ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-757 & 81-970

TITLE W. WAYNE ALLEN, Petitioner v. INEZ WRIGHT, ETC., EL AL.; and DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL., Petitioners v. INEZ WRIGHT, ET AL.

PLACE Washington, D. C.

DATE February 29, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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W. WAYNE ALLEN, :

Petitioner :

v. : No. 81-757

INEZ WRIGHT, ETC., ET AL; :

- x

DONALD T. REGAN, SECRETARY OF THE :

TREASURY, ET AL., :

Petitioners :

v. : No. 81-970

INEZ WRIGHT, ET AL; :

- x

Washington, D.C.

Wednesday, February 29, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

REX E. LEE, ESQ., Washington, D.C.; on behalf of the Federal Petitioners.

WILLIAM J. LANDERS, II, ESQ., Memphis, Tenn.; on behalf of Petitioner Allen.

ROBERT H. KAPP, ESQ., Washington, D.C.; on behalf of Respondents.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Allen against Wright and the consolidated case.

Mr. Solicitor General.

ORAL ARGUMENT OF REX E. LEE, ESQ.,

ON BEHALF OF THE FEDERAL PETITIONERS

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

This lawsuit was brought as a class action by parents of black students attending desegregating public publics in seven states and seeking to represent a nationwide class of several million parents similarly situated.

The relief that they seek is not desegregation of a public school nor admission of any child to any school, public or private. Rather, they seek an order that the Internal Revenue Service change its standards for determining the tax exempt status of private schools which their children neither attend nor seek to attend located in or serving desegregating public school districts.

The Plaintiffs lack standing to bring this action. They lack standing for two separate reasons, each of which is independently dispositive and each of

which is squarely based on a holding by this Court. I will discuss each of these two holdings separately, and the first is Valley Forge Christian College versus Americans United for Separation of Church and State.

Valley Forge makes clear that without exception, even in establishment clause cases, there is no standing to sue for the purpose of assuring that the Federal Government faithfully observe a particular plaintiff's view of the requirements of a particular provision of the Constitution. The constitutionally irreducible minimum requirement of injury in fact must be an injury that is more narrow in scope than breach of the interest shared by all citizens in assuring that Government steer clear of any particular kind of governmenal conduct, such as giving financial aid to a church or to a discriminating school or violates the ineligibility clause or the accounts clause or the incompatibility clause.

If any exception to that general principle, which reaches all the way back for 60 years to Frothingham versus Mellon, were to be acknowledged, the strongest possible case for an exception existed in Valley Forge itself, because, as stressed by the dissents in that case, one of the central functions of the establishment clause is to prevent precisely what

the plaintiffs were alleging in Valley Forge, namely direct governmental aid to religion.

The Court very correctly ruled that there is no exception, even for establishment clause cases, and thereby established that Article III has independent constitutional significance of its own and the standing issue is to be considered prior to and independent of any other constitutional issue whose substance the plaintiffs seek to vindicate.

The other case whose holding also squarely controls, though for quite different reasons, is Simon versus Eastern Kentucky Welfare Rights Organization, whose facts are remarkably similar to the facts of this case. Simon held that indigent persons and organizations lack standing to challenge the tax exempt status of hospitals which refused fully to service the indigent, and the reason that they lacked standing was because one could only speculate whether the relief that they sought, namely the revocation of the exemptions, would in fact cure the injury on which their standing was based, namely the unavailability of hospital services.

The identical defect exists in this case, as even the Court of Appeals recognized. The Court of Appeals, however, distinguished Simon from this case on

the ground that school desegregation cases in that court's view call for a different, more relaxed set of standing requirements. The court concluded that three of this Court's desegregation decisions, Norwood, Gilmore and Green, were in tension with Simon and that the court was therefore forced to select from two divergent lines of Supreme Court decisions.

In fact, I submit there is no divergence at all and Simon squarely governs for two reasons. The first is that the notion that for purposes of determining standing there is any difference between school desegregation cases on the one hand and hospital discrimination cases on the other, that the weight of the Article III burden somehow shifts, diminishes or increases according to the nature or importance of the substantive claim was squarely rejected by this Court and expressly rejected by this Court in Valley Forge, which came down after the Court of Appeals' decision in this case.

Second, even considered in isolation, the decisions in Norwood, Gilmore and Green do not establish any doctrinal enclave for standing in desegregation cases. Indeed, in our view they establish very few standing principles at all because, as Judge Tamm pointed out in dissent, they were not standing cases.

The defendants in Norwood and Gilmore were the State of Mississippi and the City of Montgomery, the precise governmental bodies that had discriminated against these claimants in prior precise desegregation suits because of the race of those plaintiffs, Norwood, Gilmore, and their colleagues. Having in both cases been parties to specific desegregation decrees, the plaintiffs in Norwood and Gilmore brought suit directly against those who had discriminated against them and, as the Court observed in Gilmore, the relief that they sought was directly related to the concrete injury they suffered.

Here, by contrast, the suit is against the revenue collector and not against the discriminator.

With regard to the summary affirmance in Green, the standing issue was not squarely presented. This Court's ruling was only a summary affirmance, and this Court later observed that because the Government and the plaintiffs in that case were in agreement, the Court's affirmance in Green lacks the precedential weight of a case involving a truly adversary controversy.

QUESTION: Well, I suppose, however, the Court had to assume standing existed to have entered the order it did. So it's much harder to explain, I think.

MR. LEE: It is correct, Justice O'Connor, that any court necessarily holds that there is standing in any decision where it renders a substantive decision on the merits.

However, even if you get over the Valley Forge hurdle, which I submit you can't in this instance, which came down after the Court of Appeals' decision, so that you have to weigh the persuasive merits of a Green decision on the one hand and a Simon on the other, which came down after Green, certainly for reasons set forth in this Court's first Bob Jones decision the Green decision is of less persuasive merit.

QUESTION: As long as you're interrupted, may I ask you another question. The plaintiffs below alleged that the Internal Revenue Service had violated with the tax exemption practice several specific sections or at least one section of the Revenue Code, and a violation of Title VI was alleged, and a violation of Section 1981 and I guess the Fifth Amendment itself.

Now, in your view is it unlawful for the Internal Revenue Service under any of those sections or provisions to follow the policy it did on the tax exemption if the Internal Revenue Service does not know that the school is discriminating racially? Is knowledge an element?

MR. LEE: Under the present procedure that is followed by the Internal Revenue Section, and a perfectly acceptable procedure, knowledge is gained by the devices that are available to the Internal Revenue Service, and certainly they cannot revoke the tax exemptions of any entity whom they do not know to be discriminating. But they do the best job that they can of finding out who those discriminators are and then revoking their tax exemptions.

If there are 1981 violations, then there should be 1981 suits brought against the discriminators. If there are Title VI violations, then Title VI suits should be brought against the discriminators. But it is an entirely different issue for the competitors or the adversaries in 1981 suit or a Title VI suit to go beyond bringing the direct suit to cure the particular injury in fact that they had and seek to employ the machinery of the Internal Revenue Service to impose a heavier burden on their adversary or their competitor.

QUESTION: Mr. Solicitor General -- I'm sorry, had you finished your answer?

MR. LEE: Yes.

QUESTION: Justice O'Connor's question and your reference to Title VI prompts this question from

me. You say that if the Internal Revenue incorrectly grants a tax exemption to a school that's contributing to white flight, allegedly, and therefore it kind of has an indirect subsidy, there's no standing to challenge it.

Supposing it were a direct subsidy and you had some different agency of the Government actually subsidizing the new school. Would there be standing to challenge the direct subsidy?

MR. LEE: I think there would be standing to challenge the direct subsidy --

QUESTION: To sue the federal official.

MR. LEE: -- but not to sue the Internal Revenue Service.

QUESTION: No, no. Well, assume it's a different service, it's an agency like HEW that might be distributing funds.

MR. LEE: I see.

QUESTION: And you sue them. Could you sue the Secretary of HEW and say that the direct subsidy is doing the same thing that these people say is going on here? Could there be standing in such a case?

MR. LEE: I believe there would be standing in such a case --

QUESTION: What's the difference?

MR. LEE: -- to bring suit directly against HEW, HHS, to prevent the payment.

QUESTION: In terms of impact on the individual litigant, what's the difference whether it's a subsidy in the form of cash or in the form of tax exemption?

MR. LEE: Well, whether it's a difference between -- there is a difference between tax cases and non-tax cases, which I will get to, in that, reaching all the way back to Louisiana versus McAdoo, this Court has recognized that tax cases may fit in a different category.

But where the -- I'm not sure that I understand your question. But if it is simply that there is a direct -- excuse me. This is a situation, then, where it's a governmental entity that is --

QUESTION: Well, let me restate it. Their theory, as I understand, is that the Federal Government is in effect supporting the creation of schools that enable white flight to occur and interfere with their ability to go to racially integrated schools. And you say, well, you can't sue the Internal Revenue for granting a tax exemption to support that, for very persuasive reasons.

I'm wondering if your argument would also

apply in terms of standing only -- I'm not talking about separation of powers or all the other problems that are around the corner here. In terms of standing only, what would be the difference, if any, between a direct subsidy of federal dollars instead of federal tax exemption for such a school?

MR. LEE: All right, I think I understand your question now. It is a question, I think, that pushes our principle to its limits, and I have two answers to it.

I think the first answer is that under Valley Forge as I understand it in that particular instance there is no standing to sue.

My second answer is that that is not this case, and the reason that it is not this case is this. Even if you ignore Valley Forge and you say that these plaintiffs do have a right to a Government that does not grant tax exemptions to racially discriminatory schools or, in our instance, to a Department of HHS that does not grant any kind of subsidy to racially discriminatory schools, that is not the issue in this case. It has not been the issue, it has never been the issue in this case, and it is not an issue at all since May the 25th of last year.

The only issue in this case is what is the

best way to identify racially discriminatory schools and then revoke their tax exemptions. There are three basic approaches to that issue.

QUESTION: Mr. Lee, could I ask you one thing. You feel Valley Forge was correctly decided?

MR. LEE: Indeed.

QUESTION: It was a five to four decision, wasn't it?

MR. LEE: Yes, sir.

QUESTION: But it's very correct?

MR. LEE: Excuse me?

QUESTION: It's very correct?

MR. LEE: It is very correct. I thought so two years and three months ago and I think so today.

QUESTION: You're always so positive and I just wondered.

(Laughter.)

MR. LEE: It does -- as I said a moment ago, Justice Blackmun, it did present the strongest possible case for an exception to the general principle that had been established in Frothingham versus Mellon, Schlesinger, Richardson, and so forth, in that the establishment clause apart from any other provision of the Constitution does, as the dissents in that case noted, specifically -- or one of its central functions

is to guarantee against direct Government aid to religion, so that in the establishment clause context, arguably the Constitution itself creates standing, just like a statute can create standing.

Now, that proposition lost five to four and that was a correct decision.

QUESTION: Of course, one can argue, though, that the Court is eroding the religion clauses somewhat with these five to four decisions, isn't it?

MR. LEE: Well, I think the Court is greatly strengthening the Article III principle with its decision in Valley Forge. But in any event, to whatever extent there might be a separate consideration for establishment clause cases, that does not obtain in a case such as this.

Now, the only issue in this case, as I say, is not whether there should be tax exemptions for racially discriminatory schools; the only issue is, out of three possible alternatives -- and so far as I know, to date there are only three possible alternatives -- which is the best of those three alternatives for identifying which are the racially discriminatory schools and then revoking their tax exemption.

Those three alternatives are: the existing procedure that is now followed, Revenue Procedure 75-50;

the 1978 and 1979 regulations; and what the plaintiffs are seeking in this case. It is not at all apparent which of those is the best approach, as is shown by the difficulty that Congress has had and the Internal Revenue Service has had in selecting among those three approaches.

What this case really boils down to is an attempt by these plaintiffs to take the resolution, the choice among those three policy choices, away from the political branches and secure their first choice of alternative by judicial decree, and that is clearly outside the bounds of standing to sue in a federal court.

Let me make just one final point, and it is that this is an income tax case, the standing rules should apply across the board to all substantive matters that come before the federal courts, but that there is an extra layer of consideration in income tax cases. Taxpayers do have standing to seek review of their own tax liability and, as occurred in Taxation with Representation last year, they may challenge the tax treatment of others where it is relevant to their own claims for consistent treatment.

To go beyond that, we submit, would be both unprecedented and also unwise. It would put in the

hands of adversaries and competitors of the taxpayer a powerful weapon which would not only distort the adversarial and competitive processes, but also, in the language of this Court in Louisiana versus McAdoo, "operate to disturb the whole revenue system of the Government."

This does not mean that the revenue laws will go unenforced. It just means that the enforcement will be uniform, accomplished by Government, as prescribed and overseen by Congress, rather than exists as a weapon to be picked up at will by those who wish to inflict additional burdens on fellow citizens with whom they disagree.

If private citizens have information that someone is not paying his fair share of taxes, they should provide that information to the tax collector rather than running into court.

QUESTION: Sometimes they can get compensated for that, can't they?

MR. LEE: That is correct.

I would like to reserve the rest of my time, Mr. Chief Justice.

CHIEF JUSTICE BURGER: Very well.

Mr. Landers.

ORAL ARGUMENT OF WILLIAM J. LANDERS, II, ESQ.

ON BEHALF OF PETITIONER ALLEN

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

The Intervenor, Reverend Wayne Allen, first learned of this case when he read about it in the newspaper. What he learned was that Respondents, parents with school attending desegregated public schools, had filed suit in the District of Columbia seeking to have the court require the IRS to revoke the tax exempt status of 3500 non-party public schools, including the school that Reverend Allen had founded in Memphis, Tennessee.

Although each of these schools professed under penalty of perjury to have an open admissions policy and Respondents had not been denied admission to any of these schools, Respondents sought a blanket condemnation of all these schools and revocation of the schools' tax exemption based upon an irrebuttable presumption of discrimination, primarily as a result of the school's failure to attract its quota of minority students.

Prior to Reverend Allen's intervention, no party had any interest in the rights of these 3500 schools, whose rights would be drastically affected by Respondents' desired remedy. Respondents' had never sought admission to any of these schools, had no desire

to attend any of these schools, had never been deterred from applying to any of these schools, and of course had never been discriminated against by any of these schools.

The IRS likewise had no stake in protecting the interests of the schools. The lack of adverseness between the IRS and Respondents was demonstrated even after Reverend Allen intervened. While the motions to dismiss were pending in the district court, the IRS and Respondents spent hundreds of hours in settlement negotiations trying to agree on what procedure should be applied to the public schools.

Reverend Allen, the only party representing the interests of any of these schools, wasn't even informed of those negotiations. He learned of them when the IRS announced to the press and the court that the IRS proposed to adopt a new revised procedure which embodied most of Respondents' presumption of guilt criteria, despite this Court's admonition in Norwood that no one can be required, consistent with due process, to prove absence of violation of law.

It's not uncommon for the IRS to defend actions in that manner. That is, responding initially to suits involving the rights of third parties by saying, you can't sue me, but then turning around and

asking, well, what do you want?

That is precisely what the IRS did in the Green case relied upon by Respondents. The ironic result is that the Green case resulted in the adoption of Revenue Procedure 75-50, which Respondents now seek to challenge as inadequate. In fact, in the 1974 Bob Jones decision this Court commented on the lack of an adversary contest in Green.

The point is, if Reverend Allen had not read about this case in the newspaper his rights and those of 350C non-party schools could have been drastically affected in a suit in the District of Columbia in which persons likely to be most directly affected by the order were not before the court. There is no guarantee that in future actions of this sort that an interested party will learn of the case and intervene, which emphasizes the importance of deciding issues and rights of such magnitude only in truly adversarial contests.

This Court's decisions, as the Solicitor General said, in Eastern Kentucky and Valley Forge make clear that injury sufficient to give standing must be distinct, concrete, personal injury to the plaintiffs. A generalized citizen's grievance or a shared right to have the Constitution -- to have the Government act in accordance with the claimant's views of the Constitution

is not sufficient.

Respondents' asserted injury falls squarely within the meaning of those cases, the holding in those cases. Their injury, as characterized by the Court of Appeals, is the denigration they suffered as black parents and school children when the Government graces with tax exempt status educational institutions in their communities that treat members of their race as persons of lesser worth.

The statement of injury presumably is derived from the steer-clear language in Norwood, a school case. But there's no principled basis for a separate standing rule as to schools. So to recognize standing on the basis asserted by Respondents would mean that these same Respondents have standing to challenge all charitable tax exemptions. For example, they would have standing to sue seeking to require the IRS to revoke the 501(c)(3) status of all troops of Girl Scouts and Boy Scouts which do not have their quota of minorities.

Furthermore, in Moose Lodge this Court rejected --

QUESTION: Mr. Landers, can I ask you, if these people had applied for admission to the school you represent and been denied admission, do you think they'd have standing?

MR. LANDERS: They would have standing under Runyon versus McCrary to bring a direct action against that school.

QUESTION: I understand that, but would they have standing to bring a suit against the revenue department?

MR. LANDERS: No, sir.

QUESTION: Then that's really irrelevant, isn't it? The fact that they didn't apply to your school has nothing to do with this case?

MR. LANDERS: It does because it shows that they have even less interest in the tax exempt status of this school than did the plaintiffs in Eastern Kentucky, where they had applied to the hospitals and been denied. I might say, if they did apply to our school they'd get in. But they have even less of a concrete injury than did the plaintiffs in Eastern Kentucky.

QUESTION: Mr. Landers, in your petition in this Court you challenge the Court of Appeals holding that the appropriation riders in 1980 and '81 barred the claimed relief. You don't argue that in your brief. Is that because there aren't currently such riders and you think that's moot now?

MR. LANDERS: The riders expired in 1982, but I think that the fact that Congress considered those and

addressed this question shows that this matter is appropriately one to be decided by the Executive Branch with oversight by Congress, as Solicitor Lee said.

As I was saying, this Court specifically addressed and rejected the precise standing argument advanced by Respondents in Moose Lodge. There the Court restricted Mr. Irvis' standing to a challenge of the type of discriminatory conduct to which he had been subjected, and rejected Justice Douglas' argument in his dissent which would have given standing to any black citizen in Pennsylvania to bring suit against the state whenever any other citizen had been discriminated against.

So to allow Respondents standing necessarily would require this Court to overrule Moose Lodge. But there's no necessity to reach such a result. As I stated, if Respondents applied to a public school and they'd been denied admission, they have a direct remedy against that school and that would be an adversarial contest that would be under this Court's opinion in Runyon versus McCrary.

Second, if Respondents wish to complain that any particular private school is discriminating but is still retaining its tax exempt status, they can avail themselves of the current Revenue Procedure 75-50.

Section 6 under that procedure invites information about such schools. Respondents not only have failed to do so, but they failed to allege that if they advised the IRS it would fail to act on that information.

In fact, although I can't speak for all the other schools which were named as examples in the complaint, I know that they named Reverend Allen's school as an example of a segregated school which was tax exempt. Immediately following Reverend Allen's intervention in this suit, the IRS audited his school and found it to be nondiscriminatory.

The Respondents named the Prince Edward school in the complaint as an example of a discriminatory school with tax exempt status. The IRS audited Prince Edward and revoked its tax exempt status, which this Court upheld, as the IRS has done to some 106 other schools which were found to be discriminatory.

There is a remedy in a properly concrete injury and --

QUESTION: Mr. Landers, as I understand your position there would be no standing even if there were no remedy. You've given us examples of remedies, but your position on Article III as I understand it is that they didn't have to do any of these things.

MR. LANDERS: They didn't have to do any of

these things. Those are things they had the right to do, but did not avail themselves of.

QUESTION: But if the IRS had a policy of not caring at all about these issues, they could not be challenged?

MR. LANDERS: But that's not the issue, that's not the case before this Court at this time.

QUESTION: Does the constitutional issue then turn on the fact that they have in fact been diligent in pursuing these goals?

MR. LANDERS: No, sir. I think the constitutional issue turns on the fact that these Respondents don't have a concrete injury to themselves because of any action or inaction by the IRS. If they have an injury, it's as a result of some conduct by the schools, which they chose not to sue and in a proper case would be entitled to sue if they had been discriminated against by such a school.

Thank you.

CHIEF JUSTICE BURGER: Mr. Kapp.

ORAL ARGUMENT OF ROBERT H. KAPP, ESQ.,

ON BEHALF OF RESPONDENTS

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

This case does not involve a claim to standing

by all taxpayers or all citizens. It does not even involve a claim to standing by all black citizens. Rather, it involves a claim to standing limited to a class of black school children enrolled in public school systems which are desegregating, either voluntarily or pursuant to court order.

QUESTION: Mr. Kapp, I suppose in the complaint below two different types of injuries were alleged, I think: first, the pure stigma injury; second was the reliance on diminished ability to obtain a desegregated Washington school education.

Have you pretty much stopped relying on the pure stigma injury?

MR. KAPP: I think the injury, Your Honor, consists of a multitude of facets. Basically, the injury in the case as we see it is the same as the injury in Brown, as that injury was elaborated upon in Green versus New Kent County Schools.

It's the Government participation in the denial of the right of school children to attend a desegregated public school system. And what we say basically is that the grant of significant financial assistance to a discriminatory private school is the legal equivalent for equivalent for equal protection purposes of operating that segregated system itself.

So that I would say in answer to your question that the second aspect of injury alleged in the complaint is basically simply an elaboration of the first. The provision of significant aid to a private discriminatory school constitutes a Government approval, constitutes Government approval of a discriminatory private school system.

QUESTION: Well, do you think that any citizen would have a right to file a suit to complain about that?

MR. KAPP: Certainly not, Your Honor. I don't think that -- I think that the group of citizens that are entitled to file an action here are those citizens that are directly affected by the Government's action in providing tax exemption.

QUESTION: Well, so you aren't claiming the pure stigma injury. That's what I'm trying to pin you down on, because the complaint alleged two different types of injury, and it seems to me what you're now arguing is an injury suffered by someone who is seeking a desegregated education and you're trying to limit it to that.

MR. KAPP: Stigma is only part of the injury that is suffered, Your Honor. The injury includes the fact that racially discriminatory schools with

Government support are operating in the district, and so that it may very well be that the fact that the Government supports racially discriminatory schools stigmatizes all black citizens. But one doesn't have to reach --

QUESTION: Well, or perhaps all white citizens as well.

MR. KAPP: It may stigmatize all white citizens as well.

QUESTION: Do all those people have a cause of action, then, under your theory? Does everyone have a cause of action?

MR. KAPP: No, they do not, Your Honor.

QUESTION: Why? I'm trying to pin it down and I can't.

MR. KAPP: Because the black students that attend public schools in desegregating public school districts are particularly injured by the fact that the Government is supporting racially segregated private schools in those districts. Those are the persons who are the victims of that action, on whom the burden falls to the greatest extent.

It may be that other people suffer injury as well, and in fact there is some generalized injury as well. But it's very difficult for me to see that there

is no difference in terms of the impact of the injury on the children of, let's say, Respondent Inez Wright, who attend the Briarcrest school system -- who attend the public school systems in Memphis and attend a 99 percent black high school in Memphis, where the Government is at the same time providing tax exemptions to the Briarcrest school system, which is racially segregated and which Judge McCray has said is impeding public school desegregation.

QUESTION: Mr. Kapp, if you are correct that the Government grant of a tax exemption to a school such as Briarcrest is equivalent to the Government in effect operating the school, wouldn't that line of reasoning carry you over to say that if the Government grants a tax exemption to a church it's tantamount to the Government operating the church and therefore would be barred under the First Amendment?

MR. KAPP: I think there is a well-developed constitutional rule here that derives from Norwood, which says that at least when the Government is providing financial assistance, either in the form of tuition grants or tax exemptions, that that is the legal equivalent of operating the school simply for the purposes of analysis.

QUESTION: Well, all right. But if that's

correct for the purposes of analysis, why isn't it equally correct to say that it's a violation of the First Amendment for the Government to grant a tax exemption to a church?

MR. KAPP: I think the reason for that, Your Honor, is the reason that Justice Burger, Chief Justice Burger, indicated in the Norwood case itself. When you get into the First Amendment area, there are competing considerations with respect to the free exercise clause on the one hand and the establishment clause on the other.

And as Chief Justice Burger said in Norwood, there's a certain play in the joints, if you will, in the free exercise-establishment area which does not exist with respect to the equal protection clause, and that is, if you will, Your Honor, the distinction.

QUESTION: Let me try another hypothetical. Suppose we went back, the Government, the United States went back to something they abandoned 30-odd years ago and had segregated military forces. Would your clients, present clients, have a right to bring the same kind of a lawsuit you have brought here to challenge that segregation in the military forces? Because that would clearly be a taint on both races.

MR. KAPP: Your Honor, they may or may not.

I'm not sure precisely what the answer is in that context. But I feel quite confident of what the answer is in the context of education, because that stigma, as the Brown case recognizes, has an adverse effect on the educational process itself. It interferes with the educational process. That's really, as I understand it --

QUESTION: Well, the recruiting activities of the United States with our voluntary system emphasize the education available in the armed forces. That's the principal inducement used for the volunteer Army.

MR. KAPP: In all due respect, Your Honor, it seems to me that elementary and secondary school education, the basic education, if you will, in the United States, is of just simply greater significance, and an interference with that educational process is the very thing that Brown recognizes is an injury.

Now, a stigma may cause an injury in other instances, and you can look at that on a case by case basis. But in the area at least of education, it seems to me we have a very clearly established set of precedents.

QUESTION: Mr. Kapp, in that connection I want to be sure of one fact. Are all of the children of your Respondents attending desegregated schools?

MR. KAPP: They are not, Your Honor.

QUESTION: How many are not?

MR. KAPP: The plaintiffs are attending -- the plaintiffs in our case are people who are attending school in desegregating public school districts, and those systems, so far as I understand, have not been determined to be unitary in any way, although I think that fact really wouldn't matter under Justice Burger's opinion in Norwood.

But the group, the class which we seek to represent, are people who are attending public school in desegregating public school districts. Some of those school districts are under court order, other of those school districts are desegregating pursuant to HEW directive or HHS directive or Department of Education directive, and others of those schools are voluntarily desegregating. And we have a group of Respondents in various different classes.

QUESTION: I'm not sure I regarded your answer as entirely consistent. I take it, then, that all of the children of Respondents attend desegregated schools today?

MR. KAPP: Well, if you mean by desegregated, Your Honor, schools that are under court order to desegregate or are voluntarily desegregating or under

HEW directive to desegregate, that is correct. At least that was certainly correct at the time the complairt was filed.

QUESTION: I mean desegregated schools. I don't care how. And I take it your answer to my question is yes, in the affirmative.

MR. KAPP: If Your Honor, in all due respect, you mean it in the sense that I responded.

QUESTION: Mr. Kapp, related to that, did the district court ever certify a class?

MR. KAPP: In this case, Your Honor?

QUESTION: Yes.

MR. KAPP: They have not, Your Honor. The motion to dismiss occurred prior to the attempted class certification and the judge, the district court judge, deferred a hearing on class certification pending the outcome of this action.

QUESTION: Going back to the standing inquiry, do you think that it's necessary for the plaintiffs below to establish a causal connection between the IRS action and the injury alleged with regard to desegregation?

MR. KAPP: Your Honor, I believe that the answer to that can be found in the Norwood decision itself.

QUESTION: Well, yes or no? Causal connection or not?

MR. KAPP: There is no required causal connection between the effect of the tax exemption and the desegregation of public schools. I think as a matter of law, if you will, the grant of tax exemption and the approval that goes with it interfere with the desegregation of the public school systems, but we would not need to prove that.

QUESTION: But don't you think that the easiest explanation of this Court's decisions on standing is to say there is a causal connection required?

MR. KAPP: Well, there's a causal connection in the sense that the only action that we're complaining about here is the action of the Government in providing tax exemption. That in and of itself causes the injury, so the causal connection is established.

QUESTION: Well, it's more than that, because it's conceded that the Government has provisions that deny tax exemption. It's some additional procedures that the plaintiffs below are seeking.

MR. KAPP: That is correct, Your Honor. But we allege in the complaint that the Government -- and we are entitled to have that taken as true for purposes of

the motion to dismiss -- that the Government is in fact granting tax exemptions to racially discriminatory schools.

The fact is that there are schools that have been declared, adjudicated by the courts, by a district court in Louisiana, have been adjudicated discriminatory and yet continue to have tax exemption.

QUESTION: Do you think it's necessary that the Government know about the discriminatory practices of the schools? Is knowledge required?

MR. KAPP: Your Honor, under this Court's decision in Norwood the fact that the statute under which the State of Mississippi was providing textbooks was facially neutral and that there was no intent to discriminate established made no difference. The fact is, whether the Government -- whatever it is, the Government's procedures are ineffective for distinguishing between discriminatory schools and nondiscriminatory schools.

The Commissioner of Internal Revenue in 1979 conceded that in a public hearing. So the fact is, the Government must know it. The Commissioner himself knew it.

But I don't think as a matter of law based upon Norwood that there is any requirement of intent, if

you will.

QUESTION: In either Laird against Tatum or Schlesinger against the Reservists, this Court said something to the effect that to allow all of these people to challenge governmental decisions would turn the operations of the Government into something like a town meeting. Wouldn't that same concept apply here?

MR. KAPP: Well, the difference, Your Honor, was that in the Schlesinger case you were talking about simply a violation of the Constitution resulting from Government conduct that all citizens suffered in equal degree. Nobody was especially hurt by, particularly hurt by that any more than anybody else, and the Court basically held in that case, in fact as it did in Valley Forge, that there is no standing in the case of a generalized injury.

But here we're talking about a particular injury that falls on particular black school children who attend public schools in desegregating public school districts. It's quite possible for the Court to do this, demand this, without turning the Government upside-down.

The fact is the district court in the court of Columbia in the Green case has provided such an order with respect to Mississippi schools and the Government

is going about following that order, and there's no reason, if there are -- it seems to me, that if there are black students who stand in the same position that the black students stand in Mississippi, whose right to a desegregated education is being interfered with, that they would not have a right to standing here, and it seems to me that the Service could carry that out without any great difficulty.

QUESTION: Mr. Kapp, suppose there are two schools in a community, two private schools. One of them is one that discriminates on the basis of race and the other one is a private school that everybody agrees does not discriminate. But the Government provides tax exemption for both of them.

In terms of what you claim is an injury to the desegregation of the schools, of these schools that are in the process of desegregating, in terms of that injury what's the difference between the two schools?

MR. KAPP: The difference between the two schools, Your Honor, is that in the case of the school that is discriminatory the Government's providing of a tax exemption signals official approval of that school, which in turn injures the public school students and --

QUESTION: Well, I know, but how does it interfere with the desegregation of the school?

MR. KAPP: It interferes --

QUESTION: Other than providing another school for white children to go to?

MR. KAPP: Well, it strengthens the school and increases the attractiveness of the school.

QUESTION: Well, that happens, certainly. But both public schools are going to provide an alternative place for children to go. They don't need to go to public school. And it may be that it would be -- just by having a place for students to go, it may make it more difficult to desegregate the school because a lot of students won't be going to public school.

MR. KAPP: Well, certainly, Your Honor, there is a constitutional right to attend a private school. That's a well recognized right. It's the fact, Your Honor, if you will, that the Government is approving here a system of segregated schools.

QUESTION: It sounds like you're constantly coming back to a variety of the stigma argument. I'm not saying that's a bad argument, but I'm just wondering if there's anything concretely different between the two schools I've described in terms of impact on the desegregation process.

MR. KAPP: Well, the desegregation process, I suppose, has to do more with a lack of Government

sanction for a dual school system than it does necessarily with any particular mix of students that you would have. And so the injury is the fact of Government approval of a continuation of a type of the old dual school system, if you will, the fact that the Government is approving racially identifiable schools, and that does interfere with the educational process, we contend, and for the same reason interferes with the desegregation process.

QUESTION: Well, if any of the schools that you claim were discriminatory schools, if a particular school suddenly changed its policy in a manner that you would agree was no longer discriminatory, you would no longer be attacking the tax exemption of that school?

MR. KAPP: That is right, Your Honor. And the way -- although these are questions of relief, basically, and they don't go to the question of standing. But I think that what would happen here would be basically, if we were to succeed, is basically what happened in Norwood. The lower court would provide that where a school is formed or expanded in the wake of public school desegregation and is an all-white school that there would be a presumption of discrimination which would attach.

But the school would have the full opportunity

to establish for a lot of reasons that it wasn't discriminating. And it would in fact, under the type of relief we envision, would have a full opportunity to be heard on that before a system of courts.

Your Honors, I'd like to make one comment about the Valley Forge case, if I could. The Valley Forge case, in all due respect, does not control this proceeding. The Valley Forge case was a case of generalized injury. The Government transferred property to a school, a church-related school in Pennsylvania. The complainants were a plaintiff in Maryland and a plaintiff in Virginia who read about the transfer of property in the newspapers.

There was no nexus between the challenged action and the injury that was suffered by the particular persons. This Court in fact itself in Valley Forge distinguished the case, the Abingdon School Board case, on the ground that the plaintiffs in those cases -- in that case, who were school children in a particular school, would have been directly affected by the Government's action.

In this particular case, we have particular school children in particular districts, school districts, who we contend are being injured by this action. It is not a generalized grievance involving all

citizens or all taxpayers, and therefore is fully distinguishable from the Valley Forge case.

QUESTION: So I suppose a fortiori if you have standing in this case you could in any case sue the Commissioner and ask that he lift the tax exemption of the specific school on the grounds that it was discriminatory, even though the Commissioner may have reviewed it internally and found that it wasn't for his own satisfaction? You could always in a case, specific case, litigate the tax exemption, the existing tax exemption of a particular school?

MR. KAPP: Only if the grant of tax exemption was interfering with particular public school students. Those students would have standing to challenge the Government's action.

QUESTION: I suppose that almost anywhere you could find students attending a public school that was desegregated, even if it was not desegregating, but was desegregated, was a unitary system. I suppose your theory would give standing to a black student to challenge the tax exemption granted to a school down the street that allegedly is discriminating.

MR. KAPP: It would only if the Government's grant of tax exemption, like a grant of a subsidy --

QUESTION: Well, no, but you allege that in

your complaint, and that would give you standing, I take it.

MR. KAPP: It would only if it were -- only to those students who were affected by the grant of tax exemption.

QUESTION: Well, these are students who are registered in the schools I just described, in the public schools I've just described, and down the street is a school that has tax exemption that these students claim is discriminating against Negroes. And I suppose your theory would give standing to such plaintiffs just anywhere to challenge the Commissioner's grant of a tax exemption.

MR. KAPP: It would only, I think, as in Norwood, where the grant of aid injures particular students. Obviously there would have to be lines drawn. But it seems to me the fact -- for example, we don't contend that the fact that the Government is granting tax exemptions to a racially discriminatory school, let's say in Boston, gives a black student, a black citizen in Los Angeles, the right to sue. We're looking at specific situations where the existence of the discriminatory school is basically interfering with the educational process and is interfering with the desegregation process and it affects, directly affects,

particular persons.

It's possible, for example, in the Valley Forge context, as I've just indicated, for the Government aid in that case to directly affect particular people.

QUESTION: Well, what if you have a school in North Dakota, a public school. There's never been the slightest claim of segregation at all. And you have side by side in the same town in North Dakota a segregated academy. Now, would a black student going to the public school in North Dakota have standing to challenge the grant by the Government of tax exemption to the segregated academy?

MR. KAPP: You would not have to decide that question, Your Honor, in order to decide this case.

QUESTION: Well then, it doesn't depend -- if you don't have to decide that, it doesn't depend on the fact that the public schools are being desegregated or are under a court order to desegregate.

MR. KAPP: I think there is a particular injury which accrues when the schools are desegregated which may not accrue where you already have a unitary system or where you have no previous segregated system.

QUESTION: So the stigma -- that seems to dispense with the stigma basis for standing.

MR. KAPP: I think you have to decide each of these cases on an individual basis. I do think that in many cases the stigma will interfere, itself interferes with the educational process because it gives the black school children a sense of lesser worth and so forth. The existence of that stigma occurring in Michigan may not affect somebody who is in California to a degree sufficient to seek standing.

If there are no further questions, Your Honors, I am prepared to submit my case.

CHIEF JUSTICE BURGER: Very well.

Mr. Solicitor General, do you have anything more?

MR. LEE: Not unless the Court has questions, Your Honor.

CHIEF JUSTICE BURGER: I hear none.

Thank you, gentlemen. The case is submitted.

(Whereupon, at 10:58 a.m., argument in the above-entitled case was submitted.)

* * *

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

#81-757&81-970-W. WAYNE ALLEM, PETITIONER v. INEZ WRIGHT, ETC., ET AL.; and DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL. Petitioners v. INEZ WRIGHT, ET AL.

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY Pirne Hammond

(REPORTER)