Supreme Court of the United States

October Term, 1951

No. [illegible]

DOROTHY E. DAVIS, BERTHA M. DAVIS and INEZ D. DAVIS, infants, by John Davis, their father and next friend, *et al.*,

Appellants,

vs.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, and T. J. McILWAINE, Division Superintendent of Schools of Prince Edward County, Virginia, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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Appellees oppose review by this Court and in the alternative seek an affirmation of the judgment below on the grounds that the issues raised in this appeal have been settled by prior decisions of this Court. They argue, therefore, that this appeal presents no substantial federal questions. In support of their view, appellees rely upon *Plessy* v. *Ferguson,* 163 U. S. 537; *Cumming* v. *Board of Education,* 175 U. S. 528; *Gong Lum* v. *Rice,* 275 U. S. 78; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337; *Briggs* v. *Elliott,* 98 F. Supp. 529 (E. D. S. C. 1951); and *Roberts* v. *City of Boston,* 5 Cush. (Mass.) 198.

We submit that the very fact that this Court did not dismiss the appeal or affirm the judgment of the court below in *Briggs* v. *Elliott,* 342 U. S. 350, although there urged to do so on much the same grounds as is argued here, but rather vacated the judgment and remanded the

cause to give the lower court opportunity to consider additional evidence presented by defendants is a sufficient indication that appellees' contentions are untenable.

Further, even when *Plessy* v. *Ferguson, supra; Cumming* v. *Board of Education, supra; Gong Lum* v. *Rice, supra;* and *Missouri ex rel. Gaines* v. *Canada, supra,* are considered in the light most favorable to appellees, it is clear that they fail to support appellees' contention that the judgment below should be affirmed or that appeal therefrom should be dismissed. On the contrary, they are in definite support of appellants' position that the maintenance of segregated schools in Prince Edward County, Virginia, is an unconstitutional deprivation of appellants' rights. For in all of these cases, approbation of the state's policy of racial segregation is squarely conditioned upon the equality of the facilities offered the segregated group. Here the segregated high school facilities provided for appellants are admittedly inferior to those available to white students with respect to curricula, means of transportation, buildings and equipment. Adopting a construction most favorable to appellees, the rationale of those cases, in the light of the findings in the court below, would clearly require that the state's practice of racial segregation in Prince Edward County be condemned as an unconstitutional deprivation of appellants' rights, and that appellants be adjudged free to attend public schools in Prince Edward County without restrictions based upon race or color.

Further, neither the *Cumming* case nor the *Gong Lum* case can be cited in support of the "separate but equal" doctrine upon which appellees' contentions are based. In the *Cumming* case at pages 543, 544, the Court specifically stated that no issue was raised in the pleadings concerning the constitutionality of racially segregated schools although that issue was raised in oral argument. Under those circumstances the Court refused to consider that issue on the grounds that it had to dispose of the case as presented on the record. The *Gong Lum* case involved

only the power of a state to classify Chinese as colored persons and no question was raised concerning the power of the state to adopt and enforce a racial classification itself, which is the specific question presented in this appeal.

In the *Gaines* case, the "separate but equal" doctrine was mentioned, but in its decision, the Court held that it was denial of equal protection to provide educational advantages for white persons and deny these advantages to Negroes, and specifically conditioned the validity of racial segregation laws upon the equality of the provisions provided the segregated group.

Plessy v. *Ferguson, supra,* squarely holds that separate intrastate transportation facilities for Negroes meet the requirements of the Fourteenth Amendment as long as these facilities are equal. However, the holding of that case as it affects transportation has been seriously weakened by the decision of this Court in *Morgan* v. *Virginia,* 328 U. S. 373, and in *Henderson* v. *United States,* 339 U. S. 816. Certainly, since this Court has decided cases affecting this question in the field of education, the *Plessy* case cannot be considered the controlling authority for the purpose of this appeal.

As pointed out in appellants' Statement as to Jurisdiction, the holding of this Court in *Sipuel* v. *Board of Regents,* 332 U. S. 631, that educational facilities must be provided for Negro students at the same time that they are offered to white students, is clear and conclusive proof that where such facilities have not been provided, as here, the state has no alternative but to admit appellants to the superior facility.

It should be noted that the appellees fail to mention or discuss *Sweatt* v. *Painter,* 339 U. S. 629, and *McLaurin* v. *Board of Regents,* 339 U. S. 637, in which the Court, after finding that the separate law school facilities in the *Sweatt* case were not equal to those provided for other students at the University of Texas, and that the practices

of racial segregation within the University of Oklahoma deprived McLaurin of equal educational opportunities, ordered Sweatt admitted to the University of Texas and declared that the state could subject McLaurin only to such rules and regulations as were applicable to all other students. These cases, while they apply to graduate and professional education on their facts, cannot be so restricted with respect to their rationale.

Here appellants have demonstrated that the state requirement that they attend racially segregated schools deprives them of equal educational opportunities which they would otherwise obtain in an integrated school system. Further it has been found by the court below that in terms of curricula, means of transportation, buildings and equipment, the schools that appellants are required to attend under the laws of Virginia are inferior to those available for white pupils. We submit, therefore, that appellants are entitled to a decree declaring the statutes of Virginia unconstitutional, and ordering their immediate admission to the superior state facilities in Prince Edward County.

CONCLUSION

For the foregoing reasons, appellees' motion to dismiss or affirm should be denied.

Respectfully submitted,

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