In the

# Supreme Court of the United States

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| RUSSELL L. RUNYON, ET UX., Petitioners, v. MICHAEL C. McCRARY, ETC., ET AL., Respondents. | No. 75-62 |
| FAIRFAX-BREWSTER SCHOOL, INC., Petitioner, v. COLIN M. GONZALES, ETC., ET AL., Respondents. | No. 75-66 |
| SOUTHERN INDEPENDENT SCHOOL ASSOCIATION, Petitioner, v. MICHAEL C. McCRARY, ETC., ET AL., Respondent. | No. 75-278 |
| MICHAEL C. McCRARY, ETC., ET AL., Petitioners, v. RUSSELL L. RUNYON, ET AL., Respondents. | No. 75-306 |

Washington, D.C.
April 26, 1976

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Washington, D. C.,

Monday, April 26, 1976.

The above entitled matters came on for argument at 11:30 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
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

LOUIS KOUTOULAKOS, ESQ., 2054 - 14th Street, North, Arlington, Virginia 22201; on behalf of Respondents in No. 75-306.

ANDREW A. LIPSCOMB, ESQ., 430 Washington Building, Washington, D. C. 20005; on behalf of Respondents in No. 75-306.

GEORGE S. LEONARD, ESQ., 1225 Connecticut Avenue, N. W., Washington, D. C. 20036; on behalf of Respondents in No. 75-306.

ALLISON W. BROWN, JR., ESQ., Suite 437, 3000 Connecticut Avenue, N. W., Washington, D. C.; on behalf of Respondents in Nos. 75-62, 75-66, 75-278, and Petitioners in No. 75-306.

RODERIC V. O. BOGGS, ESQ., Washington Lawyers' Committee for Civil Rights Under Law, 733 - 15th Street, N. W., Washington, D. C. 20005; on behalf of Respondents in Nos. 75-62, 75-66, 75-278, and Petitioners in No. 75-306.

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# C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will next hear argument in No. 75-62, Runyon v. McCrary; No. 75-66, Fairfax-Brewster School v. Gonzales; No. 75-278, Southern Independent School Association v. McCracy; and No. 75-306, McCrary v. Runyon.

Mr. Koutoulakos, you may proceed whenever you are ready.

ORAL ARGUMENT OF LOUIS KOUTOULAKOS, ESQ.,

ON BEHALF OF CERTAIN RESPONDENTS AND PETITIONERS

MR. KOUTOULAKOS: Mr. Chief Justice, Honorable Justices: I represent the Bobbe's School, which is Mr. and Mrs. Runyon, who are operating it, and I will limit my argument to the narrow areas of what I consider the crucial issue in this case and, if necessary, will rebut on the point of the statute of limitations on the right of attorneys fees.

Now, first let me touch on the facts a little bit as to the reason why we are here. The Bobbe's School is a small school in Arlington, Virginia, in Fairfax, Virginia, it is right on the line, that operates a private school. It has been stipulated in the facts that the school is not supported in any way by any federal or state money and it depends entirely in its support upon the student enrollment.

Insofar as the Bobbe's School is concerned -- now, this case was consolidated with the Brewster School -- but insofar as the Bobbe's School is concerned, Mr. and Mrs. McCrary

McCrary and Mr. and Mrs. Gonzales testified -- and, of course, this is unrebutted -- that, as a result of a telephone call -- this is by both parties, one in '69 and one in '71 or '72, as I recall -- and no further contact and no formal application, as a result of a telephone call, it brought into play section 1981 of the Civil Rights Act that we are now here under. And the court, upon hearing evidence -- and there is a serious question in my mind as to whether or not -- and the dissent was in agreement with what I am going to say -- that there is a serious question of whether or not they made out a case.

They certainly did not rebut the fact that there are selective standards of exclusion by our school. There is no evidence contrary to that. I think all the evidence is clear that no one would be admitted on the basis of a phone call. There has to be a formal application and certain admission policies that are necessary, such as a medical examination, a personal interview with a parent and, based on that, then it is determined as to whether or not the person is to be admitted.

Now, it seems to me that the bedrock of what the plaintiffs relied upon to be here is the Jones case. First, starting off with section 1981 and just going briefly, it says that all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the

security of persons and property as is enjoyed by white citizens.

Now, I will jump to the Jones case, because, as I say, that seems to be the foundation of private discrimination and, really, that is what I think we are here on. Now, first, at the outset, I want to make this observation: Being of Greek heritage, it is not a question of whether I agree or don't agree with restrictive policies. I am here, as Mr. Justice Marshall used to, in the old days, support individual rights in this battle to eliminate abuses. Well, I am here in support of an individual right of a citizen in this country or any person in this country the right of privacy and the right to freely choose his associates.

Now, the Jones case says that private discrimination at least in contract matters is barred by the Constitution. Now, without getting to the question of whether I agree or don't agree with that decision, I do want to say that that decision can be distinguished.

First, if we get to the 1883 civil rights cases, I think in those cases the Honorable Court there determined that Congress is limited as to what it can do, and there are certain basic rights that transcend and militate against the right of Congress or any other political body to regulate against, and I am talking about the freedom of association.

Now, it seems to me that we are at the crossroads,

and I have tried to read -- and I am not certainly the smartest man in the world nor the most brilliant legal author, but it seems to me that just plain common sense at least leads me to the conclusion that this country is based on two things, and it separates us from other nations, and that is the most basic thing is the right to be left alone, the right of individual freedom which, of course, incorporates with it -- and I think it is protected by the Bill of Rights, but I think this right transcends the Bill of Rights. I think it is a God-given right to be left alone and to be free. And as the Pierce and the Yoder and the Mayer cases indicated with reference to private schools and the right of an education, there is certainly no constitutional right to an education. This Court has held that once a state steps in and provides an education, then due process requires that all people be treated alike, independent of color, and I certainly subscribe to that. But we are talking about public schools. And when we get into the area of private schools, I think all the cases that I have read from this Court -- and I don't want to take your time in citing them, but they all point to the fact that private schools do have a right to exist, regardless of their discriminatory policies, and I think they have got that right.

I think any more than I have the right to invite whoever I want to in my home and the argument would be, well, this is a private school, however, it does require a certain

amount of touch with the public, isn't that sufficient to bring it within the ambit of the Mayers case, and I say no.

QUESTION: Well, why is that any different than an employer who insists that he, as a private employer, should have the right to choose whom he wants to as his employees?

MR. KOUTOULAKOS: Well, because I think, as the dissent pointed out in this case, in the Runyon case, that this is the right of association in personal situations that come into play in a private school, and I think parents, if the parent has the right, as this Court said in the Pierce case, to select the school and the education for its children, then I say that there is a concomitant right of the private school to select the students it wants to educate, and I feel that that right has to be a fundamentally protected right.

It seems to me that the right of contract, if the Jones case is accepted to its fullest analysis, then it gives the right to a group that no other group can have in this country. It gives a unilateral right to force a contract when that violates and emasculates all the rules of contract at least that I have been introduced to, both in law school and since my active career as a practitioner. It seems to me that the contract right that they are talking about in 1981 dealt with, of course, eliminating the shackles of slavery and [illegible] should have been, there is no argument on that. And that is all they are talking about, because the blacks did not have a

right to contract and, as a result of that, they were submitted to the humiliation that those folks had to go through, and that is what they are talking about.

They certainly are not talking about, and I don't believe that they intended to talk about the fact that a private school, like a private individual, is mandated to accept a contract by somebody they don't want to accept a contract with, any more than I can be forced to accept a contract or anybody else because contracts require mutuality. If we are going to get into the Ophelian legalities and explanations of rights and duties, and if we are going to get into contractual rights, whether it be Williston or anybody else, whatever it may be, I have never seen any decision, any contract forced upon an individual absent a mutuality of the minds, and that is exactly what is being done here.

QUESTION: Except the statute says that all persons shall have the right to make and enforce contracts?

MR. KOUTOULAKOS: Exactly.

QUESTION: And what you say is certainly correct, as I remember my contract law from law school, except that if a school, your client, says we will never ever make any offer to anybody of the Negro race, so nobody in the Negro race will ever have an opportunity of accepting, isn't that depriving everybody in the Negro race of his right to make a contract?

MR. KOUTOULAKOS: Well, now, we are assuming, as we

are here, that this is a purely private school?

QUESTION: Yes.

MR. KOUTOULAKOS: My answer is no, and if it is -- and, regardless of my views, I may disagree with it -- I say they have got that right. It is an absolute right that every citizen has --

QUESTION: Well, I was talking about the application of the statute.

MR. KOUTOULAKOS: Well, I say, no, it doesn't apply to that, because, in citing the civil rights case of 1883 and bring them forward, the Constitution cannot reach private discrimination, it is just that simple.

QUESTION: Well, my question went to the wording of the statute. I have a right to make a contract under this statute, the same right as all white citizens, and let's say the whole world said that it is agreed that I would never, during my whole lifetime, have an offer and therefore I could never accept and I could never make a contract, wouldn't that deprive me of my right to make contracts?

MR. KOUTOULAKOS: Well, maybe in the pure sense of the word, but in the sense of a right and a duty that a contract would bring into play, then I say that that statute cannot do that, because it cannot force a person to enter into a contract that doesn't wish to, and I think that has been fundamental in all our cases. There is absolutely no decision that

I have seen anywhere -- and, of course, I couldn't possibly read them all -- that says, you, Mr. Koutoulakos, must be mandated to accept a contract whether you want to or not, and that is exactly what the interpretation of 1981 would have to do, and I say, no, that is not the case.

QUESTION: I suppose as a matter of contract law, your client would make the offer and the applicant would make the acceptance, or is it the other way?

MR. KOUTOULAKOS: Well, it seems to me that the offer has to come from the other way.

QUESTION: You invite the offer, is that your theory?

MR. KOUTOULAKOS: Exactly. Exactly correct, like you would invite a guest into your home, and that is exactly the predicate that I am operating under.

QUESTION: Yes, but if a man is running a contracting business and he puts an ad in the paper saying that he needs seven bricklayers and five plumbers and what not, he is then inviting applications, is he not?

MR. KOUTOULAKOS: But he also has the right to refuse those applications.

QUESTION: Oh, yes, but he is inviting applications.

MR. KOUTOULAKOS: Yes.

QUESTION: But if he announced or practiced a universal refusal to employ any person of a particular race, where would he be?

MR. KOUTOULAKOS: Well, of course, depending on whether you have any federal involvement or state involvement, absent that --

QUESTION: He is building an interstate highway.

MR. KOUTOULAKOS: He's got the right. Absent what the criteria have been as set out in prior court precedents, he has that right. It may not be a nice right, it may be something that we don't like --

QUESTION: Well, that is absent the statute --

MR. KOUTOULAKOS: Absent a statute --

QUESTION: -- certainly he has, unless there is state action or state involvement.

MR. KOUTOULAKOS: That's right.

QUESTION: But there is a statute covering the Chief Justice's question, Title VII, and there is a statute here, and the question is does it apply in this situation? That is the only question --

MR. KOUTOULAKOS: That's right, and I say it doesn't. I say --

QUESTION: That is --

MR. KOUTOULAKOS: -- there has been some rather interesting decisions even flowing from that decision -- and I certainly don't want to be presumptuous. I said earlier, I disagree with it, I will say it again, I disagree with it, but any one can be distinguished --

QUESTION: You also disagree with Smith v. Allright, don't you? The same exact argument was made that the primary in Texas was white because the white people wanted it white and they had a right to do it and nobody could do anything about their right to associate with whom they wanted to associate, and this Court just ignored that argument completely.

MR. KOUTOULAKOS: Well, except for one thing: We are talking here about a statute that owes its existence to the post-revolutionary days, and a hard reading of both the debates and the decisions -- and I have just got to believe that this Court was just as conversant with the debates in those days, back in 1883, when they came down hard with that decision, as they are today --

QUESTION: Which decision?

MR. KOUTOULAKOS: The 1883 civil rights decision.

QUESTION: Well, I am talking about Smith v. Allright.

MR. KOUTOULAKOS: I understand that, but --

QUESTION: Smith v. Allright says you don't have that unlimited right to associate with only whom you want to associate with.

MR. KOUTOULAKOS: Well, literally, I just don't go along with that argument. I --

QUESTION: You mean you don't go along with the decision?

MR. KOUTOULAKOS: Well, if that is the decision, I

don't go along with the decision.

QUESTION: The decision said you couldn't bar Negroes from voting in the primary in Texas.

MR. KOUTOULAKOS: Yes, but --

QUESTION: Period.

MR. KOUTOULAKOS: Right, but you are talking about a --

QUESTION: And the civil rights cases said to the contrary.

MR. KOUTOULAKOS: But you are talking about a voting right now.

QUESTION: No, I am talking about the right -- they said that it was a right to assemble, the right to be together. It was just like a country club. I can remember like it was yesterday, it was just a perfect little private matter, you do whatever you please, and this Court just threw it right out the window.

MR. KOUTOULAKOS: Well, of course, they must have made that argument with tongue in cheeck, if it deals with voting rights. Certainly, I would have to agree with you on that view. It is a little different proposition than the private schools.

QUESTION: And you say there is no state action in here at all?

MR. KOUTOULAKOS: No. Well --

QUESTION: It is completely financed -- I guess the buildings and all are completely financed by private people, and I assume they pay taxes?

MR. KOUTOULAKOS: The state actually --

QUESTION: I assume they pay taxes.

MR. KOUTOULAKOS: I would assume to, but I really don't know.

QUESTION: Do you think that school pays property taxes?

MR. KOUTOULAKOS: I would hope so, but some schools don't. I would say that they probably did.

QUESTION: Do they meet the requirements of the Virginia educational laws?

MR. KOUTOULAKOS: Are you talking about the school that I represent?

QUESTION: Yes, sir.

MR. KOUTOULAKOS: Well, you know that private schools in Virginia, at least this one is not regulated other than having a certificate, and that is the only type of thing that they have to meet. Yes, they do pay taxes. I didn't realize you were referring to my -- yes, they do pay taxes.

QUESTION: And they have a certificate and they are not periodically examined by the state?

MR. KOUTOULAKOS: For health reasons, fire prevention reasons, that type of thing. We have a very comprehensive

public school statutory scheme in Virginia. It is one of the finest in the world, and that is why I come down hard on the right of a private school, at least in our state, to do as it chooses, because our public school system --

QUESTION: The state law doesn't give you the right to refuse Negroes.

MR. KOUTOULAKOS: I am not saying that the state law gives us -- I say that insofar as a private individual is concerned -- and I am, of course, taking the position that the private school, that is a purely private school, has the same rights, and that is a right that is a personal right, that is a God-given right for you to live with -- and that is what I think separates the democracy from other nations -- that right to choose your associates, whom you want to bring in your home, and to do as you see fit personally, as long as --

QUESTION: This isn't no home. A school is not a home.

MR. KOUTOULAKOS: It is a home in a sense that it is a private establishment --

QUESTION: It is not a home.

QUESTION: Mr. Koutoulakos, could you tell us a little about this school, how many students there are?

MR. KOUTOULAKOS: About 155, in that area.

QUESTION: And what grades?

MR. KOUTOULAKOS: They run up to the second grade.

QUESTION: Just kindergarten, first grade and --

MR. KOUTOULAKOS: And second grade, yes, sir.

QUESTION: Boys and girls?

MR. KOUTOULAKOS: Boys and girls.

QUESTION: About 155?

MR. KOUTOULAKOS: About 155.

QUESTION: All drawn from the immediate area?

MR. KOUTOULAKOS: In that -- well, yes, I would say generally.

QUESTION: Is it all day long or half-day?

MR. KOUTOULAKOS: They have both half-day and all day, and they do have --

QUESTION: Yes, I've seen them.

MR. KOUTOULAKOS: Yes, sir, they do. And it is a very fine school. As a matter of fact, the man that runs it used to be -- and his wife -- were both at -- they are both fine people and love children. And let me make this observation --

QUESTION: How long has this school been in existence?

MR. KOUTOULAKOS: Since late -- the late fifties.

They never had an opportunity to reject or admit because no black person had ever applied. Once they did apply, we have admitted them, and I think there are two or three presently in the school now, so that is not the question. The question that we come down hard on is the individual right of a private citizen, just like a private school, to insist on who they wish --

QUESTION: Wait a minute. I thought it was the question. You say there are in fact Negro students in the school?

MR. KOUTOULAKOS: Now there are, yes, because they have since applied -- since the decision came down, they did apply.

QUESTION: But not at the time this lawsuit --

MR. KOUTOULAKOS: Well, none -- at that time --

QUESTION: The question is whether this school can practice a policy of complete racial exclusion, that is the question.

MR. KOUTOULAKOS: That is the question, yes, that is at least before this Court, and we take the position that if it is a private school, it can, it has got the freedom of choice.

QUESTION: And that is the issue, isn't it?

MR. KOUTOULAKOS: That is the issue, that is squarely the issue, no question.

QUESTION: What you have done since this lawsuit was started is not relevant to --

MR. KOUTOULAKOS: Not at all.

QUESTION: -- the decision here?

MR. KOUTOULAKOS: No, because we still take the position -- and, as I say, regardless of my personal views, I take the position that we have got that right, as an individual, we have got the right of privacy and the right of association. I remember what Justice Brandeis said in a dissent, he said,

you know, one of the great rights we have in this country, and he considers it the highest right, is the right to be left alone. We are getting so much government regulation, government interference in everything any more, and when that falls short, I guess, it evolves upon the courts -- when they see abuses -- and I certainly don't argue that too much, but I think sometimes we have extended ourselves into areas that belong to the legislatures. I don't believe we can legislate or, rather, we can, by judicial pressure, do away with one's --

QUESTION: Well, the point is the legislature acted here and we have a statute to construe, that is the only issue here.

MR. KOUTOULAKOS: That's right, but the interpretation of the statute, and why I --

QUESTION: And that is what is at issue here.

MR. KOUTOULAKOS: -- like the dissent, and I guess I am -- I guess I am mostly on the dissent side -- that the Honorable Justice White and Justice Harlan had -- and I think that pretty well covers it, just like there is a --

QUESTION: That was a different statutory provision. That was section 1981 --

MR. KOUTOULAKOS: But we are talking about --

QUESTION: -- and maybe a different history.

MR. KOUTOULAKOS: We are talking about private discrimination --

QUESTION: Well, certainly you would agree that it has different language?

MR. KOUTOULAKOS: Well --

QUESTION: 1981 -- because I think it might help your case.

MR. KOUTOULAKOS: Yes, it does, but I am saying though that the Justices went into the history of private and non-private discrimination and its application, and I have got to say that I thought the dissent was brilliant. I liked it very much, but -- in any event, I do take the position -- and there is a recent case, the Cook case, that came up from Alabama, in federal court, that distinguishes even the decision of Jones and comes down very hard at least on the argument that I am trying to make.

QUESTION: That case arose under section 1982. This is quite a different section, worded quite differently --

MR. KOUTOULAKOS: 1981 --

QUESTION: -- 1981.

MR. KOUTOULAKOS: -- is what is discussed in the Cook case.

QUESTION: Yes, but Jones v. Mayer was 1982.

MR. KOUTOULAKOS: 1982, that is all it is, and that is exactly right, but 1981 only comes in by allusion, you are absolutely correct, and I would like to leave it with that and leave 1981 exactly as I would like to argue.

Now, I am only going to touch briefly on the fact that I think the Court was correct in the statute of limitations application and attorneys fees. I think absent -- of course, the general rule is rather clear in this country, anyhow -- absent any contractual, any contract between the parties or any statutory mandate, attorneys fees are not awarded. And in this case, I certainly agree with the findings of the Court of Appeals, there is certainly no bad faith. And as the dissent again -- at the pain of repeating myself -- indicated, there is a serious question in their mind, and there always was in my mind, as to whether or not the case was proved, because we certainly do have selective admissibility standards, and I think we met that test. It just was overlooked, and at least it brought the issue head-on to this Honorable Court to be decided.

And with reference to the statute of limitations, I think that is rather clear, state law applies and the two-year statute was the applicable one.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well. Mr. Lipscomb.

ORAL ARGUMENT OF ANDREW A. LIPSCOMB, ESQ.,

ON BEHALF OF CERTAIN RESPONDENTS AND PETITIONS

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

I would like first to point out that Fairfax-Brewster

School, that I represent, has been in operation for more than twenty years, it is a small school, and the school year in question had 177 pupils. It is a private school, it receives no public funds or assistance of any kind.

QUESTION: Pupils are boys and girls?

MR. LIPSCOMB: Boys and girls, Your Honor.

QUESTION: In what classes, what grades?

MR. LIPSCOMB: From pre-kindergarten up through the sixth grade.

It has a plan or purpose of exclusiveness. They practice selectivity in admission of pupils on the basis of such criteria as readiness, previous school record, age, mental, physical and emotional maturity, intelligence, and achievement potential.

QUESTION: Does it now have --

MR. LIPSCOMB: Yes, sir, it does now have --

QUESTION: -- other than white children?

MR. LIPSCOMB: Yes. As a matter of fact, Your Honor, it has always had non-white pupils, many Orientals, many from Asia, India. It now, as a result of the decision below, it now, on my advice, has been accepting all Negro applicants and leaning over backwards to accept them, even when there is some doubt as to whether they are qualified. It has rejected--

QUESTION: You had better be careful with that advice.

MR. LIPSCOMB: What's that, sir?

QUESTION: You had better be a little careful with that advice, or you will have another lawsuit.

[Laughter]

MR. LIPSCOMB: Your Honor, it is a problem getting back into court again on this, and we don't want to get back into court again on it, and we believe in being careful.

The school rejects all unqualified applicants, including whites, and it is in the contract. It reserves the right to accept or deny the application of any child for any reason whatever. It does not advertise in newspapers, magazines, on radio or television. It carries an advertisement in the Yellow Pages of the telephone book, which states that it is a private school. Most of the parents learn about the school from other parents.

In May '69, the Gonzales applied for admission of their child to the summer camp, their main purpose being to get the child into the camp, get him accustomed to the environment, so that he could continue school in the fall in the first grade.

They were the first Negroes ever to apply to the school. They were given an application to fill out and return but failed to provide records of his previous education, as required. And the only previous training of the child was in a day nursery school which did not provide kindergarten

training, including reading and numbers writing, which was required by Fairfax-Brewster for admission to its first grade.

The child was rejected by a letter dated May 16. This action was filed three years and seven months later. Mr. Gonzales testified that when he got the rejection notice, he called the school, he talked to a person identified as Capt. Reiss, who said "The school is not integrated." Capt. Reiss denied having had the conversation. There was no corroboration of that call. And Mrs. Bryant, who turned out to be a neighbor of the Gonzales and also of the McCracy's, who are plaintiffs in the other action here, testified that she had telephoned the school in January of '72 and, upon inquiry, had been told by a woman or a man, she wasn't sure, she couldn't remember which, that the school did not admit Negro children. There was no corroboration of that conversation.

The witnesses for the school denied that the school had a policy of not accepting Negroes. Mrs. Gonzales testified that at all times there was a public school available for her child. About a week after rejection by Fairfax-Brewster and her inquiry at Bobbe's School, the child was immediately accepted into another private school in the area, where it stayed for two years, and it went to a parochial private school for two years. A month before the trial, the family moved out of the county and the child was attending public school in that new county at the time of trial.

The District Court found as a fact that the Gonzales child had been rejected because of his race, stating that the school could have given him an examination, even though he had not provided the educational background they had required. It also found that it was the policy of the school not to accept Negroes. There was no founding or conclusion or even any implication of bad faith, perjury or untruthfulness under oath as to any witnesses. The court concluded that the school had violated section 1981. It awarded compensatory damages on behalf of the child and attorneys fees to the plaintiffs. It had previously ruled that the claim of the parents was barred by Virginia's two-year statute of limitations, which is expressly made applicable to every action for personal injuries. It also awarded a permanent injunction enjoining Fairfax-Brewster from discriminating on the basis of color in its admissions policy.

We contend, first, that section 1981 does not prohibit or in any way affect the right of private schools to reject applicants becsuse of race, first because it was clearly the intent of the 39th Congress, when it enacted the Civil Rights Act of 1866, from which Section 1981 as well as Section 1982 is derived, that the act should be construed -- that the act should not be construed, this was their clearly expressed intent during the legislative debates, that the act should not be construed to require white children and

black children to attend the same schools.

The bill was introduced in the House by Congressman Wilson, Chairman of the Judiciary Committee, co-author of the bill, and its floor manager. I might point out to the Court that the members of the 39th Congress did not mean by the term "civil rights" what that term may mean today. Wilson said or asked, "What do these terms mean?" He was speaking of civil rights and immunities, "What do these terms mean? Do they mean that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal? By no means can they be so construed. Do they mean that all citizens shall vote in the several States? "No," he said.

And then he went on to say, "Nor do they mean that all citizens shall sit on the juries, or that their children shall attend the same schools. These are not civil rights or immunities."

Wilson defined "civil rights" as "The absolute rights of individuals, the natural rights of men, the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. Those," he said, "are the great fundamental rights which was the object of the bill to protect. And," he said --

QUESTION: Then the Court, nearest to that, the Supreme Court, in Volume 100, In Ex Parte Virginia, Slaughter

v. Virginia, and Virginia v. Rives didn't understand that at all, did they?

MR. LIPSCOMB: Perhaps not. If they did, they would applied to --

QUESTION: They were closer to that than you were.

MR. LIPSCOMB: I don't believe, Your Honor, that they applied to schools.

QUESTION: No, juries. That is what you said, it didn't apply to juries.

MR. LIPSCOMB: That is what these men intended.

QUESTION: And so the --

MR. LIPSCOMB: That was the intent of Congress.

QUESTION: The Supreme Court, in that time, didn't quite understand that?

MR. LIPSCOMB: Well, the Supreme Court later --

QUESTION: They said they did have a right to jury service.

MR. LIPSCOMB: Your Honor, I am talking about the intent of Congress. They could have been wrong. The question is what did this bill mean, what was their intent. Their intent was that it would not apply, and that I think is what this Court has to consider in construing, in interpreting this law.

Now, he said, "This bill merely affirms the existing law. We are following the Constitution. We are reducing

to statute form the spirit of the Constitution. We are establishing no new right, declaring no new principle. It is not the object of this bill to establish new rights, but to protect and enforce those which already belong to every citizen."

If the Court please, to understand the Act, it is helpful to look at its historical context and the mischief it was intended to remedy.

The Thirteenth Amendment, abolishing slavery, was the law of the land.

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock.

[Whereupon, at 12:00 o'clock noon, the Court recessed until 1:00 o'clock p.m.]

AFTERNOON SESSION - 1:00 O'CLOCK

MR. CHIEF JUSTICE BURGER: Mr. Lipscomb, you may proceed.

MR. LIPSCOMB: Thank you, sir.

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

When the bill was introduced in the 39th Congress, it contained a clause declaring that there shall be no discrimination in civil rights or immunities among the inhabitants of any state or territory of the United States on account of race, color of previous condition of slavery. In both houses, this clause created consternation. There were intense objections to it, and they were tied in, the objections were tied in often to the problem of schools and whether this language could be construed so as to require the white children and the Negro children to attend the same schools. In fact, the objections were so strong that eventually Congressman Wilson, in order to obtain passage of this bill, amended the bill to delete that clause.

QUESTION: Were they talking, do you think, about public schools or private schools?

MR. LIPSCOMB: Your Honor, they didn't distinguish, but I think they were talking about -- they were concerned with the idea that they objected to, was the children attending the same schools. They didn't distinguish, they didn't differentiate between public and private.

QUESTION: In many parts of the country, there were not public schools in those days, is that correct?

MR. LIPSCOMB: That may be true. There were some in the South, I know, and I say that they didn't distinguish. They made no distinction. Now, when the plaintiffs below filed the supplemental brief about a week ago, it spurred me to some additional research. I found some statements made by Senator Trumble, in the 42nd Congress, 2d Session, connection with a supplemental civil rights bill, introduced by Senator Sumner, which would have prohibited racial discrimination in all common schools and other public institutions of learning.

Senator Trumble's remarks are extremely interesting and revealing. With the permission of the Court, I would like to quote them. This is the 42nd Congress, 2d Session, at page 3189, he said -- and may I say, Your HOnors, that Senator Trumble was the Chairman of the Senate Judiciary Committee, he was the chief sponsor of the bill on the Senate side, he was a co-author of the bill.

At page 3189 of the Congressional Globe, he said that the right to go to school is not a civil right and never was, it is a privilege. The Senator may try, I deny his right as a member of Congress to force anybody into a school or to force anybody to take anybody into a school.

At page 3190, he said, "Why, sir, we passed years ago a civil rights bill conferring upon the colored people all

the civil rights which white people have, and they have them to the same extent."

At page 3191, he made remarks which I will not read here, but refer the Court to. At page 3426, he said, "I do not believe in legislation forcing them to the same schools. Are we now undertaking to control how they should go to school by act of Congress?"

It was the idea, Mr. Justice Stewart, that the requiring children of the two races to go to school, they objected to. They considered schools and education to be within the domain of the states and not a civil right at all, so therefore they didn't consider that going to school or the requirement of going to the same schools was comprehended within the language "right to make and enforce contracts," which is contained in Section 1981, which Mr. Justice Stewart questioned my Brother Koutoulakos about.

QUESTION: Well, would the issue of contract come up with respect to public school attendance?

MR. LIPSCOMB: Well, Your Honor, it is a property right. I think this Court has held that the right to attend public school is a property right, and so it would come under Section 1982.

QUESTION: Well, it is a statutory entitlement in those states, and I suppose that includes now all the fifty states where there is an absolute statutory right to go to a

public school. But it is only by reason of that that --

MR. LIPSCOMB: Well, Your Honor, when the Congress enacted that language and they selected that language, of course, they were trying -- the mischief they were seeking to correct was the reenactment, in effect the reenactment of the slave codes, the new black codes which simply continued the disabilities that slaves had had before the abolition of slavery, the disability to enter and enter into contracts, to own property, to acquire it, so they were seeking to eliminate those disabilities, and that is what they meant whey then said to make and enforce contracts.

QUESTION: In that setting, Mr. Lipscomb, where would sophisticated people such as you would have in the Congress, including lawyers, speak of the right to attend public school in contract terms?

MR. LIPSCOMB: I don't think they would, no, sir. I really think not. I don't think that is the kind of situation which they had any intention would be comprehended in the clause.

QUESTION: They might conceivably do that with respect to higher education of that day, that is colleges and universities, where you paid a large tuition, where you had admission requirements, conceivably that would -- it would be embraced in terms of contract.

MR. LIPSCOMB: Conceivably, Your Honor, and I would

not quarrel with that. But I wanted to move, if I might, to the Thirteenth Amendment very briefly and to point out to the Court that the Thirteenth -- that section 2 of the Thirteenth Amendment and section 5 of the Fourteenth Amendment, while virtually identical in language, are really quite different in scope, and that is because the subject matter of the two amendments is so vastly different.

The Fourteenth Amendment contains those magnificent generalities and great ideas and concepts like equal protection of the law, due process; the Fourteenth Amendment -- those ideas are capable of growth and development, but the Thirteenth Amendment --

QUESTION: The bulk of the Fourteenth Amendment confines itself to restrictions upon the states, as states.

MR. LIPSCOMB: That's correct, Your Honor. That's correct. Now, taking the Thirteenth Amendment, Your Honor, it is a sterile subject matter, it can't grow. It abolished slavery. That was the end of slavery, 110 years ago, it abolished slavery. That was the end, there could be no further growth or development. The incidence of slavery that existed then cannot be added to or enlarged under the Thirteenth Amendment, and to do so --

QUESTION: But they could be retained as they were in the black codes.

MR. LIPSCOMB: No, I mean to say it could not be --

the authority of Congress to enact appropriate legislation couldn't enlarge the incidence and add to them, to those that existed and which were abolished when slavery was abolished. That is what I meant.

QUESTION: But Congress has power under section 2 of the Thirteenth Amendment to eliminate the vestages of slavery.

MR. LIPSCOMB: I don't know about the word "vestages," Your Honor. The vestages are very -- the incidence I would accept, but vestages and badges are very loose, vague, motive terms.

QUESTION: Well, what do you think section 2 of the Thirteenth Amendment did mean then?

MR. LIPSCOMB: That they might enforce the abolition of slavery by appropriate legislation and not go beyond slavery itself, involuntary servitude and the necessary incidence that were understood by the people at that time to be part of slavery. Discrimination, for example, was not regarded by the people of that time as an incident of slavery.

QUESTION: Well, how about the ability, the legal capacity to own property?

MR. LIPSCOMB: Yes, Your Honor, they did mean that.

QUESTION: And to make contracts?

MR. LIPSCOMB: They did mean that, Your Honor. I think therefore that so construed the Civil Rights Act of 1866 is quite proper.

I wanted to point out to the Court the --

MR. CHIEF JUSTICE BURGER: Mr. Lipscomb, if you are contemplating reserving any time for rebuttal, you are now in your last five minutes.

MR. LIPSCOMB: I don't think I am going to be able to reserve any time, thank you, sir.

MR. CHIEF JUSTICE BURGER: Very well.

MR. LIPSCOMB: Private schools and public schools are quite different. Private schools have not yet been held to be a public accommodation, along with inns, common carriers, theatres, and similar places of amusement, and restaurants, and no reasonable member of the public would expect that he could demand admission into a private school and force his way in simply because they carried an advertisement in the Yellow Pages.

Lawyers are in the classified pages. They may have their cards in Martindale Hubbard, but I don't think that they can be compelled to accept clients they don't want, except in those unusual situations when they are appointed to represent a person that hasn't an attorney by a court, as an officer of the court.

About private schools, they may do things that public schools may not. They may provide religious instruction, they may propagate a sectarian viewpoint, they may do many things, including discipline, that the public schools are inhibited

from doing. They are not private clubs. Private schools are a different form or mode of private association or private club. The relationships are personal and intimate. The management provides the expertise, the professional staff and the facilities in which the children associate with the teachers and other children, and where parents also get into the act. Parents who place their children in private schools undergo great sacrifice to do it.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Leonard.

ORAL ARGUMENT OF GEORGE S. LEONARD, ESQ.,

ON BEHALF OF CERTAIN RESPONDENTS AND PETITIONERS

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

My name is George Leonard. I represent an intervenor in the District Court by the name of the Southern Independent School Association, approximately 375 schools, approximately 175,000 children.

The factual discussions which the Court has heard up to this point do not affect this particular intervenor. We stipulated with Mr. Brown in the lower court that these schools do in fact, without any question, discriminate against Negroes because of their color in exactly the same sense that a black school may discriminate against whites because of his color or a Chinese or a French school or any other kind of school.

We do it -- we have stipulated that a majority of the schools represented by this particular association actually have that particular limitation on their admission. So the factual question of whether we do or don't is not in this case as far as the intervenor is concerned.

The issue, as it was stated by both the majority and minority in the Fourth Circuit, we believe to be too narrow. They said the issue was is an otherwise qualified black child entitled to be admitted to any school of his choice, a private school.

The actual issue in this case is much broader than that. It comes up under 1981 and involves the First Amendment and the freedom of association. The actual issue in this case is whether any child of any color may attend any school of his choice. If he is a boy, may he attend a girls school. If he is Jew, may he attend a Catholic school. If he is a Chinese, may he attend a school for Mexican-Americans.

The question is truly about as broad as this Court saw it to be back in the Pierce case, namely just how far do the options of a parent go in trying to decide what kind of education that child will have.

Now, I hold no brief here, this intervenor does not make any claim that its parents are right and other parents are wrong, that white children alone should gather and all others should be mixed. We stand for the proposition, and we

claim it before this Court, and we have claimed it before the courts below, that every parent with a school child in this country may select a school that that parent believes, given some basic mathematical and reading ability, that that parent believes will develop the child into the kind of person that the parent wants it to be.

QUESTION: There are certainly some limitations on that, though, aren't there? I mean, could the state then require accreditation and that sort of thing?

MR. LEONARD: Well, as I said, there is a minimum requirement. This Court -- not this Court, the Supreme Court of Tennessee -- and I think a very illustrative case -- held that the use of poisonous snakes in religious -- well, it does have an analogy, Mr. Justice Rehnquist. Stop and think of it this way: How far must religion be allowed to go? How far must race be allowed to go?

There was a Zionist Church and school in Illinois many, many years ago and they taught that the earth was flat and the question was whether they could so teach. At that time, as a matter of fact, it was upheld. Since then, this Court has issued its holdings on the question of evolution cannot be stopped by a state. You must be able -- the teacher must be allowed to teach evolution.

Certain basic mathematics -- we have in the Rodriguez opinon from this Court, for example, the question of whether

education itself is not a constitutional right, but there is some sort of amorphous beginning of education, probably the ability to read and write and do simple things, which every child is entitled to. If a school does not provide that, I think it would be completely and utterly proper for the state to say we will not qualify you, we will not justify you. But if you give them the basic education, then what you give them in addition to that, whether it is religious training, whether it is training for home economics for girls in the girls school, whether it is bricklaying for boys in a boys school, it makes no difference, provided that the fundamental education at the core is given.

QUESTION: Well, why isn't the state or in this case Congress, if indeed Congress did say so, free to say that just as important as reading and writing and arithmetic is learning in an integrated environment?

MR. LEONARD: You are quite right, Mr. Justice Rehnquist, and if they said so, what I am trying to address myself to at this moment is exactly that point.

QUESTION: I won't distract you.

MR. LEONARD: This was made -- this point was made in point five of the brief of this intervenor. It has never been answered by any responding brief. I don't believe it can be answered. And it goes directly to Mr. Justice Rehnquist's question. If a person wants an integrated education, public,

private or otherwise, is he entitled to get it, and the answer is clearly yes.

If we had schools which were so located in the United States that a child who couldn't get into them could not be educated, I think we would have a very difficult case on our hands.

QUESTION: But you concede that even though a parent might want education for his children which was totally deficient in the three R's, the state can tell that parent, no, you cannot acquire that kind of education even in a private school, do you not?

MR. LEONARD: No, I don't go that far at all. I do feel that there is some fundamental type of education that every child in the United States is entitled to.

QUESTION: But how --

MR. LEONARD: How far does it go?

QUESTION: It is not so much a question of what the child is entitled to, it is a question of what limits the state can put on the choice that the parents --

MR. LEONARD: Ah, how far can the state go, for example? Some states have passed laws -- I believe Wisconsin is one of them -- that every private school in the state must be integrated. Let's take that as an example. Suppose they have a law which says that every private school in the state must be racially integrated but not othersise, would that be valid?

I really don't know the answer, because it is not the case which arises on the facts in this record. I think it is a very difficult question to raise as to whether you can take one particular form of discrimination and say that you cannot have, like the teaching of German, if you are -- the Court will recall, you had a decision many years ago in Waters when the State of Iowa tried to prevent the teaching of German in schools because of World War I, I presume, and this Court held that you could not prevent that type of teaching.

QUESTION: Do you think that is still good law?

MR. LEONARD: As a matter of fact, yes, I do believe it is good law, Mr. Justice Rehnquist. I believe that there are certain things of a fundamentally academic nature which a state cannot take away.

Now, if we look at the Yoder decision, for example, the state insisted that these children go on beyond a certain degree of time, and this Court held that when they were returned to the Mennonite community, the average community there, they did in fact receive equivalent instruction. Now, it might be Amish instruction, it might be Mennonite instruction, but it was equivalent instruction so that, for all practical purposes, the state could not take the position that education shall be thus and so. It is like the pregnancy case, you cannot fix an absolute line and say above or below that is valid unless there is a good reason for it. Now, I think the

German, there would be no good reason. German is a fairly well used language. Evolution, this Court held there was no good reason to stop its teaching.

Now we come down to the question of whether a child is entitled to an integrated education. 250,000 black children in the United States attend private schools, a quarter of a million of them. How many attend all-black schools? I do not know.

QUESTION: Do you know of any private "all black school" that excludes people?

MR. LEONARD: Yes, Your Honor, Sedalia, North Carolina.

QUESTION: Where?

MR. LEONARD: Sedalia -- the academy at Sedalia, North Carolina, a very good one it is, too.

QUESTION: It is a Negro school?

MR. LEONARD: To the best of my knowledge, it is a 100 percent black school.

QUESTION: But it excludes white students?

MR. LEONARD: Well, like the gentleman who were up this morning, I don't know what exclusion means if nobody makes an application.

QUESTION: Well, have any applied or not? I asked you one that excluded.

MR. LEONARD: All right --

QUESTION: That was my question.

MR. LEONARD: I think the Black Muslim schools would do for that.

QUESTION: You are wrong, as of today.

MR. LEONARD: But not as of a month ago.

QUESTION: But as of today you are right.

MR. LEONARD: As of today, they now have one white member, I believe --

QUESTION: Well, they --

MR. LEONARD: -- in the Black Muslim movement, but they do have schools and --

QUESTION: Is that a church school?

MR. LEONARD: Pardon?

QUESTION: Is that a church school?

MR. LEONARD: I don't know. All I know is --

QUESTION: Well, what are you talking about? It is a religious school. Can you give me any private Negro academy, school --

MR. LEONARD: Do you mean non-religious?

QUESTION: -- non-religious, private school, that excludes anybody on the grounds of race?

MR. LEONARD: I don't really know that I can. The eleven schools in Mississippi that were all black, that were talked about in the case down there, were I believe parochial schools. I believe the ones that were spoken of in

Philadelphia, in the lemon brief were again parochial schools.

QUESTION: Can you imagine a white student applying to an all-Negro school in Mississippi?

MR. LEONARD: I can imagine it, Your Honor, because they do seem to attend. I can't say that I am in favor of it, but they do. I think that any child who goes into a school which is 99.9 percent of a different color is really expressing something --

QUESTION: All I am objecting to you, sir, is comparing your school with the average Negro private school. There is no comparison.

MR. LEONARD: I believer there is.

QUESTION: Mr. Leonard, do you rely in your argument on the religion, either of the two religion clauses of the First Amendment?

MR. LEONARD: The second point I wanted to come to, if I may, if I find the time, Your Honor, is that the decisions in this country -- and I may say, frankly, of this Court -- have divided discrimination into malign and benign. I believe that the word of this Court in one case, it was invidious discrimination; in another case, it was benevolent.

Mr. Justice White, as a matter of fact, took the occasion to note -- I think it was in Wheeler v. Barrara, and Mr. Justice Douglas did as well -- that the decision in that case, which gave government funding to parochial schools, was

essentially a total denial of the situation which existed in the tuition grant cases, in this particular Court in which tuition grants by the states were denied to white schools.

Are these forms of discrimination on the same level? Well, they arise from essentially the same thing, and the reason --

QUESTION: Well, I am still not sure. I wonder if you would just answer my question, so I will be sure I follow your argument.

MR. LEONARD: I'm sorry.

QUESTION: Do you rely in your argument on the religion clauses of the First Amendment?

MR. LEONARD: I do not.

QUESTION: You do not. One of the amicus briefs I think does, because it is a religious school. But you do not represent --

MR. LEONARD: We do not.

QUESTION: That is what I understood.

MR. LEONARD: The Bob Dillons University situation, which you had before you --

QUESTION: Was different.

MR. LEONARD: -- and the Dade Christian situation are the ones where the exclusion of other colors is done for religious grounds.

QUESTION: Right, but that is no part of your

argument?

MR. LEONARD: That is not part of my argument. The question is whether just the parent has the right anyway.

So if I may come back for the moment, we have an amicus in this case by the name of the Council for American Private Education, it claims to represent 90 percent of all the private schools in the United States. Those 90 percent of the private schools in the United States are, according to that brief, totally integrated.

We have 16,000 private schools, roughly speaking, in the United States; 90 percent of all children attend integrated public schools; 10 percent of all children in the United States attend private schools. Of the 10 percent that attend private schools, 90 percent go to religious schools. I don't know whether they are integrated or not in a racial sense, they are certainly integrated in a religious sense.

QUESTION: Segregated?

MR. LEONARD: Pardon?

QUESTION: Did you mean they are integrated in a religious sense?

MR. LEONARD: I don't believe that a practicing Roman Catholic would make a good Jewish Rabbi, and there are schools for both.

QUESTION: So they are segregated, the religious schools, not integrated, religiously?

MR. LEONARD: Oh, religiously they are very definitely segregated. They may be -- I believe the Catholic Church takes the position that it is totally integrated racially.

Of the 10 percent of children that go to private schools, 90 percent of them go to religious schools, 10 percent go to everything else there is. Now, we have Indian schools, we have Chinese schools, we have black schools, we have French schools, we have German schools -- I would like to call the Court's attention, if I may, to the list which we put into the record, appearing at page 168 of the appendix. Now, we just took the 33,000 names in the tax-exempt lists and picked out the first hundred we came to which apparently were definitely educational organizations catering to one particular ethnic religious or other type group.

QUESTION: What page of the appendix is that on?

MR. LEONARD: Page 168 of the appendix.

In short, gentlemen, 99 percent of all schools in the United States are totally integrated in a racial sense; 1 percent is not, and that is divided up into every form that you can think of. Yet there are enough of these schools one place or another that every single parent still has some control over the education of the child. If she believes in a particular type of association, she can find it.

I have already broached on the subject of the visions between the courts which is growing. The Second

Circuit was very frank about it. In the Weise and Jackson case, they said let everybody know, we use a double standard for determining state action. If it is religious discrimination, we don't find state action; if it is racial discrimination, we do find state action.

In the Vorchheime case, which was just reversed two weeks ago, in the Third Circuit, they held that as long as the City of Philadelphia maintained coeducational high schools, it could maintain a public boys high school and girls high school.

QUESTION: Do your opponents rely here at all on state actions, in effect saying --

MR. LEONARD: None whatever, as far as I know. It was never raised as a question below, and, as far as I know, even the tax exemptions have been taken away from these particular schools.

So that what we have in this particular case is in every type of discrimination involved, and discrimination at one time was a good word, and when I stand here to use it I don't mean that this is necessarily a horrible thing. In a country which is essentially a pluralistic country, the discrimination between people, between the meals you eat, between the type of things you drink, the words you use and the people you associate with, inevitably there is discrimination in virtually every element of life.

Now, when we come down to the question of putting a

child into a school, if that child is black he can go to an integrated school, a black school or a public school, which is always integrated. If he happens to be Spanish surnamed, there are a whole series of private schools which he can attend, or he can attend an integrated school or he can attend a public school.

There is still a virtual choice for a parent in this country to find a school. Now, there may exist situations where the only school in a given area, the only school there is within reachable area is one particular type. In that case, you have a different problem. The whole question of reasonableness is gone.

QUESTION: Mr. Leonard, isn't the only issue in this case -- well, is the first issue in this case whether this federal statute --

MR. LEONARD: Right.

QUESTION: -- prohibits the policies that your schools follow --

MR. LEONARD: Correct.

QUESTION: -- and, second, if it does, is the statute constitutional as so applied?

MR. LEONARD: All of the latest --

QUESTION: Now, those are the two issues, aren't they, and the only two, aren't they?

MR. LEONARD: Those are the only two issues.

QUESTION: Yes.

MR. LEONARD: But, you see --

QUESTION: There are no questions of philosophy or policy or --

MR. LEONARD: No, it is that.

QUESTION: Well, it is a matter of statutory construction, is it not?

MR. LEONARD: Precisely.

QUESTION: And if you construe it a certain way, then it is a matter of the constitutionality of the statute as applied.

MR. LEONARD: Correct.

QUESTION: Isn't that it?

MR. LEONARD: We have two questions, really. First, 1981, and if that answers it, we have nothing more.

QUESTION: Right.

MR. LEONARD: Second, the First Amendment to the Constitution, which 1981 can't override --

QUESTION: Correct. That's right.

MR. LEONARD: -- so that if the right exists under either to have these schools -- I'm sorry, my time is up. Thank you very much.

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

Mr. Brown, you may proceed whenever you are ready, sir.

ORAL ARGUMENT OF ALLISON W. BROWN, JR., ESQ.,

ON BEHALF OF CERTAIN RESPONDENTS AND PETITIONERS

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

I will be presenting the argument in the three cases in which the plaintiffs below are the respondents, those are Nos. 75-62, 75-66, and 75-278. My co-counsel, Mr. Boggs, will present argument in the case in which the plaintiffs below are the petitioners, that is No. 75-306, the issues in that latter proceeding pertaining to the matter of attorneys fees and the applicable statute of limitations in this case.

In my argument concerning the question of whether private schools may discriminate on the basis of race, the matter really resolves itself, as Mr. Justice Stewart has just indicated, to two essential problems. One, whether 42 U.S. 1981 applies as a matter of statutory construction to the kinds of contracts that are at issue in this proceeding; and, secondly, whether, if it does apply, it is a constitutional application of the statute, or, in other words, is there some kind of prosecription in the First Amendment which restricts the application in this instance.

With respect to the first issue of the statute, the Court has indicated previously, of course, that the two provisions of the 1866 Civil Rights Act should be read in a literal way. That was the plain holding in Jones V. Mayer,

and it has been the holding in the Sullivan v. Little Hunting Park, and Tillman v. Wheaton-Haven Recreational Association, and indeed it is the essence of the holding in Johnson v. Railway Express Agency. Those are the four cases in which the Court has previously passed on the 1866 Civil Rights Act.

The plain words, of course, of section 1981 are easy to understand. They are simply that all persons shall have the same right to make and enforce contracts as white citizens. The term "make and enforce contracts" is the key expression.

It has been suggested earlier that this should not be an expansive term or term that has an expanding meaning, as perhaps the Fourteenth Amendment has been construed. It doesn't need to have an expanded meaning. It is clear what it says. It refers to contracts of all kinds, and it doesn't matter whether it is a contract of a type that might have been foreseen or contemplated by the Congress in 1866 or not.

Now, there obviously are some limitations when you get to the question of whether the First Amendment might limit it, but for the moment we are talking about the literal application of section 1981.

QUESTION: Mr. Brown, don't you think there might be some significance to the difference in the introductory language between 1981 and 1982, one saying all persons within the jurisdiction of the United States, as 1981 does, and 1982 starting with different language?

MR. BROWN: The different language in 1982 and the -- the language that exists in 1981 was added in 1870, Your Honor, as a result of the Civil Rights Act of 1970, and it was designed to encompass within the protection of 1981 non-citizens or aliens.

QUESTION: Senator Stewart's amendment basically?

MR. BROWN: I beg your pardon?

QUESTION: Senator Stewart of Nevada was the one who introduced it.

MR. BROWN: I am not certain about it, Your Honor, but that I think is what you are referring to with respect to the different introductory language.

QUESTION: Well, wasn't he thrusting basically at a Fourteenth Amendment type of right, rather than the Thirteenth Amendment?

MR. BROWN: Well, Your Honor, if you are suggesting that -- if I understand you, are you suggesting that 1981 requires state action?

QUESTION: Well, I am suggesting that that would be -- on a clean slate, that might be a very logical inference, where you wouldn't get that sort of an inference from 1982, based, as it was held to be in Jones, on the Thirteenth Amendment.

MR. BROWN: Well, knowing we are on a clean slate, because there are several decisions which we are building on,

and, secondly, this Court has examined that legislative history. Mr. Justice Blackmun, in writing the decision in Tillman v. Wheaton-Haven, referred, for example, to the fact that in the 1879 act, Congress reenacted what is now section 1981 in verbatim, and it also in another section said we are hereby adopting and reenacting all of the 1866 act. Now, it seems --

QUESTION: Was it ever reenacted in the revised statutes?

MR. BROWN: I am not sure that I understand your question, sir. There has been argument as to whether the codifiers of the revised statutes may have made a mistake in failing to make that back reference to the 1866 statute. Is that --

QUESTION: Well, section 18 of the 1870 act was never reenacted in the revised statutes, was it?

MR. BROWN: I am not sure that I can answer that, Your Honor. I am not certain that --

QUESTION: Well, in what provision of the 1870 Act was the 1866 Act reenacted?

MR. BROWN: The 1981 was reenacted in section 16 of the 1870 Act in verbatim form, and then section 18 --

QUESTION: It wasn't verbatim.

MR. BROWN: Well, with slight modifications, because it --

QUESTION: Well, it wasn't reenacted in verbatim form. The 1866 Act was reenacted in a separate section of that statute.

MR. BROWN: Yes, in section 18, yes.

QUESTION: All right. Was that section 18 ever repeated in the revised statutes?

MR. BROWN: I am not sure that I can answer that, Your Honor. I am not certain.

QUESTION: Well, were the revised statutes, when they were adopted, were they the law of the land, the statutory law of the land, or were there some other statutes that were --

MR. BROWN: Well, I think the rule, the general construction that the approach of this Court has taken is that if you look behind the revised statutes to the original enactment, the --

QUESTION: Not to the revised statutes of 1875, because they contain a particular provision that they are the law and they supersede or might be as a repealer section and repeals all other law.

MR. BROWN: Well, I can't respond to this, Your Honor. I am not certain of this. I didn't anticipate this line of questioning, because I thought the issue had been well settled by the Court's opinions in Tillman and Johnson v. Railway Express.

QUESTION: It has been settled. The question is whether it was well settled.

MR. BROWN: Oh.

[Laughter]

QUESTION: There is a lot of thought that it had been well settled before Jones v. Mayer.

QUESTION: That involved 1982.

QUESTION: Well, a very similar question.

MR. BROWN: Yes, Your Honor, I realize that.

Well, if I might proceed, as far as the application of section 1981, as we say, we think that to the contracts that are involved here, we do think that the matter has been settled by Jones and Tillman and Johnson, and we think that it would be a surprising development indeed if it were not well settled, that the statute does apply here.

Now, the argument has been made by the schools here in their arguments before the Court that this involves a coercion, the making of a contract, this matter of prohibiting the person who offers to make the contract from conditioning it on the ground of race. This Court, however, in upholding the 1964 Civil Rights Act, for example, made it very clear that a person has no constitutional right to discriminate, when Congress has said that patrons of a business establishment or another type of establishment may not be selected on the basis of race, that this does not deprive the individual

of any rights, any constitutional rights, rights of due process or property or liberty, that there is no deprivation of Fifth Amendment rights by Congress enacting this type of a statute.

The argument has also been made here in the brief by Fairfax-Brewster School and has been repeated again today that in enacting the Civil Rights Act of 1866, Congress did not intend, or that there is legislative history which would indicate that Congress did not intend the Act to cover private schools. We submit that this is an enlarged reading of the legislative history. We've discussed this in this orange reply brief that we filed in the case, where this issue had been raised, and we pointed out that there had been a clause that had been included in the original bill which prohibited -- that said there shall be no discrimination in civil rights. Some of the persons, principally Congressman Bingham, for example, of Ohio, who objected to this language and there were many others who argued that this would have the effect of interfering with various state segregation laws, that is state imposed segregation of schools, juries, et cetera, that they had at that time.

He and others felt that -- that is Congressman Bingham and others -- felt that the matter of discriminatory state action should be dealt with in another amendment to the Constitution, and indeed at that time the Fourteenth Amendment

was then being drafted. So consequently, when this language that has been referred to by the counsel for Fairfax-Brewster was -- the statements that were being made by Congressman Wilson, where he said we don't intend this amendment to apply to schools, they were really saying they didn't want -- the proponents of the 1866 Act did not -- they were trying to save it from these attacks, and they were trying to say we do not intend this Act to nullify state discrimination laws. There is no evidence at all that they had any reference, any intention to have their language referred to private schools.

They were trying to say, as I say, ultimately they agreed in the amendment that Congressman Bingham was proposing, which then eliminated this no discrimination in civil rights clause. The Thirteenth Amendment -- rather, the 1866 Act was then enacted in its present form, and there has been no -- there is really no evidence in the legislative history as to exactly what kind of contracts Congress really had in mind. It is a very vague -- it is very generalized language, the legislative history itself takes up many pages of the Congressional Globe of that era, but it leaves very little evidence, it provides very little evidence of eactly what Congress was talking about.

However, this Court has held, and other courts have held, that this phrase "giving blacks the same right to make and enforce contracts as white citizens," that this language

is broad enough to cover employment contracts, that it will cover contracts concerning the admission to amusement parks or admission tickets to amusement parks; another case has held that it covers the guest privileges of private swimming clubs -- I am referring now to cases that are cited in our brief -- it has been held, and this is significant here, that this statutory term covers privately owned, a privately owned barber trade school, it was held to cover a privately owned law school, a purchase of insurance policy, admissions to --

QUESTION: Let me ask you a hypothetical question in terms of schools. Suppose a particular community, a diplomatic community in Washington establishes a school on property not covered by diplomatic immunity, and the requirement for admission to the school is that one or more, one or both of the parents be nationals of a Spanish-speaking country, and this would be obviously the diplomatic community's means of preserving the culture and the background of their children. Do you think 1981 reaches it?

MR. BROWN: Well, 1981 has been applied to --

QUESTION: I am assuming, of course, that you have an application of some person who doesn't fit that category and --

MR. BROWN: If you just said Spanish-speaking, I wouldn't think that 1981 proscribed it. Now, where Spanish-speaking takes on a racial -- is used in a racial context, it

has been held to apply, and indeed there is a case precisely like that that we cited in our brief involving a tavern in Oregon that prohibited Spanish from being spoken there. This was used as a basis for primarily -- the owner argued -- for minimizing the chances of racial antagonisms between Mexican-Americans and Caucasian Americans. And when the Spanish-speaking -- there was Spanish spoken by Mexican-Americans. The Court held this constituted racial discrimination when they were excluded from the tavern as a result.

All I am saying, Your Honor, in answer to your question, that then 1981 only applies to racial discrimination in its present form, that's all, it doesn't cover any other kinds of discrimination.

QUESTION: Then assume further that the claim is made that in operative effect this excluded racial groups.

MR. BROWN: Well, it seems to me that it would be arguable that then it came within the proscription of 1981.

QUESTION: Mr. Brown, in light of your comment that you construe 1981 as applying only to racial discrimination, does that suggest that you disagree with counsel for petitioner who stated here fifteen or twenty minutes ago that if you prevail, the principle would apply to all-girl schools, all-boy schools?

MR. BROWN: No, sir, not on the question we are talking about here, the question of the construction of this

statute. This statute was enacted pursuant to the Thirteenth Amendment, and, aside from this question that Your Honors heard argued last week in the McDonald case, involving the question of whether whites have a course of action under 1981, this does not prosecribe anything but racial discrimination, so far as any of the cases indicate, or the legislative history would indicate.

QUESTION: In your view, 1981 does not embrace whites or the rights of whites?

MR. BROWN: I don't know that -- I can't give you that answer, Your Honor.

QUESTION: Well, that was only last week.

MR. BROWN: That was the McDonald case.

QUESTION: In any case, as I understand it, it is your submission and your understanding that you are imparting to us that whoever may be the permissible plaintiff under section 1981, the only cause of action that can be stated under 1981 is one of racial discrimination?

MR. BROWN: Yes, sir, no question about that in my view.

QUESTION: So it would not apply, in your view, to an all-boys school or an all-girls school, so that the opposite sex would have a contractual right to enter?

MR. BROWN: I do not believe so, Your Honor. I could be wrong, but I don't believe that case has been

litigated. Certainly, the issue isn't presented here. Whether somebody will bring a case proposing such a theory, I don't know.

QUESTION: Do you know of any case anywhere that has construed section 1981 to be applicable to anything except racial discrimination?

MR. BROWN: No, I do not know of any case. There was a question at one time as to whether it covered aliens, I believe, Mexican-Americans, but I think that was resolved. I think some case had been brought asserting the right of women, but I don't think it has been successful, that is asserting that women have a cause of action for sex discrimination, but I don't know -- I can't tell you what happened to it.

QUESTION: It wouldn't be more broadly applicable to just Negroes?

MR. BROWN: I beg your pardon, sir?

QUESTION: It hasn't been limited just to Negroes?

MR. BROWN: 1981?

QUESTION: Yes.

MR. BROWN: Well --

QUESTION: It has been held to be applicable to --

MR. BROWN: Blacks and --

QUESTION: -- people of Spanish ancestry?

MR. BROWN: Yes. Yes, I'm pretty certain that that is --

QUESTION: Despite the legislative history, which surely was directed to the two major races?

MR. BROWN: Well, yes, Your Honor.

QUESTION: Well, is it a Thirteenth Amendment piece of legislation then?

MR. BROWN: Well, it comes from the Thirteenth Amendment, and I suppose this is --

QUESTION: And it applies to Mexican-Americans?

MR. BROWN: Well, it sounds like I am being asked the kind of questions that are involved in the McDonald case, but I can't --

QUESTION: Well, you said it was a Thirteenth Amendment piece of legislation.

MR. BROWN: I think it is, Your Honor.

QUESTION: Didn't Johnson say it was a Fourteenth Amendment piece of legislation?

MR. BROWN: Not according to my understanding of Johnson. Maybe I am mistaken.

If I might go on, Your Honors, to what I think is really the crucial question in this case --

QUESTION: Mr. Brown, before you get started again, let me just be sure I understood one point about your reply brief and the question of the elimination of the language trying to seek out the attention of Congress in 1866 --

MR. BROWN: Yes, sir.

QUESTION: -- the elimination of the language, other civil rights language. As I understood your position, it is that you acknowledge that the elimination of that language evidences an intent not to have the statute apply to state operated integrated schools --

MR. BROWN: Yes, sir.

QUESTION: -- but that leaves open the question then of whether it applies to privately operated schools?

MR. BROWN: Yes, sir.

QUESTION: And do you think it is probable that Congress would have first legislated against private discrimination and, secondly, reserved the question of public integration? I am just trying to get your position in the --

MR. BROWN: Your Honor, the fact was that in a historical context it happened concurrently, you know, because at the same time the 1866 Act was in Congress, I think they called it the Committee of Reconstruction, a committee of -- a joint committee of Congress, which was actively engaged in drafting the Fourteenth Amendment, so I think it is my view, from reading the legislative history, and I have read a fair amount of it, that they were really sort of compartmentalizing what they were doing. They intended to reach private discrimination with the Thirteenth Amendment or with the 1866 Act -- excuse me -- and that they intended the Fourteenth Amendment to cover state discrimination or state action discrimination.

QUESTION: And Congressman Bingham, who proposed the amendment of this legislation, was at the same time a member of that committee that was actively engaged in drafting the Fourteenth Amendment.

MR. BROWN: He was the principal voice on it, yes, sir.

Just one more thing I would like to call the Court's attention to. One question of trying to discern the intent of Congress with respect to schools, if you read Brown v. Board of Education, again, the Court kind of threw up its hands at that point, after having been deluged with extensive briefs on this whole question of what was the intent of Congress in enacting the Fourteenth Amendment. In fact, the Court issued these special questions to the litigants and saying what did Congress intend, did it intend to cover schools, and the Court said in its opinion that the intent of Congresses of that period were very difficult to discern, if not impossible, therefore, we have to resort to contemporary landmarks at this time in trying to find out whether we think it is permissible or not, that is, state imposed discrimination in the schools.

My only point is that this Court in a sense has already held that it is -- that the intent of Congress is difficult if not impossible to discern vis-a-vis schools in that period.

QUESTION: Just to aummarize it once more, what you

are saying, I understand the point that the deliberations over the Fourteenth Amendment were focused on state action and therefore that problem might have been reserved. You must be saying, if I understand it correctly, that if we use the phrase "badge of slavery," that private discrimination in schools -- discrimination in private schools would be a badge of slavery, but discrimination in a public operated school would not be a badge of slavery, within the Thirteenth Amendment framework?

MR. BROWN: Yes, I think that is the way you would have to read it.

QUESTION: That must be what you are --

MR. BROWN: Yes, sir.

QUESTION: Were there in fact between 1865 and 1870 public school systems in all of the states?

MR. BROWN: I don't know whether there were in all the states, Your Honor. There were public school systems, of course --

QUESTION: In some of the states?

MR. BROWN: Yes -- and I guess they in most instances operated on a segregated basis, and this was what some of the conservatives in the Congress at that time were objecting to about this language in the 1866 Act, which --

QUESTION: You don't mean in all of the states, that they were segregated, do you?

MR. BROWN: No, I don't really know. I mean I have not seen any clear evidence of a survey of this whole question.

QUESTION: The first case against segregated schools was in Boston, Massachusetts in 1850's, Roberts v. City of Boston.

QUESTION: Well, Massachusetts, as we all know, was one of the very first states to adopt a public school system, but --

QUESTION: And desegregate.

QUESTION: -- but am I not correct in my understanding that not all of the states had public school systems in the 1960's, did they?

MR. BROWN: I just really don't know the answer to that, Your Honor.

If I might proceed to -- as I said, what seems to me to be the second crucial question in the case, namely whether there is any right or reason for exempting privately owned schools, non-public schools from the thrust of section 1981, it seems to me this breaks down into two facets. The first -- and two identifiable points here -- the first one, it seems to me, concerns the matter of whether there is an institutional privacy that these schools can assert, and then, secondly, whether there is a right of privacy, a personal privacy that the parents can assert on behalf of their children or behalf of their -- that is an expression of their

right to raise and control the education of their children the way they wish to.

With respect to the institutional privacy -- and the reason I break it down is because in a sense the Court -- it seems to me they come from two different frames of the law, two different lines of decisions. On the question of the institutional privacy and whether these schools are in fact selective and are therefore in a position to assert a privacy and a right of exclusion, I would point out, first of all, as the record shows, that the schools -- both of these schools advertise in the Yellow Pages of the phone book, that is both the defendant schools, they have open enrollments, they solicit patrons and enrollments in the community where they are located, and I would say, in addition, the record does not show anything to the contrary so far as these schools that are represented by the Southern Independent School Association.

Indeed, it is well known that the reason these schools exist and are able to continue in existence is because they attract and solicit -- their enrollments are open, I should say, to everyone in communities where there is court-ordered desegregation of schools, and that they have become -- and they are perpetuated because they have a constant inflow of white students. So as far as we are to know, they are open to all white persons in the community.

The Court, in Sullivan v. Little Hunting Park and in

Tillman v. Wheaton Haven Recreation Association, had a much more difficult question before it, it seems to me, in this regard, because there you are concerned with neighborhood swimming pools and recreation associations, which really conform much more closely to the conventional concept of what is a private institution. But the Court held in the Sullivan case, and it held in the Tillman case, that those two associations were not "truly private" because they had no plan or purpose of exclusiveness. They were open to every white person in the areas they served, there being no selective element other than race. Now, it seems to me that that language really covers these schools. They have no plan or purpose of exclusiveness, any of these schools, and they are open to everyone in the communities or the areas that they serve, and race is the only factor that constitutes an absolute bar.

Now, of course, they do have other selective characteristics, but then so did the swimming pools in the Sullivan and Tillman cases. The memberships in those associations were subject to approval of the board of directors and they had various other kinds of geographic and financial qualifications, but race became the absolute bar.

Now, again, with respect to schools, government regulation of schools is a very common thing. As Mr. Justice Rehnquist mentioned earlier in the course of the argument,

there are state regulations that have been in existence for years that govern such matters as curriculum, teacher qualifications, and various other -- and academic standards, and so forth.

Now, the other very important and very significant thing is that in 1972 Congress, as we noted in our brief, Congress amended Title VII of the fair employment provisions of the Civil Rights Act of 1964, to apply them to private schools. There had originally been an exemption for educational institutions in Title VII, but Congress repealed that in 1972 and made Title VII applicable to private schools.

Now, it would certainly be incongruous in the extreme for the Court to say that the schools could apply racial criteria in their selection of students, where Congress has at the same time said that they may not use race as a criteria in selecting faculties. If any school has 15 or more employees, they are subject to Title VII under the Civil Rights Act. That is an important consideration to be borne in mind in considering the issue here, it seems to me.

I would also point out that, as we have in our brief, there are 16 states that have non-discrimination education laws, 16 states that have adopted laws which prohibit discrimination in admissions policies. Many of these, a number of these are modeled after, are fashioned after a model law that has been promulgated by the National Conference of

Commissioners on Uniform State Laws, so obviously it would be a surprise to the persons who drafted those laws and the legislatures that have enacted them for the Court to say that it is unconstitutional to somehow prohibit schools from discriminating on the basis of race. That, of course, would be the effect of a holding against the plaintiffs in this case.

Now, it seems to me --

QUESTION: You mean a constitutional holding against the plaintiffs?

MR. BROWN: I beg your pardon?

QUESTION: You mean that would be the effect of a constitutional holding against the plaintiffs? I suppose it would be possible for the Court to decide that 1981 didn't reach, which would have no constitutional implications at all?

MR. BROWN: Yes, sir.

Now, the next face of the constitutional argument is the one I alluded to earlier, which is what I think is really involved here. There have been references made by opposing counsel to right of association and the freedom of persons to express their beliefs and right of privacy and so forth, which I don't think quite hit the real issue.

It seems to me that the proper term, an appropriate term, let's say, an apt term was used by Professor

Lewis Henkin -- and we don't refer to this in our brief, but there is an interesting article by Professor Lewis Henkin in 72 Columbia Law Review, at page 1410, in which he refers to autonomy as being an accurate perhaps description of what this Court has talked about in some of its privacy cases, that what we are really talking about here perhaps is the matter of familial autonomy.

Now, I am saying this because I want to make clear what I think might be a helpful frame of reference for the Court in its analysis of the issue.

The cases from which the right of privacy flows, which have been the basis for the constitutional right of privacy as it has been explicated by the Court, of course, are Griswold v. Connecticut, Eisenstadt v. Baird, Stanley v. Georgia, and Roe v. Wade. Those are basically the privacy cases. They deal with such matters as marriage, procreation, contraception, what are essentially family relationships. But they are not all really privacy. They don't involve necessarily an invasion of privacy so much as they involve the state's interference with the ability to act freely and according to one's own personal dictates.

Now, added to that line of cases are the other two cases which the Court has frequently referred to, Pierce v. Society of Sisters and Meyer v. Nebraska. Pierce v. Society of Sisters, of course, was a situation where the state had said

that in effect private schools couldn't exist, all persons had to send their children to public schools. And Meyer v. Nebraska, of course, was an attempt to restrict the teaching of foreign languages in private schools. And those cases are the essence of or sort of the basis, I should say, of what has been referred to as the right and liberty of persons to direct the education and up-bringing of their own children.

Now, we don't in any way dispute this, that this right exists. We could not. However, in the case of Norwood v. Harrison, Mr. Chief Justice Burger, writing the opinion, referred to the Pierce case, for example, and at page 461 of the Court's opinion in Norwood, the opinion says, "As Mr. Justice White observed in his concurring opinion in Yoder, Pierce held simply that while a state may posit [educational] standads, it may not pre-empt the educational process by requiring children to attend public schools," and that is exatly the point. In Pierce and in Meyer v. Nebraska, the Court said very clearly that the state, through its police powers, has a right to posit educational standards and other kinds of regulations that are necessary to control the manner in which schools are operated.

Now, parents do not have complete autonomy in how they raise their children, and it is well engrained in our legal system today. Compulsory school laws have been upheld everywhere that they have been challenged. Parents have

objected to compulsory school laws on moral, religious and constitutional grounds, but they have never been successfully challenged, that is such laws.

QUESTION: Are there any states that do not permit an equivalent education by private tutors?

MR. BROWN: I do not believe so. I do not believe so, Your Honor.

The other case which is an important one to bear in mind is Prince v. Massachusetts, where a person used her child for the purpose of selling religious tracts, and the state prosecutor of the State of Massachusetts prosecuted the parent on the ground that it was a violation of the state child labor law, and this Court held that notwithstanding the very sacred right, if you will, of the parent to control the child's activity and particularly there, where the child was being used in a religious way or as an expression of religious belief, that notwithstanding the importance and the high priority given these rights, the state still had a legitimate interest and the right to control that child's upbringing and interfere -- I don't mean to control the upbringing, but to require the parent to abide by the child labor laws. The Court said that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare, and this includes to some extent matters of conscience and religious conviction.

So we submit that, notwithstanding the expressions of conscience, the expressions that we've heard here about belief that segregated education is a superior form of education, that the state here may legitimately in a constitutional sense tell parents that, if you are going to send your child to school and you are required to by the compulsory education laws, they have to go to school under the conditions that we, the state, have found to be most appropriate in a democratic society.

I would just in closing like to add one word, and that is that I think it is very significant that we have in this case the support of the Solicitor General of the United States and also the Council for American Private Education, the National Association of Independent Schools, and the Southern Association of Independent Schools. This comprises the majority of the educational industry, if you will, in the United States, and they are saying to this Court that they do not believe that the Court's affirmance of the courts below will interfere with the way they operate the schools or that they will interfere with the right of parents who send their children to those schools to control the education of their children unduly.

Thank you.

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

Mr. Boggs.

ORAL ARGUMENT OF RODERIC V. O. BOGGS, ESQ.,

ON BEHALF OF CERTAIN RESPONDENTS AND PETITIONERS

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

There are two additional issues which I would like to address this afternoon. The first concerns the award of attorneys fees in this case by the District Court, which was subsequently reversed by the Court of Appeals. The second involves the appropriate statute of limitations to be applied to a 1981 action brought in the state of Virginia. The Fourth Circuit Court of Appeals in this case applied the two-year personal injury statute of limitations and petitioners seek to apply the five-year statute of limitations.

Turning first to the question of attorneys fees, we submit that there are two bases under which attorneys fees could appropriately be supported as an award in this case. The first involves the application of the bad-faith exception to the American rule; and the second involves a finding of an explicit statutory authorization to award fees in section 1988 of 42 U.S. Code.

Before discussing the attorney fee issue, however, in detail with these theories, I would like to note briefly the manner in which the attorney fee question was raised in the course of this litigation. We think it is quite important to note that in this case the District Court, at the conclusion of

the trial awarded $2,000 in attorneys fees without, however, hearing argument on this question and without making any specific findings as to the basis for the award of fees.

It is also, of course, important to note that this case arose before this Court's decision in Alyeska. On appeal, only the private attorney general theory was briefed and argued. Subsequently, in the Court Circuit's opinion in this case, the private attorney general theory was held inapplicable and by a 4-3 margin, the Court of Appeals found that no bad-faith was present on the record before it. I would think possibly of importance to the Court was the absence of any findings of bad-faith were made explicitly by the District Court.

We would note, however, that the general pattern which has been seen in cases considered by Circuit Courts since this Court's decision in Alyeska has seen remands to District Courts in circumstances where the private attorney general theory had been utilized to award fees but no basis for bad-faith had been explicitly recognized and discussed by Courts of Appeals.

We would therefore suggest that, at a minimum in this case, based on the record, a remand would be necessary should this Court be unable to agree with our conclusions from the record that bad-faith has amply been made out before the District Court.

QUESTION: I would be interested in your bad-faith point.

MR. BOGGS: Excuse me, Your Honor?

QUESTION: I had difficult in finding your bad-faith point.

MR. BOGGS: Well, I would like to turn now specifically to the question of bad-faith in this case. We believe that the bad-faith in this case is constituted not by the defense by these schools of what they believe to be their constitutional rights to refuse admission to black students, but more by the manner in which they have asserted this defense, specifically by their repeated denials under oath of having refused to admit these children on the basis of their race.

The Court of Appeals found it quite important, in considering this question, in finding and stating that they believe faults of perception and memory could have accounted for the testimony that was given on several occasions by defendants' witnesses. We, however, submit that a review of the record of this case will show that there is no question of perception or memory in the conduct of defendants; quite the contrary is true.

In the case of the Gonzales children and the Fairfax-Brewster School in particular, there is testimony by three members of the staff of that school that they remember fully the circumstances under which Colin Gonzales applied. They

remembered that he had been rejected not because of his race, because they claimed there was no policy of racial discrimination, but rather they claimed that he was rejected because he had not had sufficient preschool experience.

QUESTION: Well, that is witnesses.

MR. BOGGS: That is witnesses, but it is also --

QUESTION: Well, what about the bad-faith of the parties?

MR. BOGGS: The parties in this instance I think are much the same, three individuals involved were the directors. In fact, they constitute the administration entirely of the school.

We would submit, Your Honor, that this testimony under oath cannot be accounted for on the basis of perception and memory, and in fact can only be seen as a deliberate attempt by the defendants to deceive the court and to protect this litigation. It must be remembered that, as a result of that testimony, the result of that position --

QUESTION: Basically, they were asserting a constitutional right.

MR. BOGGS: No, we would disagree with that, Your Honor. There certainly --

QUESTION: Wait, now. Did they assert a First Amendment right?

MR. BOGGS: They asserted a constitutional --

QUESTION: Is the First Amendment a constitutional right?

MR. BOGGS: Absolutely.

QUESTION: Then they did assert a constitutional right?

MR. BOGGS: They did assert a constitutional right.

QUESTION: And it is pretty hard to find any bad-faith when you are asserting a constitutional right, isn't it?

MR. BOGGS: We do not submit that there is any bad-faith in their assertion of a constitutional right. The bad-faith in this case comes not from the constitutional defense but the manner in which they denied the underlying facts of discrimination under oath and in a way which could not possibly in our judgment be caused by failures of perception and memory, and we would submit that there was ample case authority from this Court and from the circuits which distinguish quite clearly between litigation conduct, the giving of disingenuous testimony --

QUESTION: Now, two other federal courts have already passed on this issue, have they not?

MR. BOGGS: I don't believe you could say two, Your Honor. The Court of Appeals did review this directive without the benefit of findings from the District Court. The District Court, as we pointed out initially, reached its conclusions we believe on the basis of the private attorney general theory.

It made no findings as to credibility, in explicit sense. However, we would note that in commenting on this testimony of the three witnesses, the three administrative people from Fairfax-Brewster School, the District Court explicitly found that the court rejects this testimony as unbelievable and finds that the reason for the rejection was because Colin Gonzales was black.

In other words, we are saying, as this Court in fact made quite clear in the case of Hall v. Cole several years ago, that in determining and looking at bad-faith, we must distinguish between deceptive litigation conduct and the putting forward of a constitutional defense of some kind. That distinction we think is very clear in this case, and if you review the record carefully I think we submit you will come to the same conclusion that we have, that there is a distinction here.

We aren't questioning the right of either of these schools to make a constitutional defense. We claim though that they have not done just that. They have extended this litigation unduly, put us through the necessity of interrogatories, a two-day trial on the question of discrimination itself, not the constitutional aspect of the case, and required us beyond that to pursue this question of credibility on to the Fourth Circuit Court of Appeals. In fact, in listening to the argument of counsel for the schools this morning, I would submit that the question of credibility is still being argued

to some extent by them.

QUESTION: Well, at least three of the seven members of the Court of Appeals indicated that they were far from convinced that the District Court was right in its finding of facts, in other words that they were far from convinced that your opponents were correct in the factual assertions that they made. Now, that certainly detracts from any inference of bad-faith, doesn't it?

MR. BOGGS: Well, I think if this Court is not convinced the way we are, Mr. Justice Stewart, that the appropriate course would be to send this case back to the trial court. After all, bad-faith, as many cases -- we cite some of them -- make clear, when bad-faith is an issue, the court relies heavily upon trial court discretion, in fact the case is made clear that in the absence of clearly erroneous judgments by the trial court, a finding of bad-faith must be sustained on appeal. The problem here is simply that that wasn't made. We suggest the record leads to that conclusion. There is obviously a difference of opinion on that question, and if this Court disagrees with us, we think a remand on that question would be required.

QUESTION: Alyeska was decided after the Court of Appeals decision in this case?

MR. BOGGS: Alyeska was decided after the initial Court of Appeals --

QUESTION: How long after?

MR. BOGGS: Almost simultaneously.

QUESTION: Was there a petition for rehearing of any kind in the Court of Appeals --

MR. BOGGS: There was a petition for rehearing.

QUESTION: -- based on Alyeska?

MR. BOGGS: I am not sure it was based on Alyeska. It was before Alyeska but during the time that petition was pending, Alyeska was handed down and, for that reason, the three judges in dissent who raised the private attorney general theory withdraw that aspect of their opinion but maintained their position in regard to bad-faith.

I would also suggest, Your Honor, that in looking at bad-faith, this Court has at least on one occasion made it clear that it is particularly sensitive to questions of bad-faith in matters of racial discrimination. I would call the Court's attention to its decision in Newman v. Piggie Park Enterprises, where the Court, in a footnote, Footnote 5, I believe, specifically cited as an example of bad-faith the raising of a defense regarding the denial of discrimination, which was subsequently withdrawn prior to trial, and cited that as an example of vexatious litigation tactics.

QUESTION: As you have just indicated, far from being withdrawn prior to trial, it is still being asserted here, in this case.

MR. BOGGS: That's right. I think that this Court, if this Court does not agree with our interpretation of that, which is in our judgment is a fortiori situation, in other words maintaining a vexatious defense even to trial, the proper course is a remand on that issue.

The second theory which we would like to submit to the Court justifies the award of attorneys fees in this case is found in examination of section 1988 of 42 U.S. Code. This section was originally the third section of the 1866 Civil Rights Act.

We submit that 1988 provides for this Court the specific legislative guidance which after Alyeska appears to be required in order to find the authority to grant attorneys fees absent one of the generally recognized exceptions to the American rule.

As this Court I believe is familiar from its decisions in other cases dealing with 1988, the language of that provision speaks in terms of the jurisdiction of courts in civil rights cases being exercised in conformity with the laws of the United States so far as such laws are suitable to carry the same into effect, and to the extent that those laws are not fully adopted, the Court may then look to state laws modified by common law, as long as it is consistent with the federal law.

We believe that this section provides an explicit

invitation to seek remedies to make fully effective the 1866 Act and in fact other civil rights provisions of Chapter 21 of 42 U.S.C.

We would also like to submit and state that this Court has recognized the ability that it possesses to apply the 1866 Act, section 1988, to draw upon federal law to make fully whole victims of discrimination in determining appropriate relief and remedies, and we would cite for that proposition the case of Sullivan v. Little Hunting Park, in which the Court -- and I quote -- stated "as we read section 1988, both federal and state rules on damages may be utilized, whichever best serves the policies expressed in the federal statute." We therefore suggest that as an appropriate course for this Court to follow, to draw upon the private attorney general provisions of later enacted statutes which allow the award of attorneys fees in civil rights cases.

We think no less is required to fully effectuate the purposes of the 1866 Civil Rights Act.

Finally, Your Honors, I would like to turn my attention to the question of the statute of limitations that has been applied in this case. The Fourt Circuit Court of Appeals applied in this case the two-year statute of limitations which is taken from the personal injury provisions of Virginia Code, section 8-24. This section, which had first been applied in 1972 in the case of Almond v. Kent, that being an 1983 action,

involving a suit in which a citizen had been beaten allegedly by the police, was in fact a personal injury case, a physical injury case, as well as a constitutional case.

The Court in that instance was choosing between the application of the two-year limit for personal injuries and a one-year limit based on transitory torts. It chose, in a way that was quite helpful to the plaintiff in that case, the two-year limit. Subsequently, the logic applied in that case to a 1983 action has been applied to section 1981 and 1982 actions, but of course they do not involve necessarily and normally do not involve explicit physical injury.

We submit that the classification --

QUESTION: But neither does 1983 -- 1983, while it might have in that case have involved personal injuries, the cause of action is a violation of federal constitutional or statutory law, is it not?

MR. BOGGS: No, we absolutely agree with that, Your Honor. We think that is one reason --

QUESTION: Physical injuries are only part of that cause of action.

MR. BOGGS: Precisely, and that is exactly the reason why we think neither 1981, 1982 nor 1983 actions should be equated for purposes of analogy with physical personal injury. We would state here parenthatically that it is interesting to note that in Virginia law, application within the state

of Virginia, that two-year limit, to the best of our ability to research the question, is only applied to cases of physical bodily injury, and there is no case that has been cited to us in opposing briefs or that we have been able to research which applies it any place else except in the area of civil rights. And it is for that reason that we think that in searching for the most analogous statute of limitations, which is a course that federal courts are obliged to take, and federal statutes are silent on that question, the appropriate thing to do is to look at the second section of that Virginia statute which specifies that in personal actions for which no limit is otherwise prescribed, a five-year limit should be adopted if the cause of action is found to survive, and a one-year limit is to be applied if the cause does not survive.

We would, applying that analysis, suggest that a five-year statute is dictated by virtue of the fact that even in the opinion of the Fourth Circuit in Almond v. Kent in the first instances, there was no question but that the federal right under 1983 -- and we would suggest under 1981 and 1982, as well -- would survive on the basis of generally accepted federal principles.

Because of that, Your Honors, we suggest that the appropriate resolution of this case on the statute of limitations is to hold that for the purposes of analogy the state of Virginia, the five-year statute of limitations is the

appropriate one to be applied.

QUESTION: This goes just to the damages in just one of the cases, is that correct?

MR. BOGGS: That's right. The way this issue arises, Mr. Justice Stewart, is that in the case of the Gonzales family, the parents were not entitled, were ruled not able to bring this case, because the statute of limitations barred them. They filed the suit three and a half yeasr approximately after the cause of action arose.

QUESTION: That is just one of the cases?

MR. BOGGS: That's right. We would suggest in that case that the appropriate course of action would be a remand for relief not inconsistent with the findings.

Thank you, Your Honor.

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

[Whereupon, at 2:26 o'clock p.m., the above-entitled case was submitted.]

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