In the

Supreme Court of the United States

THE STATE OF NEW YORK,

APPELLANT,

- against -

CATHEDRAL ACADEMY,

APPELLEE.

No. 76-616

Washington, D. C.
October 3, 1977

Pages 1 thru 35

Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

THE STATE OF NEW YORK, Appellant, -against- CATHEDRAL ACADEMY, Appellee.	:	No. 76-616

Washington, D.C.
Monday, October 3, 1977

The above-entitled matter came on for argument at 2:13 o'clock p.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:

MRS. JEAN M. COON, Assistant Solicitor General of New York, The Capitol, Albany, New York 12224; for the Appellant.

RICHARD E. NOLAN, Esq., 1 Chase Manhattan Plaza, New York, New York 10005; for the Appellee.

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 No. 76-616, New York against Cathedral Academy.

Mrs. Coon, you may proceed whenever you are ready.

ORAL ARGUMENT OF MRS. JEAN M. COON

ON BEHALF OF THE APPELLANT

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

In this appeal there is presented to this Court at least a collateral if not a direct descendent of this Court's decision in Levitt against Committee for Public Education & Religious Liberty, decided 1973. In that case this Court held invalid, under the First Amendment to the Constitution of the United States, a New York statute enacted in 1970 which had provided reimbursement to non-public schools for the cost of certain state mandated record-keeping and testing services. In so doing, this Court affirmed a decision of the United States District Court for the Southern District of New York, which had invalidated the statute on the basis that the tests--

Q What year was that?

MRS. COON: The District Court was 1972.

Q And ours was nineteen--

MRS. COON: 1973.

Q It was April, 1972, was it not, in the middle of the school year?

MRS. COON: Yes, it was.

Q During the school year.

MRS. COON: It was during the school year. The statute provided for annual payments in two installments, one of which had been made for the 1971-72 school year, and the other one had yet to be made; and, in fact, a preliminary injunction was issued by the District Court, I believe about two days prior to the earliest date on which that second payment could have been made.

Q These were really reimbursements, were they not, for expense incurred?

MRS. COON: They were intended to be reimbursements.

Q For expense already incurred?

MRS. COON: Yes, Your Honor. The statute provided for a lump sum per pupil payment. The record before this Court at that time indicated that the amounts which were paid to the schools were in fact generally less than the actual costs of rendering the services involved.

Immediately succeeding the decision of the District Court, which had enjoined permanently the payment of the state aid which was provided by the statute and which of course had the effect of permanently preventing the second payment for the 1971-72 school year, the New York State Legislature enacted the statute here in question, which by its terms enabled the non-public schools to go into the New York State

Court of Claims and to sue in the Court of Claims to collect that second payment for the '71-72 school year.

At the time this case which is before the Court today was selected as a test case to be tried in advance and be determined in advance of any other cases under the statute. The state moved to dismiss the claim in the Court of Claims on the basis that the statute was merely a resurrection of the statute which this Court had declared to be unconstitutional in 1973.

Q Mrs. Coon, is that not a rather strange posture for the attorney general to be taking both in the New York courts and here, to be saying that a law enacted by the New York Legislature is unconstitutional? Usually, it is my understanding, the attorney general's job is to defend laws enacted by the legislature.

MRS. COON: As a normal state of affairs, that is true.

Q Why is it different here?

MRS. COON: It is different here because it is--well, for one thing we felt that as a matter of policy, this Court having come down with a decision holding the underlying statute, the 1970 statute, unconstitutional, that we had an obligation to uphold the decision of this Court. But additionally it is as a matter of practice in defending the state in the Court of Claims under these enabling acts--and this is a relatively

common practice by the New York State Legislature to pass acts enabling certain claimants who, for one reason or another, were unable to bring an action originally under the Court of Claims Act--it is a practice of our office to defend in many instances by contesting the constitutionality of the statute itself.

Q There is certainly nobody else to defend it, is there?

MRS. COON: That is quite true, Your Honor.

Q Otherwise the legislature could pass grossly unconstitutional--flagrantly, patently unconstitutional--legislation awarding money to people. They would just come into the Court of Claims and get it, and there would be nobody to defend--

MRS. COON: That is quite true, Your Honor.

Q --on the basis that the legislation was unconstitutional.

MRS. COON: And one of the basic arguments that we frequently make and which was one of the arguments made in this case itself as a state constitutional argument is that in many cases we challenge the statutes on the basis that they constitute unconstitutional gift of state funds.

Q That could not follow if the applicants deal with it.

MRS. COON: No. In those cases they are dealing with

state constitutional questions. In this case we were dealing with a federal constitutional question. And that was the basis upon which the Court of Claims and the state courts all decided, that it was on the basis of federal constitutional questions.

The state Court of Claims agreed with the state's position, granting the motion to dismiss on the basis that the statute was indeed a reenactment, even if only for one payment, of the statute held unconstitutional by this Court in 1973. And in so doing the court distinguished this Court's decision in the second Lemon case--Lemon against Kurtzman--which permitted the final payment under the Pennsylvania statute which had been declared unconstitutional in the first Lemon case.

This case, however, in the posture in which it is presented to this Court has one additional issue which arises out of the New York Court of Appeals' decision. And I believe it is that decision which brings really the first argument which must be presented to this Court because in scheduling argument in this case, the Court delayed decision on jurisdiction, pending the oral argument. And we recognize that what we are appealing from here is technically an order of the Court of Appeals which did remand this case to the Court of Claims for an actual trial on the amount of damages. We submitted to this Court--and in fact the appellees here agree--

that the Court of Appeals' decision was final for the purposes of jurisdiction in this Court because it did finally determine the question of constitutionality under the federal Constitution of the 1972 enabling act.

But additionally we submit to the Court that the Court of Appeals in its decision interjected a new element which we consider to be a new element of unconstitutionality into this decision. The Court of Appeals in remanding to the Court of Claims adopted the minority decision in the state appellate division. In that decision the opinion of the minority in that court said that the issue of how the funds were actually used by the schools and whether or not they were used to further the religious purpose of the schools could and should be tried in each claim in the Court of Claims.

We should note that under the New York State Constitution the power to audit and determine claims against the State of New York is given to the Court of Claims. Consequently, we feel that the decision of the Court of Appeals interjected into this statute an element which was not present when the underlying 1970 statute was before this Court, and that is a question of excessive entanglement between church and state because the auditing function which would be performed by the Court of Claims in the trial of these cases is significantly similar to the auditing requirement which this Court found to be unconstitutional in the first Lemon decision.

Q In Lemon it was a recurring audit, was it not? And here, I take it, it would just be a one-shot deal.

MRS. COON: It was a recurring audit, Your Honor, but I think that the distinction--it raises a question of whether or not something can be a little bit unconstitutional. It was the auditing function--

Q That is not a very satisfactory answer. I mean, all sorts of questions up here turn on matters of degree and disctinctions of that sort, do they not?

MRS. COON: It may be, Your Honor, but it seems to me that in this type of situation that if the New York State Legislature were to be enabled to enact a statute similar to this, then this could be done any time a similar statute is found to be unconstitutional.

Q Mrs. Coon, in Lemon against Kurtzman I had thought that the entanglement concept was regarded by the Court as very dubious and contributed to unconstitutionality because it was a continuing relationship, a continuing entanglement, so that it is not a matter of being a little unconstitutional or wholly unconstitutional when you have one audit as against a continuing audit over a long period of time. It is a question of whether one audit creates entanglement, is it not?

MRS. COON: Yes, it is, Your Honor, and I think here we have a situation where an entanglement, if any exists, it exists for the entire duration of the statute. And that may be

the analogy there, that this is the statute.

Q If it is just to finish recoupment for the particular fiscal or budget year, then it is not continuing, is it?

MRS. COON: No, Your Honor. But the original statute, the 1970 statute, simply provided a lump sum per pupil payment. At the time this statute which is before the Court now was enacted, it was the understanding, I believe, of all the parties, including the legislature, that what the legislature was doing was providing for the Court of Claims to make an award which would be a mathematical computation of the same lump sum amount. But what the Court of Appeals has done in this case is to provide for an audit by the Court of Claims, an audit which will go into the question of how all of this money was used in the school year, to go into the question really of an analysis of the tests which were given by the teachers involved here and determine whether or not these services--because what would be involved here is the compensation for the teacher to prepare a test--whether or not these tests furthered the religious function of the school. And we would submit to the Court that that type of situation, even on a one-shot deal, would create an excessive entanglement situation between the courts of New York State and the non-public schools.

Q Mrs. Coon, may I ask you a question about what is going to happen if the case goes back: On this $45 per

pupil--I guess at least in the higher grades--exactly what is to be determined? Supposing they find out that that amount of money was actually spent, but $5 of it could be said to have been contributed to some religious purpose. Would they get $40 or nothing?

MRS. COON: I would assume that under the Court of Appeals' decision they would get the $40, the way the Court of Appeals' decision reads.

Q Suppose they found that they did not actually spend $45 on the test, they only spent $40, but there was none of it for religious purposes. Would they get the $45 then or just $40?

MRS. COON: They would get $45 under the statute. It is for testing and record-keeping purposes. And the record before this Court in 1973 was that the lump sum per pupil allotment actually came out to less than the actual costs of performing all of the services.

Q If that is true, then there is going to be some excess. Would you argue that that excess necessarily contributed to the religious mission?

MRS. COON: It may be, Your Honor, in going back and trying this, this case could be tried in a posture in which the schools could put in their claims for the clearly constitutional--what we would consider to be the clearly constitutional aspects--that is, the attendance, medical record keeping, the

administration of the state mandated tests, the state regents and various other state prepared and mandated tests--and that in fact none of the per pupil amount might necessarily relate to the teacher-prepared tests at all.

In other words, if the schools put in their claim for their costs, could actually--might in some cases come up with costs which would be acknowledged to be constitutional expenditures without reaching the question of the teacher-prepared tests. In others they would not. It would be when you get into this question of the teacher-prepared tests--they reach the question of the cost of teacher-prepared tests--that you wousd run into the question of entanglements.

Q Does the record now tell us exactly what they are going to ask for?

MRS. COON: No, Your Honor, because the claims were filed, based on the mathematical computation.

Q And you said filed for the $45 per pupil period?

MRS. COON: $45 per pupil; $27 per pupil in the elementary grades.

Q And then the purpose of the audit--I am still concerned about the finality question.

MRS. COON: The finality, it seems to us, arises basically in the fact that the state Court of Appeals' decision finally determined the question of the constitutionality of

this statute under the federal Constitution. In going back into the Court of Claims, there is nothing that the Court of Claims in a further decision in this case--or in any of the state appellate courts in a further decision in this case--could say which would affect the Court of Appeals' decision as to the constitutionality of the underlying enabling act.

Q But the exact effect of the Court of Appeals' decision, I gather from your response to Justice Stevens' questions, on the constitutional issue is not going to be clear until the Court of Claims interprets it and decides whether so much will go or the whole thing will go.

MRS. COON: That would be, it seems to me, Your Honor, part of the mathematical computation. If this Court were to say that the Court of Appeals was correct in saying you go back and try these issues and that this does not constitute, as we feel it does, an excessive entanglement, then it is simply a question of applying--of trying the issue of what each school was doing with this money. It does not affect the underlying question of whether or not the state could constitutionally in effect resurrect the 1970 statute by an enabling act.

Q Are you relying at all on the fact that the invalidation at the trial court level was during the school year rather than after?

MRS. COON: I think that the position of the appellees here is better in effect because of the fact that

the invalidation came during the school year.

Q Is better than if it had come after the school year?

MRS. COON: Had come after. And I would submit to Your Honor that actually it seems to me that it does not make any difference--

Q I would think that it would be just the other way around.

MRS. COON: Having come during the school year, they can raise the argument that the school budget, for example, was prepared based upon the expectation of receipt of these funds. If it came after the close of the school year and prior to the commencement of the next school year, you would not have that argument. We submit to the Court that that is one of the basic differences really between this case and the second Lemon case.

Q I just do not follow you at all.

MRS. COON: Maybe if I try to distinguish the second Lemon case, I can show you why I am saying this. When Lemon I came to this Court, it came as an appeal from a decision of the Pennsylvania District Court, holding constitutional the Pennsylvania statute which provided for the purchase of secular educational services from the non-public schools. One of the basic arguments in support of enabling the schools in Pennsylvania to collect that final payment, the final year's

payment under the Pennsylvania statute, was that the schools had in fact budgeted their funds in reliance upon the receipt of that aid.

Q When it is invalidated during the year, that element of reliance expires, does it not?

MRS. COON: They presumably budgeted their school expenses for the entire year in reliance on the fact that they would be collecting this money.

Q They were depending on getting it until the end of that school year, were they not?

MRS. COON: Yes, they were.

Q For budget purposes?

MRS. COON: They were depending on getting both payments, and these payments are not made semi-annually. One is made in January and one in April.

Q How can you say that when it is invalidated in April?

MRS. COON: They have budgeted their expenses for the whole school year.

Q Sure, they have budgeted, but obviously the budget has been thrown out of line.

MRS. COON: That is the problem, the budget has been thrown out of line. And this is why I say--

Q I was just trying to build up an argument for you that you do not want to accept.

MRS. COON: No, this is why I say that the appellee's position here, I feel, is stronger with this having been invalidated during the school year than if it were after the close.

Q I think it is weak, but then go ahead.

MRS. COON: But we would say to the Court that in this case that does not really follow because this statute, the 1970 statute, was under attack from the time it became effective; that unlike the Pennsylvania statute where they had a District Court decision prior to it reaching this Court, where they had a District Court decision saying the statute was unconstitutional, the constitutionality of this statute was always at issue and was always in a situation in which the schools could not really rely upon the continued implementation of the statute, that any time a preliminary injunction could be requested, that at any time a District Court decision could have held it unconstitutional. The fact that they collected state aid under the statute for a year and a half is not something upon which they could rely because the statute always was under attack from the time it became effective, and there was always that element of uncertainty. We would say to the Court that there was in the Pennsylvania statute situation an element, if not of certainty, an element at least of some reassurance in the fact that the District Court had held the statute constitutional.

Q May I ask you a question about your statement that the statute always was under attack? My recollection is the suit was brought the day before the statute became effective--it said July 1st--and no action was taken, no request was made for a preliminary injunction until April 11th, nearly two years later.

MRS. COON: That is quite true, Your Honor. The action was commenced the day before the statute became effective. But, as I said, the action was commenced; it is not a situation in which the statute was allowed to go into effect and continue in effect for a year or so before it was started. The case was started, and there were movements afoot in terms of interrogatories that were submitted and so forth. But the case was underway the entire time the statute was in effect.

Q But not even a request for a preliminary restraining order?

MRS. COON: No, Your Honor, there was not.

One of the reasons why we feel there is a distinction between this Court's decision in the Lemon case and in this, the other one really is that the--in the Lemon situation what was held unconstitutional there was not the services, not the payment for the services that were being compensated for to the non-public schools, but the fact that there was this excessive and continuing auditing process which the Court

considered to be excessive entanglement. In Lemon II--

Q But that excessive entanglement stopped with our holding, did it not?

MRS. COON: Yes, it did, Your Honor.

Q So, in New York there will be no future continuing entanglement.

MRS. COON: No, that is true, Your Honor. But I think I am getting beyond the question of finality now. What I am trying to do is distinguish the two statutes, the type of payment. This Court in Lemon II said that in effect the final payment to the non-public schools in Pennsylvania would be permitted because the unconstitutional aspect of that statute had already occurred. In other words, the audit had already occurred. It was just a question of paying out the amount in question. In making that final payment, there would be no unconstitutional feature involved.

On the contrary, in this case, we have a situation where what was held unconstitutional by this Court was not an auditing function or continuing function but the fact that among the tests that would be compensated for under the act were those which were teacher-prepared and which this Court held go be an integral part of the teaching process of the non-public schools. And it was the compensation for those teacher-prepared tests which the Court found to be unconstitutional. And we submit to the Court that in this enabling

act, what the Legislature of the State of New York has done has been to say to these schools, "You may collect, even if only for this one final payment, compensation for services which the United States Supreme Court has held to be unconstitutional in terms of compensation by the state." Now, we submit to the Court that this is a significant distinguishing feature between the permission of the final payment in Lemon II under the Pennsylvania statute, and the provision for payment here. And we submit to the Court that this makes this payment here unconstitutional under the federal Constitution, and it constitutes a resurrection--even if only for one time--of the statute which this Court held unconstitutional in 1973.

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

Mr. Nolan.

ORAL ARGUMENT OF RICHARD E. NOLAN, ESQ.

ON BEHALF OF THE APPELLEE

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

My name is Richard Nolan. I represent Cathedral Academy.

The issue here is whether this case is controlled by the rationale of this Court's decision in Lemon II where the Court balanced in a very flexible way, in a very equitable way,

constitutional matters as opposed to reliance interests. In this case the courts below--I am referring to the Court of Claims, I am referring to both the majority and dissenting opinions in the appellate division, as adopted by the Court of Appeals--found that these schools had relied, in terms of planning their budgets--which have to be done before the school year begins--in a way so that Cathedral Academy would expect to receive probably about $14,000 per year in two annual installments, and they would act on the basis of their expectation of receipt of that money.

Q Mr. Nolan, right at that point I want to be sure you clear it up for me, the reliance issue. Is it not correct that the services and the testing and all that for which the schools are seeking reimbursement were required by state law?

MR. NOLAN: I believe that is so. Schools have to maintain attendance records. They have to maintain health records. They have to provide--

Q Then would they have not had to perform these services entirely apart from any reliance on other funds?

MR. NOLAN: They would have had to perform the services, but they would not have expected any reimbursement. What the Mandated Services Act did was to give the schools an expectation of reimbursement of certain monies which they could use for their general purposes. It is quite true that the services themselves--

Q So, the real harm to the school is not having all the funds available for replacement for funds that will be used for general purposes?

MR. NOLAN: I think the funds that would have been made available really would have gone into the general purposes of the school, would have been additional money.

Q So, it is really the same case as if these funds were just general subsidy to that extent?

MR. NOLAN: I think that was raised in the Levitt case. But I think as to that, this Court has never said that simply because payment is made to a school which enables it to free up other funds, that that is a violation of the Establishment Clause. This argument was made by the state in its brief, and I think we have answered it on that basis, referring to the Roemer case.

Q That the whole concept of reliance here is really inability to free up funds for general purposes.

MR. NOLAN: That is right. That is right, Your Honor.

In the Mandated Services Act case, the Levitt case, I think the chronology is fairly significant because the statute was attacked almost immediately. In fact, I think the lawsuit was filed either contemporaneously with the statute or very shortly thereafter. Nothing was done in that case by the plaintiffs except to move for the convening of a three-judge district court. That motion was opposed by the state,

opposed by the intervenors, but was granted by the District Court. That meant that in the District Court's judgment there was a substantial federal constitutional question which required the convening of a three-judge district court under the statutes then in effect. Then the case remined quiet for at least another year, into 1972. And I think the reason for that was because this Court had before it the Lemon I case and the Tilton case. And putting aside the general question as to the precision with which people can predict the outcome of First Amendment, church-state cases, there was a great deal of question in everybody's mind as to what effect the Lemon and Tilton cases would have on the Mandated Services Act.

It was not until 1972--in March of 1972--that the three-judge court called for briefs. By that time--

Q In the meantime, there was never an application for injunctive relief?

MR. NOLAN: There was never an application for a preliminary injunction or a temporary restraining order, Your Honor. The case simply remained at rest. I believe there came a point where plaintiffs wrote to Chief Judge Kaufman and asked him to expedite the matter. Chief Judge Kaufman appointed the three-judge court in March. They called for briefs. The case was argued in early April. It was argued about three or four days before the first payments for the second semester would have been made between the period April

15th and June 15th. The court heard arguments and entered a temporary restraining order until its decision, which came down the latter part of April.

That decision was not unanimous. There was a very, very vigorous dissent by Judge Palmieri. Then the case came up here. But in the meantime and before Lemon II had been decided, the New York Legislature recognizing the problems which the District Court's decision--or the timing of the District Court's decision--had caused to these schools, passed Chapter 996.

The case came up here and, as this Court well knows, the Court took probable jurisdiction. Obviously there had to be something to argue about. The case was then fully argued and briefed, and it was decided that the Mandated Services Act was unconstitutional with one justice dissenting, Mr. Justice White. So that I think to say, as Mrs. Coon now does, that the schools could not have reasonably relied on receipt of this money, at least up until the time of a final determination as to constitutionality, I must say I do not think that is correct and certainly does not comport with this Court's decision in Lemon II, which recognized the very, very shadowy line of demarcation between what is valid and what is invalid in church-state cases, and which also recognized the fact that there is a presumption of constitutionality under which state officials and private parties are entitled to act and entitled

to rely.

Q Mr. Nolan, when did our decision in Levitt come down?

MR. NOLAN: The decision came down in June of 1973.

Q And monies paid over what period of time are to be reimbursed under the act here in question?

MR. NOLAN: Monies which would have been paid for the second half of the 1971-72 school year. In other words, those would have been paid had the District Court's decision not come down when it did--those monies would have been paid between April 15th and June 15th of 1972. The District Court's temporary restraining order, followed by its two-to-one decision in late April of 1972, blocked the payment of those funds. And it is those funds that Chapter 996 is intended to address itself to.

Q What is the aggregate of that sum?

MR. NOLAN: The aggregate of the sum--I believe the state has--

Q Of the $14,000, what does this involve?

MR. NOLAN: The aggregate of this particular claim is $7300. That would represent one-half of the reimbursement which Cathedral Academy could have expected to receive.

Q But this is a test case, I gather.

MR. NOLAN: Yes, it is, Your Honor. The state and we have considered it to be a test case.

Q And 996 would involve how much?

MR. NOLAN: 996 I think would involve a total amount of claims filed in the Court of Claims of about $11 million by, I believe, 2000 schools. So that we are talking about not $14 million but something reasonably close to it.

One of the attempted disctinctions that the state makes with respect to Lemon is that in Lemon there was an audit procedure under the statute which audit procedure had been completed except for certain administrative details by the time the case was concluded. In this case the Mandated Services Act did not have an audit procedure, and that was one of the problems we had with it. It provided for a lump sum payment, and that is one of the things that this Court found to be defective.

In Chspter 996 what the legislature has attempted to do is to give to the Court of Claims jurisdiction to hear claims against the state for reimbursement of mandated services. The state claims that this is going to create an entanglement. First of all, it is a one-time reimbursement. It cannot occur again. The statute on its face applies only to whatever portion of the second half of the 1971-72 funds are found by the Court of Claims to be reimbursable.

Secondly, we do not have here a situation such as in the ordinary entanglement situation of the administrative officers of the state government--in New York's case, the

state education department--coming into the schools and in effect telling the schools what to do or interfering with the schools' operations, whatever they may be. What we have here is a judicial proceeding in the Court of Claims, which handles all money damage cases against the State of New York. We have a situation here where a claimant, just as a construction claimant or anybody who has a contract fight with the State of New York, will come in and will attempt to prove what services he performed that he is entitled to recover against the state either on a theory of contract or on a theory of statutory authorization or quasi-contract or what.

Q Did you get into the question of whether or not it was religious work?

MR. NOLAN: I believe so, Your Honor.

Q That is a little different from the contractor.

MR. NOLAN: I think that--

Q It is a little different?

MR. NOLAN: That is, yes. But I think that that can be handled under the procedures that have been set up, as indicated in the opinion of Presiding Justice Herlihy at the appellate division, which opinion was later adopted as the majority opinion by the Court of Appeals. I think so far as attendance records, health records, the costs of providing the state's standardized regents examination, pupil evaluation performance examination and the like, there should not be any

problem there. The problem that arises, as Mr. Justice Marshall lately points out, is in making sure that no reimbursement will occur for examinations which tend to propagate religion.

Presiding Justice Herlihy stated: "However, it is readily apparent that it was never the intent of the legislature that any of its funds were to be allowed for the furtherance of religious purposes. In this regard, the audit by the Court of Claims must serve the same purpose as the final post audit which was referred to in Lemon II. Accordingly, the burden will be on the claimant to prove that the items of its claim are in fact solely for mandated services, and the burden will be upon the Court of Claims to make appropriate findings in regard thereto."

So, I think the Court of Claims is going to have to--if claims are made for reimbursement of teacher-prepared examinations--will have to take evidence of what those examinations consisted of and satisfy itself, if it can do so or if the claimants can carry their burden of proof, that this was not a method of propagating religion.

Q Mr. Nolan, is it possible that in that inquiry there may be exams that follow a pattern that have been used over the years and that may be used in the future--

MR. NOLAN: I would think so.

Q --and there might be a legitimate difference of

opinion as to whether a particular exam propagates religion or not?

MR. NOLAN: I would think so, Your Honor. But it seems to me that, not only on the merits of the case but also on the finality point, the law of New York now is what Presiding Justice Herlihy wrote as adopted by the Court of Appeals. And it seems to me that the law of New York is that no money will be reimbursed for any tests which propagate religion. So that as a matter of state law, as a matter of New York law, no payments can be made for anything that propagates religion. And the Court of Claims--or the appellate division or the Court of Appeals--it seems to me, is perfectly capable of making those determinations as matters of state law. So that we do not have, I do not think--we do not have a situation here where we have a real finality problem. I think finality would come within the first two tests of the Cox Broadcasting Company case. And I think the way the New York courts have handled this situation so as to make the question of religious propagation or reimbursement for religious propagation matters of state law means that this Court need not worry about the case coming back up.

Q Is it possible that that is also a federal question?

MR. NOLAN: Yes, but I think it will be decided as matters of state law because of the way that Presiding Justice

Herlihy and the Court of Appeals--

Q But if you agree that there is legitimate room for a difference of opinion as to whether a particular test has religious propagation features and you have a large number of claims, is it not possible that the trier of fact must make a large number of determinations of the religious versus lay issue?

MR. NOLAN: It may very well be, although I would think there would be certain patterns. We are talking about examinations that were given at one particular semester.

Q By a large number of schools, and it may not necessarily be the same exam.

MR. NOLAN: I would think that in many cases it would not be the same exam, and it would be a burden on the Court of Claims.

Q But you do not think this would be excessive entanglement to be reviewing literally dozens of exams to see how many have religious overtones?

MR. NOLAN: I would not think it is any more difficult than the problems the Court of Claims has gone through in trying to sort out who gets paid for what in the South Mall in Albany. The claims on the South Mall are immense and require a tremendous amount of time and energy by the Court of Claims.

Q But it did not have anything to do with religion?

MR. NOLAN: No, it did not. But there is no reason why--

Q There is no entanglement involved?

MR. NOLAN: That is right, Your Honor.

Q But it is involved here?

MR. NOLAN: It could be involved here, but I think the Court of--

Q Is it not involved?

MR. NOLAN: I say it is. It is involved, but it is not excessive entanglement because it is a one-time process by a court which is capable of handling this as a legal matter. It does not involve any intrusion by the state education department. And finally it deals with matters which occurred over five years ago.

Q Will not the state education department have to review all these exams and decide what position to take with respect to each in the litigation?

MR. NOLAN: I believe the attorney general's office would represent the state in proceedings in the Court of Claims.

Q Some claims would involve religion; others they would decide are not sufficiently serious if they had to check on it?

MR. NOLAN: I would think there would have to be--

Q What is your view, Mr. Nolan, if in conducting

the audit it is determined that only $40 per pupil was in fact spent by a school; does the school get $45 or just $40?

MR. NOLAN: I would say $40.

Q Because the statute contemplates kind of an actual reimbursement rather than a per pupil thing.

MR. NOLAN: The statute contemplates, as I read it--

Q But how does that answer the reliance question if the school relied on a full $45 and they only--

MR. NOLAN: It just means that perhaps the statute did not quite meet the full effect that its sponsors intended it to meet. But the statute again has not been construed in that light by the New York courts. They have not addressed that question.

Q What if they did not spend the full $45, they only spent $40 and $5 of it was for religious oriented exams; would they then get $35 or would they get nothing?

MR. NOLAN: They would get whatever they were entitled to that did not--

Q They would get $35.

MR. NOLAN: --involve reimbursement for religiously oriented examinations.

Q Mr. Nolan, we have had a couple of decisions in the last several years that I notice are not cited in either of the briefs and perhaps are not relevant. Blue Hull I think was the name of one and Serbian something the name of the other,

in which in effect we held I think it is no business of the courts to be deciding what is religion and what is not. Do those cases have any relevance here?

MR. NOLAN: I do not think so. I think that is in the context of--

Q Property disputes?

MR. NOLAN: --property disputes as to the operation of a church. I think here what we are talking about is simply a matter of fact as to what occurred five years ago in the spring of 1972.

Q I thought we held in those cases that if it is a question of to whom does property belong and to decide that you have got to decide a question of religion, then courts have to stay out of it.

MR. NOLAN: I think that would involve questions as to the organization or philosophy of a particular church and how property was to be divided up in the case of a--

Q I think the Serbian case involved more than just property. It involved who was the bishop and whether or not a determination of whether one or the other was the bishop was anything that lay courts could get into. And I thought we held they cannot.

MR. NOLAN: I think this situation is somewhat different because this is in effect a claim for services rendered. And if a church school that has some contract with--

Q It is a claim to property, is it not?

MR. NOLAN: It is a claim for money that the schools--

Q That is property, I suppose.

MR. NOLAN: It is property in that sense. But following that rationale a church or a church school could never seek to recover damages from a state in the Court of Claims or in any other court because the courts would be incompatent to decide those things.

Q Why is that? I do not understand that.

MR. NOLAN: I do not agree with it. I am simply saying that that would be an important proper result.

Q I do not agree with your statement. I would think that a church could recover money in any dispute where it did not involve passing on religion. Mr. Justice Brennan is suggesting to you that this is just entanglement by another name.

MR. NOLAN: It may be entanglement, but I do not think it is excessive entanglement.

Q Was not the Serbian Orthodox case based on a whole line of cases of this Court that the courts have kept out of intra--intra--quarrels of churches--

MR. NOLAN: That is right, Your Honor. That is right.

Q --leaving that to the law of the church? Serbian

Orthodox did not involve any conflict between the church and the state, did it?

MR. NOLAN: That is my understanding, and that follows a long line of cases in this Court and I believe also the New York courts with respect to intra.

Q Do you happen to know whether Lemon and Kurtzman was even cited in--

MR. NOLAN: I do not believe it was. I do not believe it was. But getting back, if I may, to the entanglement question, I really find it very hard to see how there can be excessive entanglement here. Obviously there could be entanglement, but that is not enough. Under the decisions of this Court there has to be an unreasonable or excessive entanglement or intrusion. In this situation there will be determinations as to whether or not these teacher-prepared examinations could carry the propensity for the inculcation of religion.

We are not talking about anything that is going to affect the relationship between the state and the church schools now or in the future. We are talking about accomplished fact in the spring of 1972. What examinations were given in history? To what extent were religious matters covered by those? To what extent were they not? And a determination made as to whether and to what extent money damages are to be awarded. I do not think that has any propensity at all for

moving the state into a position where it would be affecting the ongoing operations of the schools or creating any sort of administrative interplay between the present operations of the schools and the state. And I think that the entanglement argument, whatever its merits may be in an ongoing program where monies are to be made available year after year after year and who have to be audits, periodic audits, to make sure as in Lemon that there would be no use of this money for religion, that is a totally different thing I think from the one-time limited reimbursement that we are talking about here.

Q Could not this one time set a precedent that questioned aid is not secular--is that not a precedent for the future--

MR. NOLAN: It certainly would.

Q --established by the State of New York?

MR. NOLAN: If I understand you correctly, I think it would.

Thank you very much, Your Honor.

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

[Whereupon, at 2:57 p.m., the case was submitted.]

- - -