, I do not see any significant constitutional difference between the statute in New Jersey and the statute in Pennsylvania. They came out of the same pattern, the language is in most of these statutes, the language is identical, the words, the setup is identical. They are

really, for all practical purposes, as far as I can see, they are identical statutes.

QUESTION: Does the Marburger case involve all three --

MR. PFEFFER: Yes.

QUESTION: -- auxiliary services and instructional materials and --

MR. PFEFFER: Yes.

QUESTION: -- textbooks?

MR. PFEFFER: Everything within this statute was involved in Marburger. And textbooks, too. They were somewhat slightly different in the way the textbooks were provided for, but I don't believe it's constitutional significant.

QUESTION: Well, what were the differences?

MR. PFEFFER: Well, the basic difference was, in the Marburger case, that the cost, the money for the textbooks was given instead of the textbooks themselves. Here the textbooks are loaned. But basically the same principle, they still came out --

QUESTION: The money was given, wasn't it?

MR. PFEFFER: Yes, the money for -- to reimburse the cost of the textbooks.

QUESTION: And how about auxiliary services?

MR. PFEFFER: No, that was similar to this.

QUESTION: And how about instructional materials?

MR. PFEFFER: Similar to this.

QUESTION: Similar or the same?

MR. PFEFFER: Similar. Well, I almost think identical. As a matter of fact, I think it's almost word for word; identical.

They obviously came out of the same pattern, the same mold. I don't think there's any basic difference.

QUESTION: I take it, Mr. Pfeffer, that you are going to treat each of these categories --

MR. PFEFFER: Yes.

QUESTION: -- separately at some point.

MR. PFEFFER: Yes, I'm going to do that right now.

QUESTION: Speaking for myself, that would be very helpful.

MR. PFEFFER: Yes. Well, now I want to -- I say that, I will do that, Your Honor, Mr. Chief Justice, but I note that in Marburger it was not. In Marburger, the District Court and this Court's affirmance held the entire statute unconstitutional.

Now, but for convenience purposes -- and I also submit that these statutes were enacted as a package, with the clear intent and purpose of recouping the money which had been denied by this Court in the other decisions.

Now, let us take the auxiliary services provision first.

First, I suggest that, as far as I read the First Amendment, there is no constitutional distinction between educational services, whether called auxiliary or non-auxiliary, auxiliary services is a new term, and it didn't exist previously, until just very, very recently.

But making -- calling auxiliary services -- calling educational services auxiliary services, they are still educational services.

Now, for --

QUESTION: I suppose you would agree, Mr. Pfeffer, that at the time the First Amendment was drafted, there were no services of the kind we now embrace in these areas.

MR. PFEFFER: I don't, Mr. Chief Justice, because the regulations --

QUESTION: Well, put it another way: You didn't have all the range of services provided --

MR. PFEFFER: No, but the --

QUESTION: -- that you have today.

MR. PFEFFER: -- bulk, the bulk you do have. Because the bulk -- the regulations which have been adopted by the State of Pennsylvania, which I have in my footnote 3 on page 15 of my brief, our brief, indicates that services, auxiliary services are defined as to include those services necessary to assist a student to perform at the grade level of his age and potential.

What does that mean?

That means that if a pupil is below the grade level, you have to help him get to the grade level. How do you do it? You give him more intensive education, after hours, or more intensive -- or what is often done, smaller class with more teachers. But it's simply educational services. The same type was involved in Lemon v. Kurtzman and Lemon v. Sloan, the Nyquist case, and every case that has come to this Court.

There is no school in the country which doesn't have students who are below grade level, except in Utopia, perhaps, or a school limited to geniuses. And it's the job of the teacher to take additional time to -- with a pupil below grade level, in some cases it would be above grade level and you will not need additional help. And to take time with them.

Now, that existed in 1787 as it does today, in every school. But calling it auxiliary services --

QUESTION: In 1787, of course, the First Amendment -- you said a minute ago the way you read the First Amendment, there is certainly nothing in the First Amendment that would suggest that it has anything to do with this case. It begins, "Congress shall make no law". This doesn't involve anything that Congress has done.

MR. PFEFFER: Well, but, Your Honor, the -- as this

Court has held, way back as far as Kaplan v. Connecticut --

QUESTION: Yes, but not back in 1787 it didn't.

MR. PFEFFER: Well, there was no Fourteenth Amendment in 1787.

QUESTION: Exactly.

MR. PFEFFER: Well, there was no Fourteenth Amendment and there was no -- there were practically no public schools either. But the principles laid down in 1787 are certainly broad enough to encompass everything which this Court has done in interpreting the First Amendment is applicable to our educational system.

Now, it is our contention that considered within the framework of the decisions of this Court, in 1971, Lemon v. Kurtzman, Earley v. DiCenso, and in 1973, Levitt v. Committee for Public Education and Committee for Public Education v. Nyquist, that this auxiliary services provision cannot stand.

What this basically does is to make a partnership of Church and State, it involves that entanglement of Church and State, which this Court, beginning with the Walz case, held was forbidden by the Establishment Clause. It requires the State to take part of the educational burden in the schools, the Church the other part, that work together, the teachers come in, they go out, they substitute supervision, it is a administrative entanglement, it is a entanglement in the sense which the Court in all these cases has emphasized, in

order to assure that the Establishment Clause is not violated by the use of instruction to propagate religious values, there must be surveillance. And the Court said, it said it as far back as Lemon v. Kurtzman and repeated it in Nyquist and Lemon v. Sloan, the we do not have to find that in any particular school -- there was no fact, there was no trial of facts in the other two Pennsylvania cases, the two Lemon cases -- we do not have to find that this teacher or that teacher did actually use her or his position to advance religious values.

The constitutional clause requires the State to take all measures to prevent that friction, that possibility, that temptation. And we submit that the State of Pennsylvania has not done that.

The State of Pennsylvania, and it indicated on the hearing, takes the position that you can trust the teacher. Well, I have no suspicion of any particular teacher, but that's not what the Amendment requires, as far as this Court is concerned.

The Amendment requires that there be no opportunity, there be no temptation, there be no conflict, possibility of conflict, or misunderstanding. And the only way, that's why the Court in every case since Allen in 1968, in every case which reached this Court involving aid to religious schools are at the elementary and secondary level, I'm not talking

about the college level; on elementary and secondary level, no matter what the pattern, whether it's tuition grants or secular services or supplementary salaries to teachers or tax credits or tax benefits, or maintenance or repair, every one of the patterns, the Court said that you are faced with this insoluble dilemma: either the benefit is used for religious purposes, to attach religion, which is forbidden; or, to prevent that, the school is subject to that surveillance which itself violates the Establishment Clause because it entails excessive entanglement.

Now, so much for auxiliary services.

Now I go to the textbooks.

Now, the keystone of the textbook provision on which the court below, although not the court in Marburger, the court below upheld the textbook provision unanimously, was the Board of Education v. Allen, the decision of this Court --

QUESTION: Mr. Pfeffer, --

MR. PFEFFER: Yes?

QUESTION: -- are you asking that we overrule Allen?

MR. PFEFFER: I ask that this Court overrule Allen, but, as I point out in my brief, it can reach the same decision without overruling it.

It's my position, it's our position that Allen was not consistent with what this Court has said before, and certainly not consistent with what this Court has held after it.

It stands alone, by itself. That the premises upon which it is based have been shaken by every case in which the issue was raised, including the Norwood case, which, while it involved racial discrimination, basically is indistinguishable. As far as the Fourteenth Amendment is concerned, discrimination on religion is certainly no more preferable than discrimination on race in respect to institutions --

QUESTION: Do the religion clauses deal with any aspect of discrimination?

MR. PFEFFER: Well, as interpreted by this Court, by all means. This Court has, as I said, in Norwood v. Harrison, the Court pointed out that even -- even Mr. Justice White, in his dissent --

QUESTION: That didn't rest on the First Amendment, did it? In Norwood?

MR. PFEFFER: Well, Norwood was a Fourteenth Amendment case. But the Court noted Mr. Justice White's opinion in the First Amendment cases, that the First Amendment, or the Fourteenth Amendment, it doesn't matter which, I mean, it's the First, Fifth or Fourteenth, or all of them combined, forbids the use of public funds to provide services from which persons are excluded, or put in a lower category of admittance.

Either becqause of race [illegible] or religion, both of them are stated; both of them are stated in Norwood v.

Harrison.

QUESTION: Well, do you think that the First Amendment mandated the same sort of State hostility towards religious education as the Fourteenth Amendment mandates towards segregated -- education segregated by race?

MR. PFEFFER: Well, Mr. Justice Rehnquist, the answer is not hostility. That is unfortunate, an unfortunate term, because the Court, this Court has had the task, ever since it started with the first case in which it declared unconstitutional a State statute involving -- a State practice involving released time in the public schools.

Each time the Court has found it necessary to repeat that the barriers of the First Amendment were not motivated by any hostility to religion or religious education. But a belief --

QUESTION: Yes, but what I'm asking you is: conceding that, isn't the barrier of the Fourteenth Amendment in fact motivated by hostility towards public education segregated by race?

MR. PFEFFER: Well, they're talking -- it's motivated by that, because it involves State involvement, not by private education; the Fourteenth Amendment doesn't prevent private schools from segregating by race.

Now, why does it -- why does it involve -- why does the Fourteenth Amendment indicate hostility? Because it is

the State involvement in that type of discrimination which the Constitution is hostile to.

And it's our position that there is certainly no hostility to religious education, any more than it's hostility to segregated, racially segregated, as far as the Constitution is concerned; what the Constitution is hostile to is State or governmental involvement in discrimination among its own people on the basis of their religion. That is the basis of the Establishment Clause and the Fourteenth Amendment.

And it's irrelevant, it's irrelevant whether the discrimination be based upon religion or based upon race. It just is not permissible discrimination for -- as far as government is concerned.

Now, we urge -- as I say, we urge that Allen be reconsidered, but it's not necessary, if the Court is not prepared to reconsider Allen. We believe that Allen is completely distinguishable, and we pointed out in our brief the --

QUESTION: Well, how is it, on textbooks?

MR. PFEFFER: On textbooks, how -- well, in the first place, the element of discrimination does not appear in Allen, which does appear here. The element of the fact that there is discrimination in admissions, and that the State of Pennsylvania agrees that you can give textbooks for use in

schools which will involve people because of their religion. That was not in Allen.

Secondly, there are entanglement elements in this statute and in the regulations which depict a substantial degree of entanglement, how it was decided before Walz, and the entanglement part of the threefold test, which started with Schempp, that was not before the Court. But it is now before the Court. And on page 24 and 25 of our brief, we have seven -- eight; eight ways in which we submit there is entanglement. Inviolative of the Walz and its progeny, eight elements of entanglement that did not exist, were not before the Court in Allen.

Now, --

QUESTION: Before you --

MR. PFEFFER: Yes?

QUESTION: Before you move on, it's not clear to me what the discrimination is in this case, with respect to the textbooks.

MR. PFEFFER: Well, the discrimination is in respect to the textbooks as well. If a student wants to, a pupil wants to avail himself of a textbook which is applied -- it may be a very good textbook, it's applied for the parochial schools, they don't have to be the same textbooks which are used in public schools, they have to be textbooks which are accepted by public schools but not used.

Now, if a student wants to avail himself of that type of textbook, he can only do so by becoming a student of that private school; and he cannot do it if he's not of the right religion.

QUESTION: Well, --

MR. PFEFFER: He can't get the benefit of that textbook.

QUESTION: -- Boards of Education approved a wide list of textbooks, and then local School Boards and sometimes the local Superintendent or even the teachers in the classes have discretion as to which books they use.

Now, my understanding -- if I'm in error, I wish you'd correct me -- is that all of the school books available on loan under this Pennsylvania statute are school books which have been approved for use in the public schools of Pennsylvania.

MR. PFEFFER: Yes.

QUESTION: Now, how can there be any discrimination?

MR. PFEFFER: Well, the answer -- the discrimination is this: that it is certainly within the discretion of the School Board to say we will use Text A rather than Text B, and the student who would like to use Text B rather than Text A has no constitutional grievance, unless -- unless the only reason he's barred from using Textbook B is because of his race or color. That's what Norwood v. Harrison held.

He is not -- there's no question, I think, that schools have power to determine what textbooks shall be used, but, from our contention, they cannot exercise that power on the basis of the religion of the students, and the requirements that the students participate in religion instruction in order to get access to that textbook.

That decision is a constitutional wall between them.

Now, so much for the textbooks.

Now, on instructional materials, again it is our contention that the instruction materials, in order to make sure that this is not used for religious purposes, there must be that surveillance which the First Amendment forbids. And the interesting-- and that you cannot rely upon-- the Constitution doesn't permit reliability upon the good faith of the teacher.

That's what this Court has held time and time again.

The interesting part about this is that the district court itself, that the district court itself recognized that merely reliance upon the good faith of the teachers is not enough. Because in respect to instructional equipment, they tried to make a distinction between instructional equipment which is readily usable for religious purposes and one which is not readily used for religious purposes.

Now, if you rely -- if the Constitution permits reliance on the good faith of the teachers, then this distinc-

tion is meaningless, and the appellees in this case have not appealed from that part of the Court's decision.

Why do we rely on the teachers' good faith in auxiliary services, as the State of Pennsylvania asks us to do, why are we asked to rely upon the good faith of the teachers with respect to auxiliary services, when the district court agreed you cannot rely upon their good faith in respect to instructional equipment?

It is therefore bound to use the instructional equipment. We -- it is our -- the instructional equipment which is allegedly not readily usable for religious purposes.

It is our contention that that is a very artificial distinction, and that with any degree of lawfulness practically anything can be used for religious purposes.

We've given examples in the -- in our brief, and in the decision before this Court, previous decisions, the Court, for example in the Levitt case -- no, in the part one of Nyquist, which held unconstitutional a law providing funds for the maintenance and repair, a pro ratum, of school equipment and school plant. And of course if the building is heated, there's no way of shutting off the heat from the classroom in which religion is taught, or the lights. You simply -- the educational system is such that such a differentiation is artifically impossible.

You can only assure compliance with the Establish-

ment Clause by that surveillance which, as I've indicated before, is forbidden by the entanglement aspect of the First Amendment.

The -- as the Court earlier said, there is still a Charybdis here, which is simply unmanageable, the Court has said, in all these cases which I referred to, that they have gone -- allowed textbooks, allowed bus transportation, in Everson in 1947, and even then the Court said this verges upon the unconstitutional. They allowed it over the strong dissent of four Justices, and the Justice who wrote the opinion, Mr. Justice Black, has never gone beyond that.

And finally, in 1968, the Allen case said: Okay, this verges beyond -- it went that step. But in the cases which I've cited, in each of those cases, particularly the Nyquist case, and in the Sloan case, the latest one, this Court said you're not going to even approach that verge. We're not going to do any more, because the verge itself is a difficult line to draw, and the values, the values of the First Amendment and the Fourteenth Amendment are so high that we cannot tamper -- we cannot tamper or risk the violations of those values or the -- by this, such statutory provisions.

In the Yoder case, which I believe my brother, Mr. Ball, argued before this Court, the Court said that while a secondary education is a high value, is of high value, and

the State has an interest in seeing to it that all its citizens obtain a secondary as well as a primary education, it is not high enough, it is not high enough to outweigh the values of the religion clause and, in the Yoder case the Court said, use both, the religion and Establishment Clause.

MR. CHIEF JUSTICE BURGER: Mr. Pfeffer, I take it that you have worked out your arrangements with your co-counsel --

MR. PFEFFER: Oh, yes. I'm sorry, I was supposed to -- yes, I'm --

MR. CHIEF JUSTICE BURGER: I think you were signaled on it some time ago.

MR. PFEFFER: Oh, I'm sorry. I didn't see the signal.

Thank you, Your Honor, I will -- I don't know how much time we have left, but it will be for my colleague for rebuttal.

Thank you.

MR. CHIEF JUSTICE BURGER: You wish to reserve the remaining time for --

MR. PFEFFER: For rebuttal, yes.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Ball.

ORAL ARGUMENT OF WILLIAM B. BALL, ESQ.,

ON BEHALF OF APPELLEES JOSE DIAZ, ET AL.

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

We are going to have a division of argument among co-counsel: I'll address myself principally to Act 194, the auxiliary services Act; and Mr. Blewitt for the Commonwealth is going to concentrate mainly on Act 195; and Mr. Reath is going to discuss various related aspects of this litigation.

For years the State educational authorities in the various States have recognized that there are individual children in the schools who need special help, and in response to this, the States have provided and identified certain kinds of services which can help these children.

Now, many of these relate to health, while others relate to learning disabilities, and they all interrelate in a school situation, first, because that's where the learning takes place, and that's the place which is most useful to afford services for the correction of deficiencies or the affording of help.

I might mention also that these services are also very much tied in to aid to families. If it please the Court, we have in this Chamber at this very moment a child to whom we refer in Footnote 5 of our brief, a little girl named Johnna Bense, who had a 95 percent decibel loss of hearing, she was

deaf.

This related intimately to the fact that she could not well carry any kind of learning process.

And thirdly, this had all manner of repercussions on the life of the family, quite obviously.

Now, these services have been known as adjunct services, they've been called auxiliary services, supportive services, and so on.

Ten years ago the Congress of the United States in the Elementary and Secondary Education Act spoke of specialized services, and identified them, for the benefit of all children.

Pennsylvania, for years, had been furnishing auxiliary services to children in the public schools of the State.

In 1972, they made this program general by including all children under the benefits of auxiliary services.

I'm going to discuss the auxiliary services program in detail in a moment, because I think a great deal needs to be said on it with respect to facts. Preliminarily, however, I want to divert the line of my argument to go into the matter of the trial which forms the record upon which the judgment of the court below was based.

I think that's important to do, Your Honors, because the programs have been attacked largely on presumptions of fact. Presumptions with respect to the administration of

the Act and how it works; presumptions with respect to employees of the State, who carry out the Act and how they behave; and presumptions with respect to religious schools.

We knew at the beginning of this litigation that these allegations and assertions were totally at variance with reality, and therefore we decided that the prudent thing, from the point of view of our case, and the best way to achieve justice would be to put the program on the stand, and then let the eminent counsel for the plaintiffs have at witnesses, live witnesses, not stipulated facts that can't be cross-examined, but put on the stand, parents put on the stand, administrators put on the stand, teachers who carry out the program, and then permit their credibility to be gone after. If they weren't credible, let it be shown. If they were not typical, let that be shown. If they were highly selective and not typical, let that be shown.

But here with, at counsel's tap, what was indicated to be simply an ocean of universally accepted fact about all these matters, when the time came to bring on the tidal wave of fact and get away from the world of presumption, the plaintiffs came up bone dry. They declined to cross-examine a single witness, they did not put on one piece of evidence or one witness, rather, to contradict what we through our witnesses we think had established.

Now, the significance of that is this, if it please

the Court: I think the plaintiffs are asking the Court to ignore the facts and to ignore this record, how little, in fact zero discussion we have heard just now of this record, and to follow, they beckon the Court to follow them into a never-never land where valuable social programs may be comfortably disposed of; by talk of potential, of danger, of values, of likelihood, of -- it may be just that in substitution for fact.

May I now cover Act 194 under three headings.

First of all, with respect to its subject matter, then with respect to its administration, and then with respect to its teachers.

The subject matter is services, services directly to children. None of these services are required under Pennsylvania's compulsory attendance law, and therefore a school affording these services does not, by that fact, qualify as a compulsory attendance school.

The services of their nature, by statute and by practice, are secular, are neutral, are non-ideological.

QUESTION: I didn't understand your point a moment ago, that schools providing these services do not qualify as compulsory attendance schools?

MR. BALL: No, by virtue of the fact that they afford speech therapy, psychological services, and so son, those facts, those services do not qualify them as compulsory

attendance schools.

The meaning of it is this, Mr. Justice Powell, that by virtue of the fact that they hold themselves out as affording these services does not give them any status in the school market whatever, because they are not ultimately, because of that, compulsory attendance schools. They must meet the requirements of the compulsory attendance law to be units through which the services may be afforded to children.

QUESTION: The provision of these services is irrelevant to their status as qualifying as compulsory attendance schools? Is that it?

MR. BALL: That is correct, Mr. Justice Stewart -- pardon me.

QUESTION: That's all right; you flatter me.

MR. BALL: The services are also obviously of immediate and meaningful benefit to children. The record very definitely establishes that.

If we needed greater testimony with respect to these services, we have that of eminent counsel, Mr. Pfeffer, who told the court below: We do not in the least challenge the testimony presented by the defense that these services are invaluable to children.

QUESTION: Are these services, just to get it straight in my mind, --

MR. BALL: Yes, sir.

QUESTION: -- these services are provided in the public schools, are they not?

MR. BALL: Yes, and they have long been.

QUESTION: And long been.

MR. BALL: Yes. That is correct, Mr. Justice Stewart.

These services, he said, were invaluable to children, to the deaf children, to the otherwise disadvantaged children; we do not in the least challenge that.

Coming to the administration of the services -- oh, by the way, I ought to mention one thing before passing to that.

Mr. Pfeffer had stated in his argument now that the provision of the guidelines which speaks of bringing below-grade children to grade level status equals in effect the affording of normal services by the non-public school, through the services of the intermediate unit.

The court below faced that, and we have alluded to that at page 16 of our brief. The court found that contention to be without substance, and it did so on the following grounds: that, first of all, auxiliary services are by and large not mandated as part of basic curriculum in Pennsylvania, and this we have shown by the regulations of the State Board of Education, which we cite at page 16. By and large the

services are totally new to non-public schoolchildren, a fact which also the General Assembly very clearly declared in this Act.

If you read this to mean that the services are simply ordinary, general services of the schools, we have contradicted any meaning which the General Assembly and the Department of Education have given to the term "auxiliary services".

In administering the Act, we come to the year 1970, in which the Commonwealth enacted into law the Intermediate Unit Services Act, this was well prior to the existence of the present legislation that I'm discussing.

This created 29 entities in the State which would afford technical and planning services to clusters of public school districts.

And it is this unit of the public educational system which administers this Act. It does so, and administers the Act on the premises of non-public schools, first of all, because this affording of auxiliary services had always been presented in that way, on the premises of the school where the child is.

Secondly, it was clear that it is the only place in which these services can be usefully and meaningfully afforded to children.

The testimony that we have in the record from Dr.

Horowitz, who, for ten years, has been administering ESEA services to non-public schoolchildren on non-public school premises and who has also been the administrator of Act 194 in the School Districts in Philadelphia, which is also the Intermediate Unit of the City of Philadelphia, is very eloquent to the fact that logistics, the transporting of children, are very much -- greatly impede any chance of meainingfully affording these services to children.

One witness, Miss Stopper, a speech therapist in the Carbon-Lehigh Intermediate Unit, testified to that fact that because of these kinds of difficulties and the case loads of people in public schools, it had not been possible to afford auxiliary services to but 17 out of 350 children needing speech therapy services.

Now, counsel speaks of a modest sacrifice in the transporting of children to get these services elsewhere. We ask the Court to look at the record, the testimony in particular of Dr. Horowitz, as flatly contradicting any assertion that this is a modest sacrifice and is not indeed a prime means of defeating the benefits which this Act recognizes and public policy recognizes that all children need.

The Intermediate Units administer the Act through Commonwealth personnel. They are people who are under the direct supervision and control of the public intermediate units.

They are bound down by the school laws of Pennsylvania, the regulations of the State Board of Education, and the directives of the Intermediate Units, which extensively and intensively regulate the conduct of the Intermediate Unit employees.

They must be properly certified, according to Pennsylvania Code, Section 49.11.

Now, we come to the contention that the people who furnish Intermediate Unit services create religious problems, and that this program does that. Yet when we go to the record in the case, we find not a single instance brought to the attention of the court wherein one individual has abused his office as a public employee in seeking to inculcate religion in the course of the performance of his professional duties.

On the other hand, we have positive, unquestioned and uncontradicted, testimony to precisely the opposite effect. Dor Horowitz, who had been ten years administering ESEA programs on non-public school premises, testified flatly that he knew of no incident of this kind.

The other witnesses who have testified as the administration of the Act, testified similarly, and not one word of evidence discloses, in a State of 67 counties, 29 Intermediate Units, and a program that's been going on since 1972, any instance of this horrible to which counsel alludes.

We are here impressed by the quotation by Mr. Justice

Powell in Nyquist, in which he quotes from Allen, saying that absent evidence -- absent evidence, we cannot assume that school authorities are unable to distinguish between secular and religious books or that they will not honestly discharge their duties.

There is nothing, either, to show that these people, who perform for the Intermediate Units, go through the experience which it was assumed in Marburger they go through, of becoming susceptible to and contracting religion when they enter upon the premises of a religious school.

There is nothing in the record to indicate that any one of these people, these many employees, are so mentally dim that they cannot understand the regulation under which they are supposed to operate; that they are so psychologically weak that they cannot help but be overcome by a supposed and unproved dominant religious atmosphere in a religious school; that they are so professionally shoddy that they would throw their professional ethics to the winds in order to divert into some religion or other; that they are so lawless that they would deliberately violate the law of their State and their nation.

QUESTION: Mr. Ball, what's the record show about these people? Do they spend all of their occupational time in one school, or do they move around from school to school, or what?

MR. BALL: The record does not clearly disclose this, Mr. Justice Stewart. My impressions, for what they are worth, indicate that the speech teachers, speech therapists such as Miss Stopper, whose testimony is here, moves about in Carbon-Lehigh Intermediate Unit District, which involves I believe a couple of counties.

QUESTION: In a geographic area.

MR. BALL: She is only a speech therapist. She is a specialized licensed speech therapist, so there would really be no occasion for her to stay in one school as a constant employee of it. For one thing, the schools can't use that much speech therapy or whatever the service may be.

QUESTION: Might she move, then, from a Catholic parochial school, where she is on Tuesday afternoons, to a Lutheran parochial school on Wednesday afternoons, to --

MR. BALL: Moravian Lutheran, yes, indeed.

QUESTION: -- to a non-denominational parochial school on Thursday afternoons --

MR. BALL: Yes.

QUESTION: -- and ever into a public school on Friday and Monday afternoons?

MR. BALL: This I could not say, but she would be available to be used in public schools also for the same services, as far as this Act is concerned.

QUESTION: The record doesn't show what the actual

practice is?

MR. BALL: It doesn't show that --

QUESTION: In this respect.

MR. BALL: -- there is any particular pattern, and there may be no particular pattern, Mr. Justice Stewart.

QUESTION: Because the claim is, of course, that these teachers get so imbued and involved with the religious atmosphere of a particular school that they --

MR. BALL: Well, that, Mr. Justice Stewart, is the claim, --

QUESTION: Yes. Well, I thought that this question might have something to do with that claim, that's why --

MR. BALL: Well, we went directly to that contention in examination of three witnesses. We asked Miss Stopper, we asked Dr. Boesenhofer, a Lutheran who serves in Catholic schools according to his testimony, and Dr. Horowitz. We asked all of these people: What about this matter of becoming involved in a religious school, and thus starting to reflect religion?

This was very staunchly denied, for example, by Dr. Boesenhofer, who is a school psychologist, who testified that he is Lutheran, who testified as to his experience in Catholic schools, and said he wasn't about to start reflecting Lutheranism and certainly not to start picking up Catholicism from being present in the Catholic school.

I think the testimony -- and if there were evidence of this, as we've said before, the plaintiffs had all the time in the world to bring on these supposedly innumerable examples of the very thing that they alleged in their complaint.

QUESTION: Mr. Ball, --

MR. BALL: Yes, sir?

QUESTION: -- does the evidence show the extent to which these services are available in religious schools without the benefit of State aid?

MR. BALL: The evidence shows, first of all, it's the finding of the General Assembly that they were not generally available in religious or other non-public schools.

As to non-sectarian schools, we have the testimony of Mr. Jarvis, the Headmaster of Lancaster Day School; we have the testimony of Miss Stopper and the other witnesses, in fact, all of whom said -- including parent witnesses -- who said that up to now they had not been available in their schools.

Where there is any evidence that the Commonwealth has that these had been available to any extent in the sectarian schools is not known. But the Legislature and the court below having seen all the evidence concluded firmly that by and large these services were not available in non-sectarian, including religiously affiliated schools.

In the last moments that I have, I'll try to deal

briefly with the questions of primary effect and the question of entanglement.

On the issue of primary effect, we have to realize that nature and not this statute has singled out particular children who need particular help; and this statute responds to nature, to those needs.

There is no class here singled out for a special economic benefit. This is in no wise comparable to situations seen in Sloan, Nyquist, and so on.

QUESTION: How about Marburger? Is somebody on your side of the table going to deal with Marburger?

MR. BALL: Yes. I'll do it right now, Mr. Justice Stewart.

Marburger, first of all, in terms of the book program, involved children as -- the Marburger opinion stated that children in public schools were borrowers of books. By and large, the Act was a parent reimbursement Act, whereby non-public schoolchildren did not borrow books but instead their parents were given a cash payment.

There was an allotment of funds for each public school, something like -- each non-public school, something like a bank account in Marburger, which is not present here.

There was a further fact concerning the Marburger case, is that there was no evidence introduced at the trial respecting constitutionally critical facts concerning these

very things we've been talking about, whether the public school teacher has to be the object of surveillance. Whether in non-public schools and religious schools, the attempts are made by religious authorities to proselyte teachers who come into the schools.

None of these things were ever reviewed in Marburger in terms of witnesses, and this is the -- one of the major features of importance of the record in this case, that at long last we have witnesses on the stand who are able to testify as to what happenes in real life and not what happens in fantasy; which, indeed, I must say, Marburger reflects, in respect of the issue of surveillance and entanglement.

QUESTION: Do you think the -- the biggest difference, or at least a very substantial difference between this case and Marburger is that here you have a record of evidence in the testimony, and in Marburger you just had the bare bones of the statute, aided by speculation and imagination; is that it?

MR. BALL: That, Mr. Justice Stewart, plus the fact that I think Marburger in no wise faithfully followed the decision of this Court in Board of Education vs. Allen.

QUESTION: So, just as your brother is asking us to overrule Allen, you're suggesting that we overrule Marburger; is that it?

MR. BALL: No, I'm not suggesting Marburger be over-

ruled, because I cannot read Marburger, and I cannot read the mind of the Court in affirming Marburger. I am reminded, in the words of the Chief Justice recently, that some are quick to use the district court's opinion to define this Court's judgment.

And I think that I cannot conclude that this Court, in its affirmance of Marburger, in any wise reflected a desire to overrule Allen or to affirm all of its presumptions with respect to entanglement.

I didn't observe whether the red light --

MR. CHIEF JUSTICE BURGER: It did. You are now cutting into your colleague's time.

MR. BALL: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Blewitt.

He didn't use very much of your time, however.

ORAL ARGUMENT OF J. JUSTIN BLEWITT, JR., ESQ.,
ON BEHALF OF APPELLEES PITTENGER AND SLOAN

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

I'd like to begin my argument by stating what I consider to be two basic principles that have run through all of this Court's decisions under the Establishment Clause as they relate to education.

First is that the State has a recognized interest in the quality of secular education in all non-public schools.

And the second general observation is that some form of State aid can be directed to the secular function of a religious school without providing thereby direct aid to the religious functions of such schools.

This theme has been restated in every Establishment Clause case which has come before this Court.

The question, then, is: Does Act 195 meet this test?

In answering that question, I'd like to address myself to what is being provided by the enactment, and I feel that by focusing on what is provided, the Court will see that this enactment passes both the entanglement and primary effect test.

What is provided are three types of educational aids: textbooks, educational materials, and instructional equipment.

A very limited type of instructional equipment, I must mention: slide projectors, record players; instructional equipment of such form is not permissible by virtue of the district court's order and by virtue of the amended guideline which we have submitted to replace the original guideline, which did authorize that equipment.

Now, they are the three types of equipment, the three types of educational aids; but, in addition, these educational aids have two characteristics. First, they must be secular;

second, as to textbooks, they must be acceptable for use in a public school; and as for instructional equipment and materials, they must be such as are provided in non-public schools.

So I think it's important to emphasize at the outset that plaintiffs don't even claim, much less make any attempt to prove, that any form of religious material is being provided under these Acts.

QUESTION: Would you clarify, for me at least, your comment about the curtailment of the equipment loans? You suggested there was an alteration of the program on equipment, --

MR. BLEWITT: Yes, Your Honor.

QUESTION: -- slides and movie projectors, that sort of thing.

MR. BLEWITT: Yes, Your Honor. The enactment and the guidelines promulgated pursuant to it originally had a very broad definition of instructional equipment. It would have authorized the loan of slide projectors, overhead projectors, record players, tape recorders.

The district court, I think, fashioned a very healthy rule by prohibiting the loan of materials which are, in the words of the district court, readily divertible to a religious purpose.

We adopt -- by not appealing, we have adopted that

-- that standard fixed by the district court, and we think it a healthy standard. Because the district court has fashioned the concept of a self-policing educational aid.

One can look at the aid and determine, merely by looking at it, whether or not it can perform any sort of religious function.

Now, the appellants have made some attempt to distinguish Allen, I think that attempt is unavailing. I can see no way in which this program could be found unconstitutional, and yet this Court should retain the vitality of the Allen holding.

The two are virtually identical, and I would suggest to the Court that in reviewing the guidelines which implement this program, this Court look to the brief of the intervenors in Board of Education v. Allen, which has attached to it as an appendix the guidelines for the New York textbook loan program. They are virtually identical.

QUESTION: Mr. Blewitt, are you familiar with an article in 79 Yale called, Sectarian Books: The Supreme Court and the Establishment Clause, which was published after Allen?

MR. BLEWITT: I have read it, but not recently, Your Honor.

QUESTION: So you have no comment about the article?

MR. BLEWITT: I can't offer one.

But I think the point of Allen was that the officials who must make the decision as to what is loaned are public officials, and in deciding whether to -- whether a given educational aid is permissible, can be loaned, the public school official is making the very same decision he makes all the time in deciding what materials can be loaned to a public school.

In essence, the school official is really making one decision, no matter where the request for the educational aid comes from, whether the request comes from a public school principal or from the non-public schools, he is making one decision: is this acceptable for use in public schools?

There is nothing in this record to suggest that public school officials will not honestly discharge their duty, or that they are unable to distinguish between religious and secular materials. So I think it's important that what we're here providing is tangible educational aids, their content is ascertainable in advance, the aids themselves, by their very nature and by virtue of the necessary prior approval of the public school authorities, cannot be diverted to religious use. They are self-policing.

And I think this, the concept of self-policing, is not only important but essential to our case. For the concept of self-policing, in and of itself, answers two questions. It answers the primary effect question and the entanglement

question. Because the material cannot be used for religious purpose, then it is being restricted exclusively to a secular use, and therefore there is no danger of a primary effect of advancing religion.

Because the --

QUESTION: But that part of Mr. Pfeffer's argument is that it's not feasible to conduct a monitoring of that, to see that it is, that the statute is complied with.

MR. BLEWITT: But, Your Honor, what we suggest is that no such monitoring is necessary. The school official who decides what is to be loaned --

QUESTION: Yes, but it passes from his control then, doesn't it?

MR. BLEWITT: But what I'm suggesting is that the material is not, cannot readily be used for religious purpose. That spectrum was present in Allen, you know, you cannot decide what a teacher is going to do with a secular textbook. But --

QUESTION: Well, I take it your point that you made earlier, that the modification of the guidelines has taken care of this problem, that is, equipment which could be used either for secular or sectarian purposes is now out of the program?

MR. BLEWITT: Yes.

QUESTION: Why do you use the word "loan"?

MR. BLEWITT: I beg your pardon, Mr. Justice?

QUESTION: Why do you use the word "loan"? Do you anticipate any of this material will ever come back?

MR. BLEWITT: Well, we consider it to be a loan in the same -- the Act refers to the legal relationship as a loan, and it is the same form of loan that was present before the Court in the Allen case. Mr. Justice White, in writing the opinion, acknowledged that ownership, at least technically, remains with the State.

So the concept of loan is equally the same as in Allen as in here.

I'm sure that the textbooks which were loaned to the private schools in Allen are no longer functional, they have long since lost their utility. But, I mean, that was a factor that was present in Allen, and was not deemed controlling.

QUESTION: Well, isn't that fairly common in the public schools in Pennsylvania, for students to be loaned textbooks and perhaps for the books to survive two or three or four years?

MR. BLEWITT: Oh, yes, Your Honor, absolutely.

And of course that feature of the Act, it was a point made in our brief, but since you've touched upon it, Mr. Justice Rehnquist -- the argument has been made that this is class legislation. Well, it certainly is not class

legislation because what is being provided here for the non-public school students is being provided through other provisions of the public school code for public school students.

This Court, in Nyquist, recognized that direct aid in any form is invalid, absent effective means of assuring that the material -- what is loaned, will be used exclusively for a secular purpose.

Here the guarantee comes from the nature of the equipment loaned, it cannot be diverted to any other than its original purpose.

Every school aid program - excuse me, every educational program which dealt with private schools, which has reached this Court since Allen, has dealt with money, cash subsidies in one form or another, to private schools or private school students. And of course the trouble with money, probably its only trouble, is that money, when money is provided it must carry with it restrictions on its use, it must be earmarked for a particular purpose.

And to the extent that the earmarking takes on a pervasive character, the other objection, the Charybdis of the Establishment Clause would be violated, would give rise to undue entanglement.

MR. CHIEF JUSTICE BURGER: We'll resume there at one o'clock.

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

AFTERNOON SESSION

[1:01 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Blewitt.

ORAL ARGUMENT OF JU. JUSTIN BLEWITT, JR., ESQ.,

ON BEHALF OF APPELLEES PITTENGER AND SLOAN -Resumed

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

Before my colleague begins, I will make one point in one minute.

The point that appellants make throughout their brief, of examples of how some of these educational aids can be subverted for religious purposes, I submit, in the first instance, that they are hypothetical in every sense of the word, these examples.

In the dictionary sense, they are not based on facts. No proof has been offered that materials, or that such examples as they hypothecate have ever in fact occurred.

Furthermore, such possibilities were equally present in Allen, and this Court wisely refused to resort to this form of conjecture.

The third aspect of the hypothetical nature of these examples is that they're predicated on bad faith. They suggest bad faith on the part of the non-public school personnel who would be using these materials. There is no record of bad faith in this case, in fact there's a record

of good faith. I refer the Court specifically to page A92 of the Appendix.

This Court, in Tilton, recognized that a possibility always exists of a law's legitimate purposes being subverted by conscious design or lax enforcement. The Court recognized that such possibilities, standing alone, do not warrant striking down the statute as unconstitutional.

This is important State action, and it should not be invalidated on the basis of hypothesis.

Thank you.

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

Mr. Reath.

ORAL ARGUMENT OF HENRY T. REATH, ESQ.,

ON BEHALF OF APPELLEES CHESIK, ET AL.

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

I would like, in the few minutes left to me, to first restate the issue which I think has been fully argued.

And the issue is: should this Court exercise its admitted power to invalidate State action where the legislation under attack has the proven primary purpose and effect of improving children's learning and communication skills, and where there is no disqualifying provision in the statute denying such benefits to children attending religious schools.

I appear this afternoon, if Your Honors please, on

behalf of two parents and two children attending private independent schools. I also serve as counsel for the Pennsylvania Association of Independent Schools. I am appearing essentially as the spokesman for the independent schools, and at this time I would like to say I of course join in the arguments made by my predecessors, and I also join in the brief that was, the amicus brief filed by the Council for American Private Education.

I don't think I need to take this Court's time to dwell on or emphasize some basic constitutional principles, which is that there is a strong presumption of validity to the propriety of State action, and that one who seeks to overturn it has a very heavy burden, and I believe, based on the arguments that Mr. Ball and Mr. Blewitt have made, that it has been shown how they have utterly failed to meet this burden, they have offered no evidence whatsoever.

Mr. Pfeffer, in his argument, made a charge which I submit was totally unwarranted and not in this record, a charge of discrimination. There is no evidence of discrimination in this record, and that is fully developed in our brief at page 19, and I won't take my valuable time now to answer it.

Secondly, as far as the availability of these auxiliary services are concerned, under the present statute they are now equally available to children in parochial

schools, in private schools or in public schools; and there is complete and total freedom of choice among the children as to which of those school systems they will use to avail themselves of those benefits.

Secondly, if Your Honors please, and I think that this is very clear, I've referred to it at page 13 of our brief, in Everson, the Court had this very issue before it, where the question was, whether or not the State of New Jersey could exclude the benefits, certain benefits to children in religious schools.

And here's what the Court said:

"While we do not mean to intimate that a State could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against State-established churches, to be sure that we will not inadvertently prohibit New Jersey from extending its general State law benefits to all its citizens without regard to their religious beliefs."

And the record shows here unequivocally that these are general State benefits now offered to all children, regardless of their race, religion, color, or creed.

Finally, I would submit, and again I've developed this argument at page 35 of our brief, and I incorporate it in my argument; that it would be impermissible and highly unconstitutional for Pennsylvania to attempt to inquire into

the religious practices or beliefs of any child in order to determine whether that child was eligible to receive the benefits. It would be a denial of the equal protection, the free exercise arguments which these plaintiffs seem to claim to represent in attacking this legislation.

Now, if Your Honors please, I would like next to very briefly refer to this Court's decision in PEARL v. Nyquist and Lemon v. Sloan, because I would submit that that is our point of departure.

And this Court, in an opinion for the Court by Mr. Justice Powell, held and struck down tuition reimbursement and tax credit because it was felt that this conferred in some fashion or other a special benefit on children whose parents -- on children and parents who were attending religious schools and thus had the disqualifying effect of being -- have a primary purpose of aiding religion.

At the same time, the Court, in Mr. Justice Powell's opinion, rebuffed the very same arguments that are being advanced here and have been advanced before, and that is, there must be an absolute wall of separation and that there must be an absolute ban on the provision of any form of public aid to non-public education.

And there the majority held that aid still can be channeled, albeit it may be a narrow channel.

Happily, this Court did give us some aids to

navigation, and the aids to navigation I believe were these:

One, to pass muster, it must not be class legislation, it must be something available equally to everybody.

Two, it must be neutral, non-ideological.

Three, it must be indirect.

Four, it must be only of incidental benefit.

I submit that Pennsylvania Acts 194 and 195, in all respects, stay within the narrow channel prescribed. It is not class legislation, it benefits all children.

It is neutral and non-ideological; it deals with the tools for learning, and the ability to improve one's communication and learning skills.

It is indirect, no payments are made to the schools; the benefits are given to the children.

There is no real benefit to the school directly, because, at most, it could be deemed incidental in that, again, the benefit goes to the children and not to the school.

It is self-policing. There is no problem with entanglement.

A perfect example of that, Mr. Chief Justice, to elaborate the question Your Honor asked earlier, was that this Court -- the lower court said, for example, We will not permit you to lend moving picture projectors, because a movie projector could be used to show a religious film.

So that those are out. Any kind of a training aid

that could lend itself to be used for religious purpose is excluded. What is left is only a self-policing type of auxiliary teaching material or textbook or a service that deals not with the core of the educational program but deals with such things as remedial reading, to improve the learning skills and the communication skills of our children.

And I submit, therefore, that in all respects we have met the test of the Nyquist case, and the Chief Justice's admonitions in Lemon v. Kurtzman.

There are in Acts 194 and 195 none of the evils which this Court has been concerned about, the evils of sponsorship, financial support, or active involvement in the -- by the sovereign in religious activity.

In conclusion, I'd like to say this, Your Honors please, I think that we in this country have placed a very high priority on the role of education and the role of our Judiciary in preserving and strengthening a free democratic society.

As to the role of education, I would submit that we stake the very survival of the republic on a literate, educated, informed and, hopefully, enlightened citizenry.

We have had a love affair in this country with education, and rightly so, because through education it makes us free.

At page 10 I have a quotation in my brief, the

only one I want to read, from Lord Broughman, Henry Peter, the eminent English statesman, jurist and scientist, where he said:

"Education makes a people easy to lead but difficult to drive; easy to govern but impossible to enslave."

Secondly, as to the role of the Judiciary, recent events, and a landmark decision by this Court, have highlighted the critical role of the Judiciary as the fulcrum in disputes between branches of government and between the people and government. And to perform this function, of necessity it has, and it must have, great power, including the power to invalidate State action.

But I would submit that in matters involving State action, it must be -- this power must be used sparingly and particularly in matters of State action, only where there is a clearly proved and patent infringement of constitutional rights, not found in this case.

In respect to State action, we are now witnessing, and in large measure spurred on by this Court's decision in Baker v. Carr, and its progeny, the development of what might be called a new federalism; a return swing of the pendulum which recognizes that we're going to put more responsibility and power on the individual States to work out, in harmony with the federal government, to solve the vexing problems that beset our society.

And I submit this is good, and it should be encouraged. For only by trial and error, by the process of experimentation, can be chart a safe course that will give us the answer to constitutionally valid tests.

The people of Pennsylvania, through their duly elected representatives, have determined that this form of legislation is desirable to strengthen their commitment to the working of free democracy, to education, to enable these children to have the learning skills and the communication skills that they need.

Anyone who would deny the -- and I submit that this is proper -- anyone who would deny the power of the States to do this has a very heavy burden, and that burden, I submit, has not been met in this case.

We ask your honorable Court to deny the appeal and to affirm the judgment of the court below.

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

Mr. Thorn.

REBUTTAL ARGUMENT OF WILLIAM P. THORN, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. THORN: Mr. Chief Justice, if the Court please:

I would like to devote the minutes that I have to attempting to answer some of the questions that have been raised.

First of all, I believe it was Mr. Justice Stewart

who asked the question as to how the Allen statute could be distinguished from the Pennsylvania statute.

There is a very real distinction. In the Allen case, the statute provided for the loan of textbooks, free textbooks, to all schoolchildren in the State of New York, both public and non-public.

Act No. 195 provides only for the loan of textbooks to non-public schoolchildren.

Now, the Act recties that the other, that the public schoolchildren in Pennsylvania already have the benefit of free textbooks.

However, I would like to point out that it's the local School Board which provides textbooks to public schoolchildren in Pennsylvania, and not the State. The State has singled out a special class of beneficiaries for which it is using tax-raised State revenues for the support and administration.

QUESTION: But there must be State law that authorizes the local school board to do the same thing for public schools, is there not?

MR. THORN: It mandates that they do it. The Pennsylvania statute mandates that they local school board --

QUESTION: For public schoolchildren?

MR. THORN: -- provide -- Yes.

QUESTION: Well, then, there is no distinction.

MR. THORN: Pardon me?

There is this distinction: the local school boards must raise the funds, provide the textbooks from local revenues, not from State revenues; although the State reimburses the local School District for part of its expenditure. Initially, the expenditure must come from locally raised revenues.

QUESTION: What percentage of the school budget is provided by State funds? Public school budget.

MR. THORN: Well, they have a complicated formula -- I believe it's approximately 50 percent.

QUESTION: That would be about average.

MR. THORN: It's about 50 percent, as I remember.

QUESTION: Well, wouldn't you agree that it's constitutionally irrelevant as to where and how the financing comes from, so long as it is, we all agree, governmental financing?

MR. THORN: I don't think so. But here the State has singled out a special class of recipients.

And it's provided in a separate channel, a different channel.

QUESTION: But isn't it -- am I mistaken in understanding that this law here at issue gives to the students in private schools what is already and has been for a long time given to the students in public schools?

MR. THORN: No, your -- that is correct.

QUESTION: That is correct, is it not?

MR. THORN: That is correct. But public schools do not --

QUESTION: And both with public money?

MR. THORN: Yes, except different taxation, different sources of funds.

Now, the second thing I'd like to speak to is the issue which my brother Ball raised, concerning burden of proof. He has stated that it is our job to prove that the supplies and materials and services mandated by these statutes are being misused for religious purposes.

However, it is not our burden, at all. This Court has held in several instances that the burden is upon the State to make certain, given the religion clauses, that subsidized teachers do not inculcate religion; Lemon v. Kurtzman. And furthermore, the State must see to it that State-supported activity is not being used for religious indoctrination; Levitt vs. Committee for Public Education and Religious Liberty.

So the burden is not upon the complainants, but, rather, is upon the State or Commonwealth to prove that.

Furthermore, there is a record. In the record we introduced guidelines, established by the Pennsylvania Department of Education for the administration of these Acts; and we believe these guidelines show beyond any peradventure of

a doubt that there's pernicious entanglement with religion by the State in administering these laws. They just can't be administered without numerous contacts with the non-public schools.

As an aside, in one of our interrogatories we asked the defendants to state whether any of the persons employed by defendants or the Intermediate Units to provide auxiliary services were previously employed by the non-public schools to which they are assigned.

The answer of the State is that there are some situations where this does exist.

In other words, what has been done in some situations is simply take auxiliary service personnel from the non-public school payroll and put it on the public school payroll.

QUESTION: Mr. Thorn, --

MR. THORN: Yes, sir?

QUESTION: -- does the record show whether or not the private schools in Pennsylvania require their pupils to take the same standardized achievement tests that are required in the public schools?

MR. THORN: I don't believe the record shows that, but I believe that is true.

Is it not? [addressed to co-counsel.]

QUESTION: The record is silent on that question?

MR. THORN: The record is silent on that.

However, testing is one of the services provided under Act No. 194. What "testing" encompasses, I'm not sure. We believe the statute is so open-ended that it could cover almost anything.

QUESTION: There's no evidence in the record as to comparative test scores between students in the public and private schools, is there?

MR. THORN: No. Only on hearing defects, and I think speech defects. There is some evidence in the record on those two things.

QUESTION: Right. Right.

MR. THORN: Yes.

One of the claims of the defendants is that the statutes are self-policing. We believe that that just isn't so.

Obviously the district court below did not think they were self-policing; otherwise it would not have rewritten Act No. 195 with respect to instructional equipment. And that's really what the court did, because the Act itself states that instructional equipment is to include projection equipment, recording equipment, laboratory equipment, and any other educational secular, neutral, non-ideological equipment as may be of benefit to the instruction of non-public school-children, and are presently hereafter provided for public

schoolchildren.

The court excised projection equipment, recording equipment, et cetera, from the statute. So, in effect, it rewrote the statute.

Also, the non-public people apparently don't think the Acts are self-policing. Dr. Boesenhofer, who testified as a school psychologist on behalf of Intervenors Diaz, et al., and Miss Stopper, a speech therapist, and Sister Mary Dennis Donovan, the Coordinator of Human Relations Education for the City of Pittsburgh, for the Catholic schools of Pittsburgh, all said that they had been repeated warned by the public school authorities that they had to be very careful that none of these services, none of the supplies or equipment were used for religious purposes.

QUESTION: Does that tell us any more than the statute tells us?

MR. THORN: Well, I think it tells us this: It tells us that it can't be done without constant surveillance, or without constant reminders.

And I think the State has to do more than just remind them, I think the State has to see to it that they're not used for religious purposes.

Since my time is about up, I'm going to summarize this way:

Act No. 194 provides services which are part of a

modern secondary educational institution. The characterization of "auxiliary" does not mean that they are auxiliary to the school system, but simply are auxiliary to the normal instruction program of the school.

They're part -- and the witnesses for the Intervenors testified that these services were essential to modern secondary educational system.

I see that my time is up, so I won't go on.

Thank you.

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

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:24 o'clock, p.m., the case in the above-entitled matter was submitted.]

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