

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

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DKT/CASE NO. 85-499

TITLE B.H. PAPASAN, SUPERINTENDENT OF EDUCATION, ET AL.,
Petitioners V. MISSISSIPPI, ET AL.

PLACE Washington, D. C.

DATE April 22, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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B. H. PAPASAN, SUPERINTENDENT :

OF EDUCATION, ET AL., :

Petitioners, :

V. : No. 85-499

MISSISSIPPI, ET AL. :

- - - - -x

Washington, D.C.

Tuesday, April 22, 1986

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 12:59 o'clock p.m.

APPEARANCES:

T.H. FREELAND, III, ESQ., Oxford, Mississippi; on behalf
of the petitioners.

RICHARD LLOYD ARNOLD, ESQ., Assistant Attorney General of
Mississippi, Jackson, Mississippi; on behalf of the
respondents.

C O N T E N T S

ORAL ARGUMENT OF

PAGE

T. H. FREELAND, III, ESQ.,

on behalf of the petitioners

3

RICHARD LLOYD ARNOLD, ESQ.,

on behalf of the respondents

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T. H. FREELAND, III, ESQ.,

on behalf of the petitioners - rebuttal

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1 MR. FREELAND: I think it is contrary to
2 federal law, Justice White, for them to do as they are
3 doing. In other words --

4 QUESTION: Well, that doesn't answer my
5 question.

6 MR. FREELAND: I think it is contrary -- yes,
7 to answer your question in a word.

8 QUESTION: Good. So you think they should
9 take the total trust income from trust lands and divide
10 it among the counties in accordance with the number of
11 students or some other neutral standard?

12 MR. FREELAND: I think that they could do that
13 as part of the relief that we seek, yes.

14 QUESTION: I know, but I thought you said that
15 it would be contrary to federal law to let the counties
16 in which the land is located have all the money
17 generated for that land.

18 MR. FREELAND: Not precisely. What I said was
19 that it is contrary to federal law to allow all of the
20 trust income to go to 59 counties, and at the same time
21 none of it to go to the 23 that we represent.

22 QUESTION: Well, suppose there wasn't this
23 Cherokee land involved at all, and every county in the
24 state had that section of land or whatever it was, those
25 sections of land, but that those lands in the different

1 counties produced different income, different levels of
2 income, and some counties from the school land would be
3 getting X dollars per child, and other counties would be
4 getting one-tenth that per child. Now, would that be
5 permissible?

6 MR. FREELAND: Well, in the first place --

7 QUESTION: Would it be, or not?

8 MR. FREELAND: Yes, yes, indeed, it would be,
9 and that is the situation that does in fact exist in
10 lots of state, where the state has not done --

11 QUESTION: So you do not attack allocating the
12 income to the counties in which the land is located.

13 MR. FREELAND: As a matter of fact, the
14 language of the trust says that that is what is to be --
15 in other words, the land is to be maintained for the
16 benefit of the township in which the land is located,
17 but we have gone beyond that in Mississippi.

18 QUESTION: I understand.

19 MR. FREELAND: That is my point.

20 QUESTION: Mr. Freeland, I am not sure I
21 understand the facts. My understanding was that the
22 counties you represent were owned by an Indian tribe,
23 and when the United States government took that land
24 over and sold it, they gave the proceeds to the State of
25 Mississippi. The state then invested the proceeds in --

1 of a railroad that went broken during the War Between
2 the States. Is that correct?

3 MR. FREELAND: No, Judge, that is --

4 QUESTION: That is incorrect?

5 MR. FREELAND: That is incorrect.

6 QUESTION: All right. Tell me what the facts
7 are.

8 MR. FREELAND: All right. What happened was
9 this. First of all, the entire school lands trust was
10 created at one time in 1817 in Mississippi's enabling
11 Act and the Land Sales Act. The Land Sales Act provided
12 that the 16 section lands were to be retained throughout
13 the state in trust for the schools. Then, in the sale
14 of the lands in what is called the Chickasaw Cession,
15 the 23 counties that we represent, rather than retain
16 the lands in trust, as was supposed to be done, they
17 sold them and gave the money to the Indians, and not to
18 the state.

19 QUESTION: The United States Government did
20 that, didn't it?

21 MR. FREELAND: That is correct, and of course
22 the United States government realized what it had done,
23 subsequently passed a statute that said, we are going to
24 give the state 177,555 acres of new lands to replace
25 these lands that we wrongfully, if you will, sold to the

1 Indians. Thereafter, after this happened, the State of
2 Mississippi first leased these lands. They are in the
3 Mississippi Delta, some of the richest farmland in the
4 world.

5 They leased these lands, and following that,
6 the Congress in 1852 passed a statute that said, you can
7 now sell the lands provided you retain the funds,
8 proceeds of the sale in trust for the schools, or as an
9 alternative you can lease the lands, but if you do, if
10 you do sell the lands, you have got to get permission of
11 the counties where -- that would benefit from the lands
12 in order to do so.

13 Of course, the state never did do this. In
14 1856, the state comes along. They -- well, first, in
15 1854 they gave away the reversionary interest in the
16 land. They had the lands leased for 99 years. They
17 said, we will give you a fee simple title for no
18 additional charge, which they did. This was Delta
19 land.

20 Subsequent to that, in 1856, the state said,
21 okay, we have got something over \$1 million in a fund in
22 the state treasury. They by statute converted that to
23 the use of the state, and put it in the general fund,
24 and spent it just like they would any other money in the
25 general fund. In other words, the trustee gave away the

1 corpus of the trust or converted it.

2 Now, the same statute that you are referring
3 to, I believe, does talk about lending money to the
4 railroads, a highly speculative venture in Mississippi
5 in 1856, but that was done after the money was converted
6 to the use of the state.

7 QUESTION: Did they put all of that money in
8 the railroads?

9 MR. FREELAND: No, as a matter of fact, if you
10 read the statute, I believe they put about \$400,000 of
11 it into the railroads, railroads, incidentally, that had
12 no rolling stock, had not been built, and to add insult
13 to injury, they were in south Mississippi, not in north
14 Mississippi where our 23 counties are.

15 QUESTION: And no suit has been brought
16 against the state in all the years that have passed
17 since then?

18 MR. FREELAND: Until this day.

19 QUESTION: Mr. Freeland, I assume as far as
20 you are concerned that we could take judicial notice of
21 the matters in the public record such as the annual
22 report of the superintendent of public education to the
23 state legislature from Mississippi.

24 MR. FREELAND: Certainly, Justice C'Connor. I
25 certainly hope the Court will do that.

1 QUESTION: And in looking at that report, it
2 appears that there are other state funds that go toward
3 the pupil costs of public education in the State of
4 Mississippi other than the 16th Section and lieu lands
5 revenue.

6 MR. FREELAND: Is the Court referring to
7 general appropriations or are we talking about --

8 QUESTION: Appropriations that go to the costs
9 of public school education.

10 MR. FREELAND: Aside from the school lands
11 trust.

12 QUESTION: Yes, aside from the 16th Section
13 and the lieu lands revenues.

14 MR. FREELAND: That is precisely correct.

15 QUESTION: What percentage of the funds per
16 pupil would you say comes from other funds, local,
17 state, and possibly federal, other than these moneys you
18 are worried about, the lieu lands and 16th Section?

19 MR. FREELAND: May I illustrate in dollars?
20 In dollars, in the Chickasaw Cession 63 cents per
21 student, moneys in lieu of trust funds prior to 1985;
22 outside the Chickasaw Cession, \$75 per student.

23 QUESTION: Well, my question goes to what
24 other revenues go toward public school education. Those
25 figures, of course, are in your brief, but the other

1 figures are not.

2 MR. FREELAND: The fund represents outside the
3 Chickasaw Cession approximately 20 percent of the total
4 school funds available to the schools in the State of
5 Mississippi. This is outside the Chickasaw Cession.
6 That is less teachers' salaries. In other words, these
7 are basically used as discretionary funds. So if you
8 discount teachers' salaries, the fund represents
9 approximately 20 percent of the total school funds
10 available in the State of Mississippi.

11 QUESTION: State, local, and federal?

12 MR. FREELAND: I believe that's correct.

13 QUESTION: All money, state, local, and
14 federal.

15 MR. FREELAND: I believe that's correct. I'm
16 not positive of that answer, but I believe that's
17 correct.

18 QUESTION: I share Justice O'Connor's
19 concern. Don't you end up in a situation where the
20 children in the Chickasaw Cession lands get about the
21 same overall as those in the southern part of the
22 state?

23 MR. FREELAND: Justice Blackmun, that is
24 precisely our complaint. They do not. They do not.

25 QUESTION: I get the other impression from

1 looking at the facts here, but go ahead and explain.

2 MR. FREELAND: No, they certainly do not. In
3 other words, against 60, a little better than 60 cents
4 per pupil in the Chickasaw Cession prior to '85; in the
5 rest of the state, \$74.

6 QUESTION: I know, you say that, but we are
7 asking, overall, with all other funds available, what is
8 the answer?

9 MR. FREELAND: The answer is the same. That
10 difference is not made up with these other funds.

11 QUESTION: But what order of magnitude are we
12 talking about? Is it a correct interpretation of your
13 answers to Justice Blackmun that about 80 percent of the
14 public funds from everywhere in Mississippi for schools
15 come from sources other than these lieu lands?

16 MR. FREELAND: Outside the Chickasaw Cession.
17 That's correct.

18 QUESTION: And how much comes in -- much more
19 than 80 percent, perhaps approaching 100 percent?

20 MR. FREELAND: No, no, no. In the Chickasaw
21 Cession, less than 3 percent because of the amount of
22 moneys that we get. In other words, again, you are
23 talking about a difference.

24 QUESTION: Counsel, what we are interested in
25 is, what is the disparity when you add all the figures

1 together of all sources for public education? What is
2 the disparity between the southern part of the state and
3 what you refer to as the Chickasaw Cession? Is it
4 roughly 100 percent to 80 percent?

5 MR. FREELAND: It is -- if I have got my
6 mathematics correct, Justice Rehnquist, it is -- yes,
7 roughly, I would say that would be correct.

8 QUESTION: And is it your position that the 80
9 percent funding does not give a minimally adequate
10 education?

11 MR. FREELAND: It is our position that the
12 lack of a minimally adequate education, and as the Court
13 understands, we are here on a 12(b)(6) motion, is the
14 effect of the denial of the rights that we claim under
15 this trust, and not the cause. The cause, we say, is
16 denial of these rights under this federally created
17 trust.

18 QUESTION: And you say that the absence of the
19 cession lands revenues makes the difference between a
20 minimally adequate education and not?

21 MR. FREELAND: That is correct.

22 QUESTION: Mr. Freeland, I would like to go
23 back to the fundamentals. Do the localities have the
24 primary responsibility for financing public education in
25 Mississippi? The localities?

1 MR. FREELAND: I would say not, the state.

2 QUESTION: The state has.

3 MR. FREELAND: Yes.

4 QUESTION: Is the funding of public education
5 the largest single item in the state budget?

6 MR. FREELAND: That, I believe, is true.

7 QUESTION: I think that is true in most
8 states. Now, I get back to the question you have been
9 asked several times. Is that allocated on a per pupil
10 basis?

11 MR. FREELAND: Average daily attendance I
12 believe is the basis.

13 QUESTION: Average daily attendance. Is that
14 fairly done across the state, including the counties you
15 represent?

16 MR. FREELAND: We have no complaint about
17 that.

18 QUESTION: None whatever.

19 MR. FREELAND: None whatever. That is not the
20 issue in this case.

21 QUESTION: What percentage, again I ask you,
22 of the funds in these counties comes from that state
23 appropriation? Did you say 80 percent?

24 MR. FREELAND: I am not positive of that
25 figure, but I would say it would be approximately

1 correct.

2 QUESTION: You said it was 80 percent in the
3 south.

4 MR. FREELAND: In the south, and it would be
5 higher than that --

6 QUESTION: And it would be, I thought you
7 said, about 97 percent, that only 3 percent of the money
8 came from the lieu lands.

9 MR. FREELAND: The 3 percent was trying to
10 compare what we get from the lieu lands. It is actually
11 less than that, Justice White.

12 QUESTION: So again, how much, what percentage
13 in the north part of the state is comparable to the 80
14 percent in the south? What would that figure be?

15 MR. FREELAND: The percent that we actually
16 get from the state?

17 QUESTION: Yes.

18 MR. FREELAND: The funding is basically the
19 same. How we break it down --

20 QUESTION: The percentage.

21 MR. FREELAND: Well, let me say this first.
22 We are not attacking school funding in Mississippi as a
23 general proposition. That is not our lawsuit as we view
24 it. Our lawsuit as we view it is simply this trust
25 created by the federal government is being violated

1 because our clients, or the schools that they attend, I
2 should say, are not getting their rightful share of the
3 trust income. That is the basis for our lawsuit.

4 Now, as far as the overall school funding of
5 the State of Mississippi is concerned, we are not --
6 that is not the thrust of our lawsuit in the least.

7 QUESTION: Insofar as you claim a violation of
8 the trust, that really occurred over 100 years ago,
9 didn't it?

10 MR. FREELAND: Not the violation that we are
11 suing on. Now, Justice Rehnquist. The violation that
12 we are suing on is the violation that occurs each year
13 when this trustee, who either converted the trust corpus
14 or gave it away, and owes us a continuing duty.

15 QUESTION: Well, but that is, you know, that
16 is the way everybody tries to get around the statute of
17 limitations, is to say, well, this didn't just happen in
18 1868. It is a continuing offense, but a lot of courts
19 reject that as kind of phoney.

20 MR. FREELAND: This Court has said that where
21 there is a trust and the trustee converts the corpus of
22 the trust, and thereafter continues to admit, as the
23 State of Mississippi has done in this situation, that
24 the duty is owed to continue paying income, that the
25 statute of limitations doesn't run. The only way the

1 statute commenced to run is if the trustee repudiates
2 the trust, which the trustee didn't do. It didn't say
3 the trust was void --

4 QUESTION: The trustee doesn't admit of any
5 greater duty, obviously, than to pay the income from the
6 substitute funds.

7 MR. FREELAND: That is another point. There
8 is no substitute fund. It is entirely mythical. The
9 fund of something over \$1 million was arrived at simply
10 by taking 177,555 acres and multiplying it by \$6. The
11 fund doesn't exist and has not existed since 1856.

12 QUESTION: So the legislature simply
13 appropriates what would have -- a hypothetical income on
14 that fund?

15 MR. FREELAND: For years they appropriated
16 first 8 percent, starting with '56, then they dropped it
17 to 70, and then in the constitution of 1890 they dropped
18 it to 6 percent, which amounted to something over
19 \$60,000 per annum to be divided amongst 23 counties, and
20 then in 1984 they came back again and said, we know we
21 have violated this trust. We know we should do
22 something about it.

23 QUESTION: The only reason that the northern
24 counties are treated any differently than the southern
25 was the bad investment during the Civil War -- pardon

1 me, the War Between the States, wasn't it?

2 MR. FREELAND: The state of Mississippi would
3 like to -- I hope this is the last occasion on which any
4 state official from Mississippi uses the Civil War as an
5 excuse for some of their wrongdoing.

6 (General laughter.)

7 MR. FREELAND: They do it every time. You
8 would think, you know, after all these years, but here
9 they are again, and they say the Civil War had no more
10 to do with this -- the money was converted in 1856,
11 before the Civil War ever occurred.

12 QUESTION: Well, aren't you really asking
13 damages for prior breaches of the trust obligation?

14 MR. FREELAND: Absolutely not. We are
15 asking --

16 QUESTION: There is no corpus left.

17 MR. FREELAND: That, though, is the fault of
18 the state, the trustee and the state officials who are
19 acting as trustees, and where a trustee does that the
20 law of trust places the trustee under a very specific
21 obligation. He is under a continuing duty, a trustee
22 is, to pay income for the trust intended purpose, and
23 the purpose of this was to educate children. The way he
24 has converted the trust corpus, the trustee has to
25 continue paying income after the conversion. The

1 trustee's duty to pay income continues in that if recurs
2 annually, and each time, each year that rolls around and
3 he doesn't pay the income he should it is another
4 violation, and that is why we are suing to stop these
5 annual recurring violations.

6 QUESTION: Mr. Freeman, I am sure Mississippi,
7 like other states in the public school system tests the
8 progress of pupils periodically in different grades.
9 Does the record in this case show the achievement test
10 scores of the counties in Northern Virginia as compared
11 with other rural counties in the state?

12 MR. FREELAND: The record does not. There is
13 a statement made in the Attorney General's brief which
14 is entirely outside the record that my home county had
15 high test scores. Well, it also happens to be the seat
16 of the University of Mississippi, for what that is
17 worth. It doesn't show, for example, what the records
18 are in Mr. Papasan's home county, Tunika County, where --

19 QUESTION: Without such a showing, how can you
20 persuade us that people in your county, children in your
21 county are not receiving a minimally adequate
22 education?

23 MR. FREELAND: Because, Justice Powell, this
24 case is here on a 12(b)(6) motion, and that is our
25 allegation, and for purposes of this argument --

1 QUESTION: But you have to allege facts to
2 support it. That is a conclusion, isn't it?

3 MR. FREELAND: The fact that we allege is that
4 this is the result of the denial.

5 QUESTION: How do you define minimum adequate
6 education?

7 MR. FREELAND: Well, let's say at the minimum
8 it would be something that would raise the pupil above
9 the level of a functional illiterate, and we literally
10 have schools in Mississippi where they are being denied
11 even that, and a lot of them are not -- Tunika County,
12 -- I keep going back to that. The poorest county in the
13 whole United States. The only poorer place in the whole
14 country is the leper colony on Molokai. The point,
15 though, of the matter is that here we are dealing with a
16 federally created trust. We are not just dealing with
17 appropriations of school money for the State of
18 Mississippi. We are dealing with a trust created by the
19 federal government. We are dealing with a trust that
20 the state admits it has violated over these years and
21 has continued to violate, and it comes down to this, to
22 say that a suit such as we have here on the basis of
23 this continuing violation is barred by the Eleventh
24 Amendment, and that is the state's primary argument, is
25 to say that there is no trust at all. There is no

1 continuing duty at all, in other words. If there is a
2 trust, there is a continuing duty.

3 Now, of course, this Court has repeatedly and
4 recently upheld the school lands trusts, in Lassen
5 versus Arizona, Arizona -- Alamo Land and Cattle Company
6 versus Arizona.

7 QUESTION: Both those cases came up through
8 the state court system, didn't they?

9 MR. FREELAND: Lassen -- Alamo did not.

10 QUESTION: Alamo came up through the federal
11 courts?

12 MR. FREELAND: It came up through the federal
13 courts. There are other cases that the Court, like
14 United States versus Ervine, that did come up through
15 the federal court system, where in fact the United
16 States was seeking to enforce the provision of the trust
17 and the states were arguing there was no trust here at
18 all.

19 QUESTION: Well, of course, the Eleventh
20 Amendment is no bar to a suit by the United States
21 against the states.

22 MR. FREELAND: And we submit, Justice
23 Rehnquist, the Eleventh Amendment is no bar to
24 prospective injunctive relief, which tells these
25 trustees to cease violating the terms of this trust in

1 the future, to do your duty in the future, and that is
2 what we are asking here. Of course, we don't -- the
3 entire thrust of our case is not just the trust.
4 Assuming argument there is no trust, we still say that
5 the way these schools are being financed has no rational
6 basis whatsoever.

7 QUESTION: This is an equal protection case?

8 MR. FREELAND: Yes, it certainly is. What is
9 the basis for it? Well, an accident of land value is a
10 basis, the state says. There is no land to put a value
11 on in North Mississippi. They are trying to make a
12 Rodriguez argument. We want to have local
13 administration of local schools. That is the basis for
14 it. There is no school lands trust to administer in
15 Northern Mississippi. The state either gave it away or
16 took it.

17 Contrast this case with Rodriguez. For
18 example, there you have a facially neutral situation.
19 You do have a difference in land values. It is just one
20 section of San Antonio had a higher value of land than
21 another. Here we have a discriminatory act the way this
22 money is divided up and no basis for it. The relief
23 that we seek is simple enough, an adjudication that the
24 trust is valid, that it is governed by federal law, that
25 it is violated annually by the respondent state

1 officials, and that it the recurring violations are a
2 derogation of the equal protection clause as well as the
3 contracts clause of the Constitution.

4 We seek prospective injunctive relief to stop
5 these trustees from doing what they have been doing with
6 these kids in the future, to give them a chance, and see
7 that their schools receive the support for which the
8 trust was created in the first place, and which is now
9 being denied. What we say about this trust is certainly
10 consistent with the decisions of this Court dealing with
11 school lands trusts generally.

12 For example, we are asking the Court to apply
13 certain common law principles to this situation just as
14 the Court did in Oneida II. There you had a trust
15 created by the Non-Intercourse Act of 1793, and the
16 Court said, well, we don't have any law to look to here,
17 there was no regulatory scheme for enforcing the trust,
18 so we are going to apply common law principles. These
19 same principles apply here.

20 We are asking this Court to declare that this
21 is in fact the trust, something that the court has done
22 each and every time it has ever had an opportunity to
23 rule on the question, and that the law governing the
24 trust, because it is created by federal law, is, of
25 course, federal law, and the trust is enforceable. In

1 other words, the short answer to what we want is for the
2 trustees to honor their obligations in the future.

3 To argue, as the state does, that the Eleventh
4 Amendment bars any such remedy or the trustee's
5 diminution of the trust corpus is to say that there is
6 no trust at all, contrary to the statutes which created
7 it, that there is no enforceable continuing duty,
8 nothing that can be enforced in federal court, that any
9 claim under federal law would have to be left to the
10 tender mercies of the state court. The Fifth Circuit's
11 holding is nothing less than that this trust is simply
12 not there because they said there is no continuing
13 duty. Granted, says the Fifth Circuit, there was a
14 valid compact created 130 years ago.

15 What we are looking at now is some weird
16 creature that has to do with Mississippi trust law, and
17 they flatly refuse to enforce the continuing duty, and
18 really that is what this lawsuit is about. If this is a
19 trust, and we certainly contend that it is, then it
20 follows as the night the day that the trustees of this
21 trust, and those are the people that we are suing, are
22 obliged to honor it, and as part of that they are
23 obliged to pay or see that the trust income is properly
24 divided or paid in the future from some source, and they
25 can be made to do that because they are acting in

1 derogation of federal law and they are acting in
2 derogation of the equal protection clause. We submit
3 that they could be made to do that by this Court, and
4 that indeed they should be made to do that by this
5 Court.

6 Are there any other questions? May I reserve
7 the rest of my time?

8 CHIEF JUSTICE BURGER: Yes.

9 Mr. Arnold.

10 ORAL ARGUMENT OF RICHARD LLOYD ARNOLD, ESQ.,

11 ON BEHALF OF THE RESPONDENTS

12 MR. ARNOLD: Mr. Chief Justice, and may it
13 please the Court, initially I would like to correct some
14 misstatements by counsel as to the Choctaw Cession
15 counties, and that is the way it is referred to. There
16 was the Choctaw Indian Tribe in basically the southern
17 two-thirds of the state, the Chickasaw Indian Tribe in
18 the northern one-third, relatively speaking.

19 Every school district, and let's talk school
20 districts and not counties, because school districts are
21 the geographical areas, every school district in the
22 southern part of Mississippi in the Choctaw Cession
23 does not receive income from 16th Section lands. It is
24 just simply not the case.

25 For instance, the Meridian Public School

1 System receives from 16th Section lands zero. It has no
2 16th Section lands. The Greenwood Municipal Separate
3 School District, located in the Mississippi Delta, which
4 has been referred to earlier, receives some 16th Section
5 land zero. It has no 16th Section lands there. There
6 are at least 20 school districts in the southern half of
7 the State of Mississippi which receive less than the
8 Choctaw -- the Chickasaw Cession districts, the lowest
9 Chickasaw District receives from the State of
10 Mississippi.

11 QUESTION: Mr. Arnold --

12 MR. ARNOLD: Yes, Your Honor?

13 QUESTION: -- is the state under an obligation
14 to return the money attributable to 16th Section lands
15 to the school district in which the 16th Section is
16 located?

17 MR. ARNOLD: Your Honor, I don't believe so.
18 We don't believe that the petitioners here have ever
19 asked that, that the funds be returned to them in any
20 way, and I don't believe the state would be in an
21 obligation to make that return to them. The state had
22 the --

23 QUESTION: Are they pooled then?

24 MR. ARNOLD: Yes, Your Honor.

25 QUESTION: All 16th Section lands --

1 MR. ARNOLD: No.

2 QUESTION: -- income is pooled?

3 MR. ARNOLD: No. Pardon me, Your Honor. I
4 misunderstood your question. The 16th Section money
5 from the leases does not come to the state. I misspoke
6 myself. I thought you were referring to the Chickasaw
7 Cession funds being returned to the Chickasaw counties.

8 No, Your Honor. The state does not receive
9 those funds. Those funds are dependent upon the lease
10 by the local school district.

11 QUESTION: My question was, is there some
12 obligation that those moneys from the 16th Section go to
13 the school district in which the section is located?

14 MR. ARNOLD: Yes, I believe that is correct,
15 Your Honor.

16 QUESTION: Is that a state law requirement --

17 MR. ARNOLD: No, ma'am.

18 QUESTION: -- or a federal law requirement.

19 MR. ARNOLD: That is a federal law
20 requirement. I believe that is found in the enabling
21 act, Land Sales Act, found in the joint appendix at Page
22 56 -- 55, pardon me, Section 12, where the 16th Section
23 lands reserved in each township for the schools therein
24 and also it is found in the 1917 Land Sales Act when
25 Mississippi became a state, joint appendix 60, reserves

1 for the schools therein.

2 QUESTION: Who does do the leasing? I thought
3 it was the county.

4 MR. ARNOLD: No, sir, it is -- the individual
5 board of education in that school district leases the
6 lands and the minerals thereunder, Your Honor.

7 QUESTION: So that it is only those school
8 districts in which lands are located that are going to
9 get any of the money.

10 MR. ARNOLD: Yes, sir, and the amount they get
11 depends upon the geographical location of the school
12 district.

13 QUESTION: I understand. And so there could
14 be two adjoining school districts in that part of the
15 state. One gets some money, and the other get none.

16 MR. ARNOLD: Yes, sir, that is a fact. For
17 instance, the Meridian School District is located in
18 Lauderdale County, Mississippi. I believe Lauderdale
19 County schools do get some income from 16th Section
20 lands whereas the Municipal Separate School District,
21 due to its geographical location and configuration,
22 receives none, and also the fact, I believe the lands in
23 Meridian, there may have been some lands located there
24 at one time, but they were also sold, the 16th Section
25 lands were sold.

1 QUESTION: And a school district that occupied
2 two or three townships, I suppose it would have two or
3 three sources of this kind of income.

4 MR. ARNOLD: Yes, sir, it would if it had the
5 16th Section lands in it. Yes, sir. They had not been
6 previously disposed of in some way, and we do have that
7 in some areas of the state where there was no
8 prohibition on the alienation of these lands under the
9 state constitution, and the lands were sold some years
10 ago. Other lands had been previously settled prior to
11 the extinguishment of the Indian claims under the
12 Spanish dominion or the French dominion.

13 QUESTION: What do you think governs the
14 obligation to return that money to the school district
15 in which it is located? Is it governed by the Schmidt
16 case, where Justice Holmes said the obligation is just
17 an honorary, not an enforceable one?

18 MR. ARNOLD: To return the money in the
19 Chocktaw, where they actually have the land, Your
20 Honor?

21 QUESTION: Sixteenth Section lands.

22 MR. ARNOLD: Well, I think it could have been
23 done another way. I think the state had the option,
24 perhaps, to have leased all the lands that it so
25 desired, brought the money in, and redistributed based

1 upon some form --

2 QUESTION: And put it in a pool and
3 redistribute it.

4 MR. ARNOLD: Yes, I think it could have done
5 that, but it also had the option to allow --

6 QUESTION: So, has the state made it a state
7 law that it will not do that?

8 MR. ARNOLD: Yes, ma'am, it is in the
9 constitution, Section 211.

10 QUESTION: The state constitution.

11 MR. ARNOLD: Yes, ma'am, provides for how it
12 is done. As we correct a few other items here, with
13 reference to the fact that the Delta lands were so
14 valuable, they weren't then. It was swamp, overflow
15 lands, very few roads, and \$6 an acre for the sale of
16 the land was probably pretty good money back then. The
17 Delta wasn't really settled and drained and roads built
18 and railroads built in there until some time after the
19 1870's.

20 QUESTION: Would those values have any impact
21 on the issues raised in this case, do you think?

22 MR. ARNOLD: They seem to think, Your Honor --
23 we think the issues come down very simply in this case.
24 They are saying either raise the amount that is in the
25 corpus, the principal amount, or raise the interest that

1 is paid. That appears to us to be the issue here in
2 this case. That is the reason for the Eleventh
3 Amendment jurisdictional bar we have made in the
4 District Court, the Fifth Circuit Court of Appeals
5 before this Court, but be that as it may, I don't --
6 they seem to think that the principal should be raised
7 or the interest should be raised. And we think the
8 Eleventh Amendment jurisdictional bar would prohibit
9 that.

10 If we look at who -- and it has been referred
11 to, the trustees, the trustees, the trustees. Not one
12 single named state official in our office is a trustee
13 of the Chickasaw fund. Not one. Not in the
14 constitution. Not in the state law. Or they have made
15 a trustee of that fund. The legislature of the state,
16 the state itself has helped itself to be a trustee of
17 the Chickasaw fund. It cannot be funded except by the
18 legislature. The legislature is the only -- the state
19 is the trustee of the fund, not the Governor of the
20 State of Mississippi, not the Secretary of State.

21 QUESTION: What does the Secretary of State
22 say?

23 MR. ARNOLD: Well, he had a lot to say, I
24 believe, Your Honor, that we somewhat oppose, but I
25 don't believe the Secretary of State spoke to the issues

1 in the case here. He spoke to maybe the emotional
2 issues of school children, and --

3 QUESTION: What is his role? I thought he had
4 a supervisory role with respect to all 16th Section
5 land.

6 MR. ARNOLD: He has a supervisory role as to
7 the 16th Section lands in the Chocktaw Cession. That is
8 correct. But he has no supervisory role as to the
9 trust, the monetary trust on the Chickasaw lands, more
10 whatsoever.

11 QUESTION: I understand. I understand that.
12 But what is the scope of his duties with respect to the
13 non-Chickasaw lands?

14 MR. ARNOLD: The Chocktaw? His duty is to
15 check and see two primary things, that the land is not
16 disposed of because our constitution now which was
17 adopted in 1890 prohibits the sale of 16th Section
18 lands. They cannot be sold.

19 Before that time there was no prohibition as
20 to the sale of these lands. One, he sees that. Two, he
21 sees that the lands are administered in such a way that
22 a reasonable income is derived therefrom, and that they
23 are not donated. The law in Mississippi on 16th Section
24 lands underwent a dramatic change in 1978.

25 Up until that time they had been very loosely

1 administered in that regard. The legislature proposed a
2 constitutional amendment, changed it around, gave the
3 Secretary of State much more power. The Supreme Court
4 of Mississippi affirmed this power to go out and check
5 on these counties and see if they were in fact getting
6 the highest amount they could from the lands there. So
7 he has that duty.

8 QUESTION: Mr. Arnold, do you agree with the
9 statements of Mr. Freeland about the amount of money
10 that goes per pupil for education from all sources other
11 than these 16th Section and lieu lands moneys?

12 QUESTION: Your Honor, I do not agree with
13 some of his statements there. I do not have an exact
14 figure or percentage as to the amount. However, much
15 like Texas had done in the San Antonio versus Rodriguez
16 case, the State of Mississippi, every child, every
17 school district in the state as far as an appropriation
18 is concerned from the State of Mississippi, gets the
19 exact same amount of money per teacher unit. There is
20 no distinction, whether it runs from Tunika county all
21 the way to Jackson County on the opposite end of the
22 state.

23 This money also goes -- Mr. Freeman says it
24 does not go for teacher's salaries. On the contrary, it
25 does. The money can be used for teachers' salaries, and

1 this is separated, divided up when it goes to the
2 schools there, teachers' salaries, superintendent and
3 principals' salaries, separate services such as salaries
4 for art and music teachers, librarians, guidance
5 counselors, as well as providing for nurses and
6 lunchroom personnel together with the funds for
7 textbooks, audiovisual equipment, building improvements,
8 and cost of transportation.

9 QUESTION: Mr. Arnold, could I ask a question
10 right there?

11 MR. ARNOLD: Yes, Your Honor.

12 QUESTION: As I understand it, the discrepancy
13 with regard to the trust fund income is the difference
14 between 63 cents and \$75 per pupil, and as I understand
15 what you are saying now, the additional money supplied
16 by the State of Mississippi are the same per pupil,
17 whether it is \$50 or --

18 MR. ARNOLD: Yes.

19 QUESTION: So the discrepancy between \$75 and
20 63 cents, although it would be a different percentage,
21 in absolute dollars is the same percentage after you add
22 in the Mississippi supplemental fund. Is that right?

23 MR. ARNOLD: Based on the figures that are
24 there, Your Honor, those figures --

25 QUESTION: Maybe they are a little off.

1 MR. ARNOLD: They have changed substantially
2 since 1985. The state is now appropriating -- well,
3 July 1st of this year it will be \$2 million, which will
4 go to the Chickasaw Cession school districts there.

5 QUESTION: Does that \$2 million totally
6 eliminate the differential, or does it just reduce it a
7 great deal?

8 MR. ARNOLD: No, sir. I think it reduces it a
9 great deal, but even as this money goes, I think we
10 really have a de minimis effect here as far as the
11 question of a minimally adequate education. I am not
12 sure that I understand what it is, Your Honor, based
13 upon the --

14 QUESTION: But on that point I also was
15 wondering with regard to Justice Powell's earlier
16 question, as I understand the Court of Appeals opinion,
17 they took the allegations of the complaint at face value
18 and said that your motion to dismiss was properly
19 sustained. And don't we just really -- we are talking
20 about a lot of facts here, but aren't we pretty much
21 confined to what they say in their complaint?

22 MR. ARNOLD: Yes.

23 QUESTION: Which does make this allegation
24 about not a minimally adequate education, whatever it
25 is. And I think your argument is that even if that is

1 all true, there is still no federal relief that they are
2 entitled to.

3 MR. ARNOLD: That is the position of the
4 state, Your Honor.

5 QUESTION: But I am just wondering, we are
6 really limited to the complaint itself for purposes of
7 our decision as to whether it needs further --

8 QUESTION: To the well pleaded facts.

9 MR. ARNOLD: Well pled facts, I believe.
10 Thank you, Your Honor. Not just --

11 QUESTION: And \$75 per student, that is just
12 the -- is that the highest that any school district gets
13 from the 16th Section lands?

14 MR. ARNOLD: No, sir, I believe that is an
15 average.

16 QUESTION: That is an average.

17 MR. ARNOLD: Average.

18 QUESTION: But aren't there some school
19 districts in the Choctaw area that don't get any?

20 MR. ARNOLD: Yes, sir, there are some that get
21 absolute zero, as I pointed out.

22 QUESTION: And which is less than the
23 Chickasaw school districts get.

24 MR. ARNOLD: Yes, sir, that's correct. There
25 are at least two that get zero, and as I recall, I

1 believe the Biloxi Municipal Separate School District
2 gets substantially under \$100 a year total. I mean,
3 total amount, not --

4 QUESTION: From the 16th Section lands?

5 MR. ARNOLD: Yes, sir. I mean, we are
6 speaking not per student or anything. We are speaking
7 total amount of money that they get at all there.

8 QUESTION: I understand.

9 MR. ARNOLD: And a distinction that should be
10 made, I believe --

11 QUESTION: What would be the -- is that \$75
12 per student, is that the average per student in the
13 school districts that get something, or does that
14 average out through all of the school districts?

15 MR. ARNOLD: I think that is the average for
16 all school districts. That is taking, as I understand
17 it --

18 QUESTION: Including the ones who don't get
19 anything?

20 MR. ARNOLD: Yes, Your Honor, and of course
21 that is inflated. Some school districts have vast
22 mineral wealth under them, under their 16th Section
23 lands, and they have leased that. Of course, prices
24 have been falling lately. I think these figures may
25 change around based on some changes in the economic

1 pattern here in the last few months or years for that
2 matter.

3 Another point I would like to make is the
4 Chickasaw Cession counties are getting an appropriation
5 from the state, albeit it only \$66,000, 66 percent of
6 the corpus on the trust. They are getting something
7 that not another county or school district in the state
8 gets. They are getting, as we say, a land -- something
9 they are getting that no one else is getting there from
10 the state.

11 So I think that when we look at it from the
12 standpoint that the state allows the local school
13 districts to manage their own 16th Section lands subject
14 to state oversight to make sure there is no donation of
15 the land or disposition of the land that is not
16 permitted under state law under the constitution, that
17 there is no unequal treatment here.

18 This Court has also said that the equal
19 protection clause is not applicable, I believe, and
20 geographical differentials there. It is between
21 persons, and this is a geographical differential simply
22 because the initial action of not reserving the 16th
23 Section lands precipitated this whole lawsuit. That is
24 what started it. The 16th Section lands were not
25 reserved.

1 Finally, some five or six years, seven years
2 later, the state was allowed to select some lands, the
3 Governor of the State, and that is the only thing that
4 any named official in this complaint has ever done in
5 regard to the Chickasaw Cession lands. The federal
6 government allowed the Governor to go out and select
7 these lands in the Mississippi Delta which were
8 virtually unsettled at the time, as I said, swamp and
9 overflow land.

10 The Attorney General has never done anything
11 in regard to these lands, nor has he been authorized
12 to. There has been no duties imposed upon the Attorney
13 General of the state. The mere fact that he may be a
14 member of the board of education, or was at one time
15 until the law was changed, just simply does not subject
16 him to being enjoined in this thing. There is nothing
17 he can do. He does not administer the trust. He can't
18 change it around. He can't invest it in some other type
19 of investment. He can't change it around or change the
20 interest paid.

21 The same is true of the Secretary of State.
22 He does not administer the trust. He no longer sits on
23 the board of education. He is a member of the State
24 Lieu Land Commission, and under our law, which is still
25 in effect, and under the constitution lieu lands can be

1 disposed of to this day, right now. I believe there are
2 something like 37 acres left that nobody really wants,
3 but you can dispose of lieu lands under state law at
4 this time.

5 So, it is our contention -- and also the
6 Superintendent of Education at one time was a member of
7 the board of education. He is not any more. He was
8 appointed by the board of education. The Assistant
9 Secretary of State, that person is basically someone
10 there who keeps up with the state lands, where is the
11 state land, has it been leased, is it coming up for
12 renewal, and this sort of thing.

13 These offices, and that is what is sued here,
14 they are only sued in their official capacity, have
15 never acquired or disposed of the Chickasaw lieu lands
16 or handled any funds from there. In order to accomplish
17 what the petitioners seek here, the State of
18 Mississippi, the State of Mississippi would have to
19 grant the relief. If there is an injunction issued in
20 this case, as petitioners seek, it would have to be out
21 of the corpus of the State of Mississippi to pay this
22 money in the future.

23 That is where it would come from, and we
24 submit that this would be proscribed by the Eleventh
25 Amendment on the decisions of this Court that start back

1 with Hans v. Louisiana and come forward all the way
2 through Green versus Mansour, I believe, decided this
3 term by the Court.

4 One other matter we would point out to the
5 Court at this time is that the -- if the Court were to
6 make the order that petitioners seek, we believe it
7 would literally open the proverbial Pandora's Box.
8 Every school district in the southern district of the
9 State of Mississippi would then sue the state, saying,
10 well, another school district has got more money or more
11 land or receives more income from there because of
12 geographical variances than we do, so we will sue, and
13 we will get our money back, or get some more money back,
14 although we have sold our lands some years ago.

15 QUESTION: Mr. Arnold, what -- to the extent
16 that the plaintiff said in the complaint Mississippi is
17 depriving the children of the plaintiff class of a
18 minimally adequate education, and that is prohibited by
19 the equal protection clause, now, just to that extent,
20 is that barred in your view also by the Eleventh
21 Amendment, that kind of a claim?

22 MR. ARNOLD: Your Honor, I believe it would
23 be. As I read Filer v. Doe and San Antonio there, what
24 this Court has said in the past is that it is the
25 absolute deprivation of an education that is barred by

1 the --

2 QUESTION: Well, assuming that what the Court
3 said was that you will apply a higher level of scrutiny
4 if a child is denied a minimally adequate public school
5 education, and that is alleged in the complaint, do you
6 think the Eleventh Amendment absolutely bars that
7 complaint in federal court?

8 MR. ARNOLD: If the state is the real true
9 party in interest, Your Honor, to require the state to
10 expend funds, perhaps it would. I think it would depend
11 on the facts as they have evolved by the Court, but in
12 the facts that we have alleged here --

13 QUESTION: Well, I guess the facts weren't
14 developed, were they?

15 MR. ARNOLD: Right, but as the facts are
16 alleged here, I believe the Eleventh Amendment would
17 proscribe that, would be a jurisdictional bar as far as
18 the State of Mississippi, and it is the real party in
19 interest in this case, we submit. The other defendants
20 are nominal defendants only for the purpose of
21 attempting to evade the Eleventh Amendment
22 jurisdictional bar which would apply to the state. So,
23 I think it would in this case.

24 QUESTION: If you are right, why wouldn't the
25 San Antonio case have gone off on the Eleventh Amendment

1 grounds rather than the substantive equal protection
2 decision?

3 MR. ARNOLD: I am not sure, Your Honor. I
4 don't know if they raised that or not in the San Antonio
5 case. I don't recall it in seeing if they raised the
6 Eleventh Amendment as a jurisdictional bar in that case
7 there. But be that as it may, assuming arguendo that
8 the Eleventh Amendment is not a jurisdictional bar in
9 this case, there just simply has not been a cause of
10 action stated that can survive a motion to dismiss under
11 12(b)(6). A boilerplate allegation, just boilerplate,
12 deprived of a minimally adequate education, it is just
13 not there. That is just not something I think this
14 Court or any federal court could address. The Court
15 would be continually looking over this.

16 QUESTION: The reason it was difficult to
17 address it, of course, is that the record that we got
18 just didn't really reflect what other funding the state
19 gives to peoples. That is the handicap.

20 MR. ARNOLD: Perhaps in the record not, Your
21 Honor, but in our brief, I believe, on Page 6 we
22 referred to the minimum program for education that the
23 State of Mississippi provides and what those funds go
24 to, and how it goes to each school district based upon
25 the teacher units. Perhaps I did not make this clear as

1 I should have to the Court.

2 But other than that, that fund going to these
3 school districts throughout the state, the only other
4 appropriation specifically out of the state treasury to
5 education is the money to the Chickasaw Cession. In
6 that regard, I believe the figures will show, the most
7 recent figures show in the State of Mississippi
8 approximately 62 or 63 percent, in that range, of the
9 total state budget is directed to educational matters
10 throughout the state and the public education in the
11 state. I think this year it probably increased. There
12 have been some increases as far as the amount the state
13 would pay in teachers' salaries.

14 But we would submit to the Court that the
15 State of Mississippi is the real true party in interest
16 in this case. They are seeking what they call an
17 injunction, but it would require the state to expend its
18 funds out of the state treasury. We also submit that
19 there is no equal protection claim based upon the
20 allegations made in the complaint here, because to the
21 contrary of not receiving everything that the state
22 appropriates to every school district, the districts in
23 the northern section of the state receive more as far as
24 appropriation from the State of Mississippi itself
25 there. And the fact that one school district may be

1 able to raise more money because the land is valuable or
2 it has minerals under it is not an equal protection
3 question that should be addressed by this Court or any
4 other lower federal court.

5 Thank you.

6 CHIEF JUSTICE BURGER: Mr. Freeland.

7 ORAL ARGUMENT OF T. H. FREELAND, III, ESQ.,

8 ON BEHALF OF THE PETITIONERS - REBUTTAL

9 MR. FREELAND: Mr. Chief Justice, counsel says
10 that there are school districts in the State of
11 Mississippi that get no 16th Section land money. That
12 may be. I would like, though, to refer the Court, if I
13 may, to Joint Appendix 45, where the Secretary of State
14 points out precisely how much moneys are received from
15 the trust by the various counties in the State of
16 Mississippi.

17 QUESTION: Counties or school districts?

18 MR. FREELAND: Counties and school districts.
19 I am using them synonymous, Justice White, because that
20 is the way the money is divided up.

21 QUESTION: Are the leases made by the
22 counties?

23 MR. FREELAND: Under the supervision of the
24 Secretary of State.

25 QUESTION: I know, but the counties don't make

1 -- the lease rental is not paid to the county, is it?

2 MR. FREELAND: No, it is paid to the county
3 school board as it now stands.

4 QUESTION: It is paid to school districts,
5 isn't it?

6 MR. FREELAND: School districts. Yes, sir.
7 That's correct. That's correct.

8 QUESTION: Well, school districts are not
9 necessarily coterminous with counties, are they? I mean,
10 may there not be more than one school district in a
11 county?

12 MR. FREELAND: Absolutely, and that is the
13 point also as to Meridian, for example. What happened
14 with that 16th Section land, it was sold, and the money
15 is held in trust, and they get the income from the
16 trust. So, to say that they are not getting any income
17 from 16th Section lands of the trust begs the question.
18 They still are, and our complaint is that we are not,
19 and that is what this lawsuit is about. It is about the
20 trust. It is not about how the State of Mississippi
21 funds its schools around the state. They do that on
22 more or less an equal basis, and that is another basis
23 for our complaint, however.

24 How is it that they can give everybody the
25 same amount of state money, and yet acting as trustees

1 of the trust give us not one nickel of the trust income
2 and say that they are treating us on any sort of
3 rational, reasonable basis? And then they point at
4 Rodriguez and say, well, there wasn't any discrimination
5 in Rodriguez. Of course there wasn't. The case was
6 tried, and that is what the trial court found, that the
7 scheme in Rodriguez was facially neutral, but of course
8 we allege here that we are dealing with rank
9 discrimination, and that is what the pleadings have to
10 say.

11 The Eleventh Amendment, we contend that this
12 claim concerns only continuing violations of federal
13 statutory and constitutional law, and it falls therefore
14 within the rules permitting suits alleging conduct
15 contrary to the supreme authority of the United States,
16 as this Court mentioned in Penhurst, or it said in Green
17 versus Mansour, a recent opinion, that such prospective
18 relief as we are looking for vindicates the authority of
19 the United States, and that is all we ask. We ask that
20 this trust be enforced. We don't ask the Court to
21 interfere with the way schools are funded in
22 Mississippi.

23 QUESTION: What if we disagree with you that
24 there is any trust at all? Then do you still claim that
25 there is an equal protection violation?

1 MR. FREELAND: I do indeed.

2 QUESTION: Even if there is no trust.

3 MR. FREELAND: If there is no trust.

4 Precisely.

5 QUESTION: And even if the Chickasaw counties
6 or school districts have no claim whatsoever to any
7 moneys from 16th Section lands or from lieu lands.

8 MR. FREELAND: Then what they are doing is
9 totally irrational, because they are giving \$75 or \$74 a
10 pupil in 59 counties, and at the same time they are
11 giving 63 cents a pupil in the rest of the --

12 QUESTION: I would think you would rather have
13 us find there was no trust.

14 MR. FREELAND: I would rather have you find
15 that there is a trust, Your Honor, because just as the
16 Court has done in --

17 QUESTION: Aren't you arguing against yourself
18 really?

19 MR. FREELAND: I am arguing that I have got a
20 two-way street here. Not only do we have the trust,
21 which this Court has repeatedly upheld in Andres,
22 Lassen, Alamo Land and Cattle, more cases than I can
23 name, but also that the scheme that the state has set up
24 is so totally irrational that we also have an equal
25 protection claim which we press.

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CHIEF JUSTICE BURGER: Thank you, gentlemen.
The case is submitted.
(Whereupon, at 1:55 o'clock p.m., the case in
the above-entitled matter was submitted.)

CERTIFICATION

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

#85-499 - B.H. PAPASAN, SUPERINTENDENT OF EDUCATION, ET AL., Petitioners

V. MISSISSIPPI, ET AL.

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

BY Paul A. Richardson

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