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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 413

SPOTTSWOOD THOMAS BOLLING, ET AL.,
Petitioners,

v.

C. MELVIN SHARPE, ET AL.,
Respondents.

REPLY BRIEF FOR PETITIONERS

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In order to clarify the issues in this case and to indicate some minor corrections in the briefs and record and to disclose some apparent misconceptions on the part of respondents with respect to the legal theory underlying petitioners' cause of action, petitioners submit this reply brief.

This reply brief deals with certain of the points advanced by the respondents in their brief which will be identified by number and language as used by respondents.

I.

THE COMPLAINT FILED BELOW STATES NO CAUSE OF ACTION BECAUSE, INTER ALIA, IT FAILS TO SET FORTH ANY INJURIES TO THE PETITIONERS.

Here respondents rely upon the fact that minor petitioners do now attend a junior high school in said District of Columbia to support their assertion that the complaint fails to set forth any injury to the petitioners because (1) the compulsory law does not require petitioners to send their

children to public schools and does not require them to go to any school; (2) the complaint fails to show by comparison that Sousa Junior High School has educational opportunities which are superior to educational opportunities in the high school which minor petitioners do now attend, and (3) the allegations of the petitioners are merely legal conclusions.

It is evident that respondents misconceive the gravamen of the complaint. For the purpose of determining whether the injury has been alleged it is only necessary to examine the allegations of the complaint with respect to factual matters in the light of the motion to dismiss. The motion to dismiss, like the old common law demurrer, admits all facts well pleaded. These facts are: that minor petitioners, Negroes, citizens and residents of the District of Columbia, accompanied by their parents, Negroes, citizens, taxpayers and residents of the District of Columbia, at the proper time for admission of students and possessing all qualifications for admission to a junior high school, applied to Sousa Junior High School for admission and enrollment and were denied admission and enrollment solely because of race or color. Admission to Sousa Junior High School was denied by respondent Eleanor P. McAuliffe, principal of Sousa Junior High School, solely upon the basis of race or color; and thereafter petitioners exhausted all of their administrative remedies up to and including the Board of Education, which Board still denied admission and enrollment into Sousa Junior High School solely on the basis of race or color. The petitioners are suffering irreparable injury by reason of this action of respondents and are threatened with irreparable injury in the future at the hands of respondents.

These facts clearly show an admission by the respondents that they denied petitioners admission to Sousa Junior High School for no reason other than because of their race or color, and that this denial was injurious and threatened

to injure the petitioners in the future. These are all the facts essential to establish a justiciable claim by the petitioners and to provide a basis for the relief requested of the Court by the petitioners. Not only did respondents admit all these facts in their motion to dismiss, but with respect to all these facts except injury, they enumerate them in their brief as a correct statement of the facts. On these admitted facts the only question before this Court is a question of law.

That question of law is—Whether the respondents possess the power to segregate pupils in the District of Columbia for the purpose of public education solely on the basis of race or color. Or to express it in another way, whether the action of respondents in denying minor petitioners admission to Sousa Junior High School solely on the basis of race or color violates rights secured to petitioners by the Constitution and laws of the United States. The court below dismissed the complaint, thus deciding this issue in the negative.

In the transmission of the record in this case, from the District Court to the United States Court of Appeals for the District of Columbia Circuit, and in turn to this Court, a clause in paragraph sixteen of petitioners' original complaint was inadvertently omitted. This clause, italicized in the paragraph set out below, we submit for inclusion in the proceedings in this case.

> "16. A present actual case or controversy exists between plaintiffs and defendants. Plaintiffs, and other Negroes similarly situated, on whose behalf this suit is brought, are suffering irreparable injury, *and are threatened with irreparable injury* in the future by reason of the acts of defendants hereinbefore set forth. They have no plain, adequate or complete remedy to redress the wrongs or illegal acts hereinbefore set forth other than this action for an injunction. Any other remedy to which plaintiffs, and other Negroes similarly situated, could be remitted would be attended

by such uncertainties and delays as to deny substantial relief, would involve a multiplicity of suits, and would cause further irreparable injury, damage, vexation and inconvenience to plaintiffs and other Negroes similarly situated."

This clause as above set out was a part of the original complaint with respect to which the court below granted the motion to dismiss, and its inclusion here can in no wise prejudice the case of the respondents.

On the legal issue as to the power of respondents to take the action complained of, the mere deprivation of a civil right by government, has been held by this Court in numerous cases, to constitute injury. See: *Giles* v. *Harris,* 189 U. S. 475 (1903). In addition, the respondents admitted the well pleaded operative factual allegation of injury contained in paragraph 16 which allegation was not a legal conclusion.

As to the assertion that these petitioners were not compelled by law to send their children to any school or to the public schools, it is sufficient to point out that having chosen to avail themselves of the educational opportunities afforded by the government in the public schools, as they had a right to do, *Meyer* v. *Nebraska,* 262 U. S. 390 (1923), petitioners were compelled by threat of criminal sanction to send their children to the school set apart by the respondents for Negroes alone.

As to respondents' contention that the failure of the petitioners to compare educational opportunities offered in the school they now attend with those afforded in Sousa Junior High School, it is apparent that respondents misconceive the legal theory underlying the complaint. Petitioners complain of a deprivation of the right to choose Sousa Junior High School without any limitation based solely on race or color, irrespective of the nature and availability of educational facilities elsewhere. Quite apart from that, petitioners' concession of equality of facilities

is not a concession of equality of educational opportunities, for it is implicit in petitioners' complaint that the mere denial of admission on the basis of race or color is a denial *per se* of educational opportunities. The offering of education to minor petitioners in a segregated school is *per se* a limitation on the enjoyment of educational opportunities.

Thus, this case as presented to this Court on the complaint and the motion to dismiss, presents a record in which the factual basis is present for the relief sought and the only question remaining is whether the action of respondents herein complained of violates the Constitution and laws of the United States.

II.

A. ACTS OF CONGRESS PROVIDING FOR EDUCATION OF CHILDREN OF THE DISTRICT OF COLUMBIA REQUIRE SUCH EDUCATION IN A DUAL SCHOOL SYSTEM AND HAVE BEEN SO CONSTRUED BY THIS COURT.

B. CONSTRUCTION OF LOCALLY APPLICABLE LAWS BY THE HIGHEST COURT OF THE DISTRICT OF COLUMBIA IS NORMALLY ACCEPTED BY THIS COURT.

Under this heading the respondents attempt to demonstate that the congressional enactment of statutes relating to public education in the District of Columbia and the judicial interpretation thereof by the lower courts have accomplished a construction of these statutes which is binding upon this Court. It is the petitioners' position that the statutes in question do not authorize racial segregation nor do the re-enactments after an intervening judicial construction by a lower Federal court that the statutes do require racial segregation, bind this Court to accept this construction. At most, the re-enactment of congressional legislation and the judicial construction of that legislation by lower

Federal courts are but aids to this Court in making its independent determination as to the proper construction to be given to the statutes. In *Federal Communications System* v. *Columbia Broadcasting System*, 311 U.S. 132, Mr. Justice Frankfurter states at page 138:

> "We are not, however, willing to rest decision on any doctrine concerning the implied enactment of judicial construction upon re-enactment of the statute. The persuasion that lies behind that doctrine is merely one factor in the total effort to give fair meaning to language."

It is certainly not arguable that the decision of *Carr* v. *Corning*, 86 App. D. C. 173, 182 F. (2d) 14 (1950), creates a well settled interpretation that these statutes compel segregation and are constitutional. As this Court said in *United States* v. *Raynor*, 302 U.S. 540 at 551:

> "The fact that Congress revised and codified the criminal laws after the Court of Appeals in the case of *Krakowski*, 161 Fed. 88, held that the act only prohibited possession of the distinctive paper, does not detract from the soundness of this conclusion. One decision construing an act does not approach the dignity of a well settled interpretation."

Where constitutional rights of individuals are concerned this Court has assumed the duty "in construing congressional enactments to take care to interpret them so as to avoid a danger of unconstitutionality" (*United States* v. *C.I.O.*, 335 U.S. 106, 120-121) and certainly it is the position of the petitioners that to adopt the construction given these statutes by the Court of Appeals in *Carr* v. *Corning*, supra, would create a danger of unconstitutionality. The position of the respondents, with respect to the construction of these acts, therefore, is untenable. We agree with the language of this Court in this connection in *Helvering* v. *Reynolds*, 313 U.S. 428, at 431:

> "Respondents' position is not tenable . . . that rule is no more than an aid in statutory construction. While it is useful at times in resolving statutory ambiguities it does not mean that the prior construction has become so imbedded in the law that only Congress can effect a change."

III.

THE DUAL SCHOOL SYSTEM IN THE DISTRICT OF COLUMBIA IS NOT VIOLATIVE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In this section the respondents, in an apparent misconception of the law applicable to the complaint of the petitioners, first argue that Congress has more power to legislate for the District of Columbia than the State Legislatures have for the States. Then they argue that whatever limitations exist upon the States in the Fourteenth Amendment, no greater limitations exist with respect to the Federal Government in regard to racial disabilities imposed upon Negroes. They argue, for example, that under the Fifth Amendment slavery was constitutional, and that since the Fourteenth Amendment has not prohibited the establishment of the "separate but equal" doctrine in the education cases in the States, that it is certainly not prohibited by the Fifth Amendment. This is a misconception of the fundamental nature of the Federal Government.

Equality, equal justice under law, liberty, freedom of speech and association, and freedom of religion are fundamental and basic principles underlying the foundation of our government. Our government is one of laws and not of men. In this system, race is irrelevant. The system of slavery, constitutionally recognized both in the Constitution and in *Dred Scott* v. *Sanford* (citation), 19 Howard 393, was abolished by the Thirteenth Amendment. Citizenship was conferred upon Negroes under Clause 1 of the Fourteenth Amendment and thus both the system of slav-

ery and the lack of citizenship status of the Negro set forth in the *Dred Scott* decision were removed as sources of constitutional power for the imposition of racial distinctions by the Federal Government upon Negroes. Thus our Government was brought into harmony and accord with its fundamental and basic principles—equality for all citizens—and a constitution that is color-blind.

The Federal Government is one of express powers and implied power necessary to carry out the express powers. It is too clear for argument that, since the Thirteenth and Fourteenth Amendments, the Federal Government has no express power to make racial distinctions in affording educational opportunities to citizens in the District of Columbia. It is the petitioners' position that there is likewise no implied power to do so.

This Court has recognized such power in the Federal Government in only one series of cases—the Japanese War Cases—in which it was dealing with the all-embracing war power. There this Court found an implied power, necessary to deal with sabotage and espionage under threat of invasion in the midst of a world-wide conflict, to deal on the basis of ancestry with loyal citizens who were comingled with disloyal persons. Even there this Court laid down drastic limitations governing the exercise of this implied power. It is apparent that integrated education in the District of Columbia presents no such threat to our National security. And no implied power to deny minor petitioners admission to Sousa Junior High School solely on the basis of race or color can be implied from the express power given Congress over the District of Columbia.

As an apparent justification for compulsory racial segregation in public education, respondents dwell at length upon quotations from Negroes who were urging the passage of a statute in 1906 designed to increase the power of the Negro superintendent of schools. The constitutional rights of petitioners are neither added to nor diminished by the

irrelevant opinions of isolated individuals, Negro or white. This Court has said that the rights which petitioners assert here are individual rights. *Gaines* v. *Canada*, 305 U. S. 337. It is of no importance in this case as to whether the "separate but equal" doctrine is constitutionally permissible under the Fourteenth Amendment, although we take the position that it is not; for even if we concede, which we do not, that equal protection of law may be constitutionally satisfied under a racial classification, by testing the quantum of treatment afforded Negroes under the substantially equal theory—it is juristically inconceivable that we can test liberty under the due process clause of the Fifth Amendment by the quantum of liberty which is enjoyed. A deprivation of individual liberty under the due process clause must be tested by the reasonableness of the action of the government. The test is whether the action is arbitrary but never as to how much liberty is taken. Thus the opinions of individual persons as to whether segregation is good or bad is irrelevant and the test of the deprivation of liberty under the Fifth Amendment cannot be measured by the quantum test apparently used under the equal protection clause of the Fourteenth Amendment in civil rights cases.

Moreover, the decision as to the constitutionality of the respondents' action in denying minor petitioners admission to Sousa Junior High School solely on the basis of race or color is strictly a legal question to be determined by this Court and legislative policy or action is not determinative.

CONCLUSION

Petitioners believe that the other points advanced by respondents have been fully covered in petitioners' brief on the merits, and for that reason are not touched upon here.

Respectfully submitted,

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