ORIGINAL



In the

# Supreme Court of the United States

C-4

PAUL A. McDANIEL,

Petitioner,

Vs

SELMA CASH PATY, ET AL.,

Respondents.

No. 76-1427

Washington, D. C.
December 5, 1977

Pages 1 thru 33



*Hoover Reporting Co., Inc.*

*Official Reporters*
*Washington, D. C.*
*546-6666*

IN THE SUPREME COURT OF THE UNITED STATES

PAUL A. McDANIEL,

Petitioner,

v. No. 76-1427

SELMA CASH PATY, ET AL.,

Respondents.

Washington, D. C.

Monday, December 5, 1977

The above-entitled matter came on for argument at 1:55 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

FREDERIC S. LeCLERCQ, ESQ., 1505 West Cumberland, Knoxville, Tennessee 37916, for the Petitioner.

KENNETH R. HERRELL, ESQ., Assistant Attorney General of Tennessee, Nashville, Tennessee 37219, for the Respondents.

# 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 hear arguments next in 76-1427, Paul McDaniel against Selma Cash Paty, et al.

Mr. LeClercq.

ORAL ARGUMENT OF FREDERIC S. LeCLERCQ, ESQ.,

ON BEHALF OF THE PETITIONER

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

The Petitioner in this case is Paul A. McDaniel, a minister from Chattanooga, Tennessee. He declared as a candidate and properly filed as a candidate for Delegate to the 1977 Tennessee Constitutional Convention, at which time he was sued by one of his opponents to have his name stricken from the ballot because he was a minister of the Gospel, and a provision of the present Tennessee Constitution, Article 9, provides that no priest or minister of the Gospel may serve in legislative office in Tennessee. And the call to the Tennessee Constitutional Convention of 1977 picked up that qualification for persons who were to serve as delegates to the Constitutional convention.

The matter was heard in the Chancery Court in Hamilton County and the Chancellor enjoined the requirement as being in violation of the free exercise of religion. An appeal was taken to the Tennessee Supreme Court which remanded for not having given notice to the Attorney General. The case was then

heard in the Chancery Court of Hamilton County, with the Attorney General appearing, and the Chancellor again enjoined the provision on Establishment Clause grounds.

During the period when an appeal was taken to the Tennessee Supreme Court, by the State and Ms. Paty, the election was held and Reverend McDaniel won handily. He came within a few votes of having more than the other three candidates combined.

The Tennessee Supreme Court heard this case and decided that Reverend McDaniel could not serve because of the provision of the Tennessee Constitution and upheld the exclusion on separation grounds. Counsel then sought a stay from Mr. Justice Stewart which was denied with suggestion that application be made to the Tennessee Supreme Court, which was then done, and the Tennessee Supreme Court granted a stay until June 20, 1977, at which time the Tennessee Supreme Court denied a second request for a stay and Mr. Justice Stewart then granted Appellant's request for a stay.

The Constitutional Convention began August 1, 1977, and Reverend McDaniel has been sitting as a delegate to that Convention under the stay granted by Mr. Justice Stewart.

QUESTION: Is it still in session, the Constitutional Convention?

MR. LeCLERCQ: The Constitutional Convention is still in session.

QUESTION: Any anticipation or anything you can tell from the record about when they expect it to end?

MR. LeCLERCQ: It is very difficult to predict when legislative groups in Tennessee will end.

QUESTION: Or anywhere else.

QUESTION: But what would happen, counsel, if upon election, or upon filing as a candidate under the Tennessee law, the ordained minister renounced his ordination and resigned. Would that clear him of the disability or don't we know?

MR. LeCLERCQ: Query, Mr. Chief Justice --

QUESTION: He might be tainted for life.

MR. LeCLERCQ: We face that issue in the brief on the vagueness question. And this was very much a question in England: Can one renounce his ministry, can one be defrocked and then run for office? It is by no means clear on the face of the Tennessee disqualifying provision whether that could be done.

Now, the issues in this case involve several provisions of the Constitution. This is a voting rights case. It involves the right to be a candidate for public office which this Court has vindicated in the past. It involves voting rights as well, since the right to vote for priests or ministers of the Gospel is an important right. We face the same question in this case that was faced by the Court some years back when it addressed

the question of whether persons in the military could be fenced out from candidacy or from exercise of their voting rights.

QUESTION: In what cases have we vindicated what you describe, the right to be a candidate?

MR. LeCLERCQ: It's my opinion, Mr. Justice Rehnquist, that this was done in Bullock and in Lubin v. Panish and in American Party of Texas v. White. It seems to me that one can say that the rights of candidates qua candidates were vindicated in these cases, although I don't think it makes a great deal of difference even if the Court should choose to vindicate these rights as voting rights.

We also have at stake here free exercise rights. Because Reverend McDaniel has chosen to exercise his rights as a minister of the Gospel, he has been penalized in his voting rights. So you have a situation where the Appellant is put to the Hobson's choice of either choosing between his voting rights, which this Court has declared are fundamental or his free exercise rights, which this Court has declared are fundamental.

QUESTION: His voting rights being his right to vote for himself?

MR. LeCLERCQ: Yes, or for any other minister since this has been certified as a class action by the Chancellor of the Hamilton County Court.

QUESTION: Both may be fundamental, but only one is

a constitutionally protected right, isn't that correct? If you read the case of Miner v. Haperstat you will find it stated there by the Court, unanimously, as I remember, that there is no constitutional right to vote. That case made necessary the amendment of our Constitution to allow women to vote. That was an equal protection case. The Court said the Equal Protection Clause gave no such right, whereas the First Amendment protects and creates freedoms and rights, doesn't it?

MR. LeCLERCQ: Yes. But we think the voting rights cases of this Court are sufficient, as well, to seat Appellant.

QUESTION: Who is in this class?

MR. LeCLERCQ: All ministers who shall be candidates for office of delegate to this or future constitutional conventions, and all candidates for legislative office.

QUESTION: How can that be a class? I thought a class was a large number of people.

MR. LeCLERCQ: Well, we think there may be a number of other ministers who --

QUESTION: Name one.

MR. LeCLERCQ: Mr. Justice Marshall, it is my understanding that there are several other ministers who are serving at this time as delegates to the Tennessee Constitutional Convention.

QUESTION: Is that in this case? Is that any place in this case I can put my hand on?

MR. LeCLERCQ: We did not know at the time that this class was certified that --

QUESTION: I thought a class had to be a number that was too many to name. I am not using the exact language, but I think that is what the language is.

MR. LeCLERCQ: The state class action requirement is patterned upon Rule 23.

QUESTION: Why doesn't the class include every ordained minister in the State of Tennessee, whether or not he has a present intention of running for anything?

MR. LeCLERCQ: Well, that's a point well taken, Your Honor.

QUESTION: It's an inhibition --

MR. LeCLERCQ: It is an inhibition.

QUESTION: -- now resting on every ordained minister in the State, is it not?

MR. LeCLERCQ: I think that really wouldn't matter very much, however, because if the class relief were afforded as Appellant sought, any minister who ever wanted to seek legislative office in Tennessee would be allowed to do so.

QUESTION: Is it very important to us now for our purposes, whether it is proper class action or it is only one man?

MR. LeCLERCQ: I think it is important for this reason. If we strike down Chapter 848 of the Tennessess Public

Acts of 1976, dealing with the call to this convention, then we only deal with this particular call and it means that next year should some minister in Tennessee choose to be a candidate for legislative office, that he could be excluded under this provision, and it would entail the great expense that has been entailed in this or any other case that comes to this Court to afford relief and we may not have the fortuitous event then which occurred here.

QUESTION: Well, this Court always -- If we disagree with the judgment of the Supreme Court of Tennessee, our mandate is always vacated and reversed for further proceedings not inconsistent with this opinion. We would not tell, as I understand our practice, the Supreme Court of Tennessee what form of mandate to send down to the Chancery Court in Hamilton County, so long as it was not inconsistent with our opinion.

MR. LeCLERCQ: Well, the only problem that I could see coming from that is that the Supreme Court of Tennessee limited the cross-appeal taken by Appellant from the Chancellor's ruling to this particular case and this particular statute, and they relied upon, I believe, the Story case in Tennessee which, in our brief, counsel has alleged is inapposite. It is simply a question of whether this Court is willing to resolve this question in Tennessee.

QUESTION: You'd have a precedent, in any event, if we simply decided it on the narrowest of grounds, would you not?

MR. LeCLERCQ: That's quite true, sir, but it is also true that Chancellors and circuit judges at the local level in Tennessee may view precedents in very different lights. If this Court granted relief only as to the call for the 1977 Convention, it's possible that some local judge may try to distinguish that away and deny relief to some ministerial candidate for legislative office. Then the election would be held and ultimately, even though the State Appellate Court may choose to grant relief, it would be faced with a very disruptive possibility of having to invalidate an election, call an election again.

QUESTION: Well, you'd have all the same remedies that were available to you in this case, wouldn't you?

MR. LeCLERCQ: We are very lucky that we had a good Chancellor at the local level who afforded relief and allowed our candidate --

QUESTION: I am thinking of the stay processes.

QUESTION: You had a very good circuit justice, too.

MR. LeCLERCQ: Very fine.

QUESTION: Is the Chancellor still there? I assume the Justice is still here.

MR. LeCLERCQ: Yes, but we don't have him in every county in Tennessee, Mr. Justice Marshall.

QUESTION: Well, if you want us to draw a decree that will stop every judicial officer in the State of Tennessee from

doing wrong, forget about it.

MR. LeCLERCQ: We don't expect that, but we would like -- We do think we are entitled to a decree that would prevent the State of Tennessee from ever disqualifying for candidacy for public office any person because of his being a priest or a minister of the Gospel.

QUESTION: Mr. LeClercq, could I ask a question about your theory on the merits. Supposing Tennessee had a law that said -- Say they decided they wanted to have a fresh look at the whole governmental structure and they would like to exclude from those participating in the Constitutional Convention anyone presently serving in the State Legislature or in the State Executive Department. Say this included all senior government officials. Would that be permissible?

MR. LeCLERCQ: In my opinion, it certainly would.

QUESTION: Well, why wouldn't they be forced to make the same kind of Hobson's choice between serving in the Legislature or serving in the Constitutional Convention.

MR. LeCLERCQ: Because that's a matter of choosing between two secular offices, and the State can decide that a man ought to spend all of his time on one secular office and not split his responsibilities. But the State, under the First Amendment, under the Establishment Clause and under the Free Exercise Clause, the State has no business interfering in what a person does one way or the other.

QUESTION: What if their theory is that these people now in public are unduly influential on the deliberations of the new body and they might think ministers are unduly persuasive. They can use certain kinds of arguments that some of the rest of us can't use, and so we'd better keep them out of these debates.

MR. LeCLERCQ: Well, as to the influence of ministers, I don't think that it would be permissible to exclude presidents of corporations and many of them exert substantial influence or presidents of universities. Many of them exert substantial influence. And I would say that it would certainly deny ministers, as a class, equal protection to treat them differently from other persons who have equal or greater amounts of influence.

QUESTION: But to exclude all college presidents would violate what section of the Constitution?

MR. LeCLERCQ: I think it would violate the Equal Protection Clause, because it would be treating people who are similarly situated differently.

QUESTION: Suppose it excluded all lawyers?

MR. LeCLERCQ: Well, you know we have a reference to that in --

QUESTION: I know.

MR. LeCLERCQ: -- in the brief. And that parliament was called the "lack learning" parliament. I think that a case

could be made for excluding lawyers which could not be made for excluding ministers.

QUESTION: Why?

MR. LeCLERCQ: I'd hate to see that done. Because it would be singling out an occupational class for invidious treatment without any reference to the capacity of that group to serve. Many of the lawyers who serve in legislatures serve very honorably and with distinction, and in forty-nine other States in the Union ministeres are permitted to serve in the legislature. It is only because of an anachronism that goes back to the Tennessee --

QUESTION: Do you know of anybody who could be excluded?

MR. LeCLERCQ: I answered Mr. Justice Stevens' question. I think the state could certainly exclude justices of its court from serving in the legislature, or any officer in government. There is no problem with the validity of the Hatch Act or similar state laws.

QUESTION: What about all ministers? There are chaplains in every penitentiary in Tennessee, are there not?

MR. LeCLERCQ: Whereas a minister --

QUESTION: Are there?

MR. LeCLERCQ: I don't know.

QUESTION: Assuming that there are chaplains in the state penitentiaries on the payroll of the state, could they

be excluded?

MR. LeCLERCQ: I think the state might exclude any state officer because --

QUESTION: Even if he happens to be a minister?

MR. LeCLERCQ: I would say even if he happens to be a minister.

QUESTION: On your theory, he wouldn't be put out as a minister but as a state employee.

MR. LeCLERCQ: As a state employee, yes, that would be a rational classification. But this classification is not rational, and it singles out persons for invidious treatment because of their --

QUESTION: That's what I'm trying to get. Is this Fourteenth or First Amendment?

MR. LeCLERCQ: I think it is both, sir. Of course, the Free Exercise and Establishment Clauses have been incorporated or absorbed by the Fourteenth, and in that sense it is both a First and Fourteenth Amendment --

QUESTION: And equal protection.

MR. LeCLERCQ: Yes, it is an equal protection case in that we are contending that the state has denied the voting rights and rights of political candidacy to ministers. I cited earlier the cases on which we rely on voting. I also think it is a due process case on vagueness grounds. Who is there to determine who is a minister or priest within the meaning of

this Tennessee statute?

QUESTION: Well, ultimately, I suppose, your State Supreme Court might be called upon to do it.

MR. LeCLERCQ: It's a very difficult task and it invites the very type of entanglement problem that this Court has tried to avoid, determining who is a minister of the Gospel.

QUESTION: How many denominations make all of their members,adherents,ministers of that church? There are several, I believe.

MR. LeCLERCQ: Yes, there are.

QUESTION: I don't recall if your brief numbered all of them or not.

MR. LeCLERCQ: I am sure that our list was not exhaustive, but it was suggestive of the number of denominations which -- the Mormons, for example, require that each member of the faith engage in a ministry of several years, when they perform religious functions. A number of fundamentalist religions hire working preachers who are involved in the community in their own jobs. They support themselves with regular jobs and they preach on Sunday. Would such a person be disqualified under the Tennessee act? We think that the vagueness problems on due process grounds, with this statute, are very substantial.

QUESTION: There is no vagueness as to your client, Mr. LeClercq.

MR. LeCLERCQ: Absolutely not.

QUESTION: With respect to the 1641 legislation in England which your very interesting brief described, the historical conditions then and how important the clergy was in England at that time, if we thought that the clergy was equally important in Tennessee when this statute was passed, would you say the statute was unrational?

MR. LeCLERCQ: There is a vital distinction between the situation in England in 1641 and the situation in Tennessee in 1976, in that the church was established in England. And the danger in England was that the Commons which controlled the appropriation of funds, if dominated by Anglican priests, would vote the state church great sums of money. Since we have no established church in Tennessee and never have had an established church, I think the argument would be inapposite. But that 1641 Act, with friends like that, the church needs few enemies.

A couple of other points. The Constitution, the body of the Constitution itself right in the same section with the Supremacy Clause, provides that there shall be no religious test for office. Now, there is some question as to whether that applies to state offices or whether it applies only to federal offices. But it seems to me, coming where it does in the Constitution with the Supremacy Clause, that that clause of the Constitution also affords a basis for overturning this

requirement.

Now, of course, the support in the decisions of this Court is not as great for that argument as it is for the arguments that I have been discussing. But I do think that that is a respectable argument. It has been made, I believe, by Mr. Justice Black, a number of years back, used this as either a basis of a concurring or dissenting opinion, and I think a respectable argument can be made, looking back to Faron's Records of the Federal Convention. And even if the Court were to decide that that clause did not apply in full force at the time it was adopted, it would be permissible for that guarantee, as being a fundamental guarantee, to be received through the Due Process Clause of the Fourteenth Amendment.

QUESTION: Let me ask one other historical question, Mr. LeClercq.

Your brief pointed out that Thomas Jefferson once might have disagreed with your argument here and then he later changed his mind.

MR. LeCLERCQ: Which is a credit and a strength.

QUESTION: But do you suppose any provision that could have commended itself to Thomas Jefferson, even for a few years, even temporarily, could be so irrational that we would have to strike it down?

MR. LeCLERCQ: Well, this view commended itself to Thomas Jefferson only at a time prior to the enactment of the

of the First Amendment. And I think that explains Mr. Jefferson's position. I think, historically, one can justify these clauses in the state constitutions of 1776, because at that time the church in this country had not been disestablished. And, as Your Honor knows, the church was not disestablished, I think, in Massachusetts until 1830 or 1831. So there was a very great fear of an established church, but the First Amendment, with its Establishment Clause, put those fears to rest. And it is interesting that this Tennessee provision was 1796. This is only four years after the First Amendment, or five years. So this Tennessee provision is really contemporaneous with the First Amendment. And, policy-wise, it looks back to a time before the First Amendment. Now, whether or not the framers of this Amendment were anti-clerical.-- there were some anticlerical forces in Tennessee at that time -- or whether they were trying to give a preference for religion, in either case the clause would fall, on Establishment Clause grounds.

Your Honor, if I may, if there are no further questions, I'd like to save the remaining time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Herrell.

ORAL ARGUMENT OF KENNETH R. HERRELL, ESQ.,

FOR THE RESPONDENTS

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

Under the Constitution that we live under in this country, we have certain fundamental rights which are guaranteed to us by the Constitution and the Amendments. These are so fundamental that they cannot be taken away from us. However, we also have other rights that we enjoy in this country that can be, we submit, limited because they are not absolutely guaranteed by the Constitution.

The case that we have for consideration here today involves these two questions, these two principles which I want to explore. These cover all the issues, I believe, that have been made in this case, the issue of free exercise of religion, the Establishment Clause, the Equal Protection Clause and the Due Process Clause.

QUESTION: They are all expressed provisions of the Constitution, are they not?

MR. HERRELL: Right.

My purpose here, that I want to attempt to distinguish these cases that have been decided by this Court, citing certain applications of a person's rights.

In the first category, we have cases where they are absolute, that is the right pertaining to a belief. This cannot

be changed by our concept of the Constitution. This Court would not do so. However, there are certain practices which can be limited, I think, by the application of activities of a person who wants to enjoy his rights under the Constitution. For instance, this Court has said in the Torcaso case -- a case undertaken to interpret the question of a right of belief -- this Court said properly that that could not be compelled. Likewise, the cases have said that where you have a question involving sanctions, as was indicated in the Schempp case, that cannot be condoned. Now, as the Court has said in Cantwell, the free fact that we have to act is not absolute. It comes in this latter category and can be subject to certain limitations where there are proper bases for it.

For instance, in the Sherbert case, this Court said that where there is an indirect burden it may inhibit the free exercise right where there is a compelling state interest. In the Braunfeld case, the Court has said that the state may limit a person's practice, even though it may cause some inconvenience to him. In the Walz case, a valid secular objective is an appropriate subject of legislation.

Let's look at that as what we have for consideration before us at this time. As to the Establishment Clause, I don't think it need be said that there is any question but what the purpose of this clause is to keep the state from establishing any form of religion, any requirement for a particular religion,

There has been no establishment created by virtue of the Act in question here. And, again, under Schempp, a secular purpose is a valid basis for a legislative purpose.

QUESTION: What is the valid secular objective here?

MR. HERRELL: That is the separation of church and state which I want to get into.

QUESTION: And that's the only one.

MR. HERRELL: Yes.

QUESTION: Then, this brings us to a tension or a potential conflict between the Establishment Clause and the Free Exercise Clause, doesn't it?

MR. HERRELL: That is correct. And that is the thought that I want to explore now on tests that this Court has used in interpreting cases of this kind.

QUESTION: Mr. Attorney General, when was this provision first enacted?

MR. HERRELL: It was enacted in the original Constitution of Tennessee in 1796, which was carried over, basically, from the Constitution of North Carolina.

QUESTION: Has it been reconsidered?

MR. HERRELL: No, sir.

QUESTION: Has it ever been litigated?

MR. HERRELL: No, sir.

QUESTION: Don't you think it is time?

MR. HERRELL: Well, it is before the Court now.

MR. HERRELL: There are three tests that this Court can consider that have been recognized previously as a basis for a test to consider the application of this test, the rational basis test, that is the minimum test. And at the other extreme, there is a compelling state interest test which is a maximum. But I want to get into now and submit to the Court that the proper test for this Court, as is laid down in Bullock, is the strict scrutiny test. What basis does the state have? Is it sufficient? The state submits that it is a sufficient basis. Under this principle and test, the system must be closely scrutinized and found to be reasonably necessary for the carrying out of a legitimate state purpose. It is submitted that this is a legitimate state purpose and that is the separation of church and state.

It is recognized, likewise, that the state cannot be arbitrary in attempting to accomplish its goals, but it is submitted there is no arbitrary action in this case, and a criterion for different treatment must bear some relevance to the object, the object being the separation of church and state which is at issue here.

QUESTION: Do you happen to know whether we have had any presidents, except one, who was an ordained minister?

MR. HERRELL: No, Your Honor, I do not.

QUESTION: President Wilson was a Presbyterian minister, of course. No others?

MR. HERRELL: Since you call that to my attention, I believe he was, yes, sir. I am not aware of any other though.

We will move on to other questions that have been raised in this case, that is the question of equal protection. As this Court has said in Walker, there is no fundamental right or suspect case to consider in this case. All ministers are treated in a like and similar manner. What applies to one will apply to all, as our court said in the case, "and it covers priests of all denominations and their counterparts in other religions."

QUESTION: I thought your opponent was complaining not so much of our distinctions between priests and ministers as a distinction between the clergy and the rest of the population.

MR. HERRELL: If we consider the state's basis, we think that there is a sufficient basis to put them in a category to themselves, that is for the separation of church and state.

I would like to suggest to the Court, too, what it has found, that there is no fundamental right to hold office --

QUESTION: Supposing the state said nobody who goes to church every week shall serve in the state legislature, regular churchgoers are too religious and may not have complete separation.

MR. HERRELL: I think that would violate one of their

religious tenets, where they have a right to worship. It is part of their fundamental belief.

QUESTION: Nothing would prevent them from continuing to go to church. They just couldn't be in the state legislature, that's all.

MR. HERRELL: I think that would be in a similar category to that which we have before us here.

QUESTION: You say that would be equally valid or invalid, like this statute?

MR. HERRELL: Yes, sir.

This Court has likewise said in Turner that there is no fundamental right --

QUESTION: You wouldn't go so far as to approve a statute that says everybody that believes in God should be kept out, would you?

MR. HERRELL: That involves their fundamental belief.

QUESTION: Do I understand you to say that as long as you serve in the legislature you may not go to church more than once a month? That sounded to me like what you said. At least you may not go to church every week.

MR. HERRELL: Well, if you assume that premise, I think that would be true, yes.

QUESTION: Is that what you answered Mr. Justice Stevens?

MR. HERRELL: Yes, sir, it is.

This Court, too, has recently said, in the Williams case, that there is no basis for claiming the fundamental, that is, a political right, for association, nor discrimination against a group. Now, in connection with that, I would like to point out for the benefit of the Court the fact that this case is not brought as a class action to the attention of this Court. There is no assignment made on that. The Tennessee Supreme Court said that there was not a class action involved in this.

Now, this Court has had before it considerations in other cases, questions of whether religious organizations, all members of the organization are entitled to the exception. Again, I want to call attention to the fact that our court has said that the ministers cover all beliefs, that is those who would lead their people, teach them, whether it be of the Christian religion or of any other religion. So, from this, I don't believe it can be said that you have a question of vagueness as to who is a minister.

This Court, under the Selective Service Act, has had questions about ministers. I do not need to call to your attention such cases involving Dickinson. And as a group, ministers have been given special attention, special privileges, mainly under the Selective Service Act, for instance. They are exempt from service under the Selective Service Act.

QUESTION: I assume they can give the opening prayer

at all of these meetings you are talking about from which they are excluded.

MR. HERRELL: Yes, sir.

Likewise, we have certain benefits for members of the clergy, such as benefits from our Federal Income Tax provisions, not including all of their income.

Now, the question has been raised here as to whether there are ministers in the Tennessee General Assembly. All of the prisons -- Excuse me. In the prisons in the State. All prisons in the State of Tennessee have ministers serving to the needs of the inmates. In fact, I think they have several.

QUESTION: Are they paid by the state, provided by the state, is that what you are telling us?

MR. HERRELL: Yes, sir.

QUESTION: There are some states where they permit ministers from the outside, but not necessarily making them employees of the state. I wanted to be sure which is the case in Tennessee.

MR. HERRELL: So by way of summary, there is no attempt to regulate or control the belief of anyone in Tennessee relative to what they can belief, so as to exclude them from membership as a minister.

QUESTION: Mr. Attorney General, just before you finish, your opponent places some emphasis on whether or not there is an established church in jurisdictions which have this

sort of provision. Did Tennessee have an established church at the very beginning of its statehood?

MR. HERRELL: No, Your Honor, there has never been an established church in the State of Tennessee.

QUESTION: How about this lost State of Franklin which, I guess, is intermediate between North Carolina and Tennessee? Was there any established church in that state, as far as you know?

MR. HERRELL: Not to my knowledge, no. The lost State of Franklin was an initial attempt to establish a state in the State of Tennessee, the eastern part of it. That particular state, for one reason or another, gave up its charter and reverted back as a part of North Carolina, and then a later attempt was made to establish the State of Tennessee which was successful.

QUESTION: So Franklin went back into North Carolina. I thought it was part of Eastern Tennessee.

MR. HERRELL: No, sir.

QUESTION: In your submission, I take it, those denominations which make all of the members ministers of that church would exclude all the members.

MR. HERRELL: Yes, sir, we have to stand and say that ministers, if they are those as defined in the Tennessee case which undertake to minister to the needs of their congregations, to that extent they would be included.

QUESTION: Well, under the Tennessee definition, must there be an identifiable congregation in order to make its leader a minister?

MR. HERRELL: I don't think so, as long as he would be in that category where he would undertake to lead some of the people.

QUESTION: How could he get out from under being termed a minister under Tennessee law?

MR. HERRELL: That could be a very difficult decision to have to be made.

QUESTION: Difficult or impossible?

MR. HERRELL: Well, I think you might even say impossible to the extent that once a man is qualified as a minister and holds those beliefs, that he could be said to continue those in his thoughts subconsciously.

QUESTION: And be excluded.

MR. HERRELL: And be excluded, yes, sir.

QUESTION: So, I assume that if he says, "I am no longer a minister of the Gospel. I am an atheist," that wouldn't help him.

MR. HERRELL: Well, if he professes to be an atheist and does not adhere to his religion, that might be a little different category.

QUESTION: So, he might make it if he becomes an atheist.

MR. HERRELL: Yes, sir.

QUESTION: You can't put the tread back on a tire by running the car in reverse.

MR. HERRELL: That's what I am trying to say, yes, sir.

Again, I want to summarize this, very briefly, to say that there is no attempt made to regulate the belief by this Act. There is no attempt made to regulate the practice of a religion by the Act that is in question. And there is no denial of Appellant's rights under the Equal Protection Clause or the Fourteenth Amendment, and all ministers and their counterparts in all religions are excluded under the provisions of Article 9, Section 1, of the Tennessee Constitution. There is no fundamental right to hold public office.

If the Court has no further questions, I'll submit it.

MR. CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. LeClercq?

REBUTTAL ORAL ARGUMENT OF FREDERIC S. LeCLERCQ, ESQ.,

ON BEHALF OF THE PETITIONER

MR. LeCLERCQ: Briefly.

The separation of church and state argument which has been made by the Attorney General of Tennessee is a state doctrine, and it's our position that this runs afoul of the federal separation of church and state doctrine.

The question of whether this case is brought as a class action to this Court, Appellant's position on that issue

is that it was properly certified as a class action by the Chancellor and the authority on which the Tennessee court relied to deny the cross-appeal of Appellant was inapposite.

QUESTION: What federal statute is raised by that?

MR. LeCLERCQ: It's a question of whether or not this issue must be addressed again in some other litigation after this case has been decided.

QUESTION: What federal right were you denied by the Supreme Court of Tennessee's ruling on that aspect of the case?

MR. LeCLERCQ: The rights of persons similarly situated to Reverend McDaniel to assert their federally protected rights to seek legislative office in the --

QUESTION: Where do we find that enunciated in the Constitution or in the cases?

MR. LeCLERCQ: It would be in the voting rights. It would be in the same free exercise and establishment rights that are being asserted here. It's also a question of economics. It is a question of whether or not counsel -- whether there is a likelihood of this Court's decision leaving open the way for counsel to have to come back up and do this sort of thing again on candidacy for legislative office.

QUESTION: Are you against that or for that?

MR. LeCLERCQ: I would be very much in favor of saving the money. Indeed, speaking of money, this is a 1983

action for which, if Appellant prevails, there is a right to attorney fees. Also, under the voting rights section of the Voting Rights Act of 1975, there is provision for an award of attorney fees to prevailing counsel in voting rights litigation. So it would seem to me that it would even be in the interest of the State of Tennessee to have the thing decided once and for all, unless they want to pay counsel to do the same thing that had already been done.

The matter of ministers having special privileges, being excluded from the service, the ready answer to that which we provided in our brief is that this is to encourage the free exercise rights of those who have been removed from their churches by being drafted, or otherwise going into the Army. Similarly, the tax rights, this is to advance free exercise rights, the tax advantages that are afforded ministers. The difference between the tax advantages and the service provisions relating to ministers in law and this case is that here there is a penalty against ministers, and those cases involve preferences.

One other point. Although it has not commanded a majority view on this Court, it is the case that the Appellant is a black minister, and in the amended complaint it was alleged that the effect of this provision is to disproportionately exclude black leadership from candidacy for public office. This Court can take notice of the fact --

QUESTION: You don't have any Negro politicians in Tennessee who are not ministers.

MR. LeCLERCQ: We've got a lot of them but what we are saying is that the leadership in the black community traditionally has been over-represented in the ministry and even though --

QUESTION: You are making statements that you can't back up, and I don't think you should make them, unless you've got facts to back them up. Would you agree?

MR. LeCLERCQ: I believe that the sociological --

QUESTION: You are talking about the leadership of Negroes in Tennessee. Now, cite me your authority for that statement.

MR. LeCLERCQ: Your Honor, my time is up, but I would like to respond.

MR. CHIEF JUSTICE BURGER: You may respond.

I took your response to mean that of the professions Negroes, proportionately, have a higher representation in the clergy than in other professions.

MR. LeCLERCQ: In law or in medicine, black lawyers or black doctors could run for office. Black ministers can't. Since leadership --

QUESTION: How many white ministers are in the Mormon Church? Every member is one.

MR. LeCLERCQ: I mean this case certainly transcends

racial grounds, because it affects white ministers, as well as black.

QUESTION: Does it really have anything to do with race at all? Suppose we had not know, as I did not, that this man was Negro, white, Chinese, or whatever, would it make any difference to the fundamental issues that you are presenting?

MR. LeCLERCQ: No. It's just an additional reason.

QUESTION: Then we needn't concern ourselves with it.

MR. LeCLERCQ: All right, sir.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:42 o'clock, p.m., the case in the above-entitled matter was submitted.)