IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 667 44

HEMAN MARION SWEATT,
Petitioner,

vs.

THEOPHILUS SHICKEL PAINTER, ET AL.,
Respondents.

BRIEF FOR THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI.

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The Congress of Industrial Organizations files the within memorandum on behalf of its members because this case involves the constitutionality of state-compelled segregation in education—a practice which has crystallized thinking in the narrow mold of racial prejudice. That distinctions based on race alone are inimical to the best interests of our country, and therefore to the functioning of a free, non-discriminatory labor movement, is recognized by the Preamble to the Constitution of the Congress of Industrial Organization:

> "Racial persecution, intolerance, selfishness, and greed have no place in the human family."

This brief manifests the belief expressed in the Preamble as it applies to the validity of state requirements of educational segregation.

Pressing Need for a Definitive Decision by This Court.

For the first time this Court is squarely confronted with the question whether segregation in education, based solely on differences in race, satisfies the Fourteenth Amendment's requirement of "equal protection of the laws." The need for a clear-cut answer by this Court cannot be overemphasized. Prolonged litigation and large expenditures, both by individual petitioners and by states practicing segregation, have been the direct result of the present uncertainty as to the constitutional status of that practice. Negro petitioners have sought judicial relief in eight[1] of the seventeen states which provide for separate school facilities by statute or constitution. Largely as a result of the present suit, the Texas legislature has appropriated $3,000,000 for separate Negro education—fully one-half the total expenditure for Negro education in the state during the preceding third of a century.[2] And plans for regional professional schools, obviously aimed to espouse the doctrine of "separate equality", have been con-

1. *Johnson* v. *Board of Trustees,* No. 625 (D. C. E. D. Ky., 1949); *Louisiana ex rel. Hatfield* v. *Louisiana State University,* No. 25,520 (La., 19th Jud. Dist., 1949); *Pearson* v. *Murray,* 169 Md. 578, 182 Atl. 590 (1936); *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337 (1938); *Bluford* v. *Canada,* 32 F. Supp. 707 (Mo., 1940), app. dism. 119 F. 2d 779 (C. C. A. 8th, 1941); *Sipuel* v. *Board of Regents,* 332 U. S. 631 (1948); *Fisher* v. *Hurst,* 333 U. S. 147 (1948); *McLaurin* v. *Oklahoma State Regents,* No. 614 (U. S. S. Ct., 1949); *Wrighten* v. *Board of Trustees,* 72 F. Supp. 948 (S. C., 1947); *State ex rel. Michael* v. *Whitham,* 179 Tenn. 250, 165 S. W. 2d 378 (1942); and the present case.

2. Bullock, The Availability of Education in the Texas Separate Schools, 16 J. Negro Ed. 425, 432 (1947); see Wirth, the Price of Prejudice, 36 Survey Graphic 19, 20 (Jan., 1947).

sidered at length by the states involved.[3] This Court's decision on the merits of the issue is essential so that the need for successive court action may be ended—and so that *projected* economic plans cannot become *actual* financial outlay which may serve even as a makeweight factor in the result reached.

Segregation in Education—A Question of First Impression in This Court.

In *Plessy* v. *Ferguson,* 163 U. S. 537, 550-51 (1896), a state statute requiring racial separation in public carriers was held constitutional. This Court enunciated a test of "reasonableness" and then stated:

> "Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which *does not seem to have been questioned,* or the corresponding acts of state legislatures [italics added]."

Nothing was added to this dictum in *Cumming* v. *Richmond County Board of Education,* 175 U. S. 528, 543 (1899), in which Justice Harlan carefully pointed out:

> "But we need not consider that question [the constitutionality of the requirement that the white and colored children of the state be educated in separate schools] in this case. No such issue was made in the pleadings."

Nor did *Berea College* v. *Kentucky,* 211 U. S. 45 (1908), touch the basic problem.

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3. See Ball, Constitutionality of the Proposed Regional Plan for Professional Education of the Southern Negro, 1 Vanderbilt L. Rev. 403 (1948).

Thus the opinion in *Buchanan* v. *Warley,* 245 U. S. 60, 81 (1917), accurately stated the constitutional standing (or lack of it) of segregation in education:

> "As we have seen, *this court* has held laws valid which separated the races on the basis of equal accommodations in public conveyances, and *courts of high authority* have held enactments lawful which provide for separation in the public schools of white and colored pupils where equal privileges are given [italics added]."

But dictum assumed the respectability of doctrine only ten years later. In *Gong Lum* v. *Rice,* 275 U. S. 78, 85 (1927), Chief Justice Taft asserted:

> "Were this a new question it would call for very full argument and discussion, but we think that it is the same question which has been many times decided to be within the constitutional power of the State legislature to settle without intervention of the Federal Courts under the Federal Constitution."

To sustain this proposition the Chief Justice invoked only one Supreme Court decision—the dictum of the *Plessy* case.

Then, in *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, 344 (1938), the statement quoted from *Buchanan* v. *Warley* was wholly disregarded in still another dictum:

> "The State has sought to fulfill that obligation by furnishing equal facilities in separate schools, a method the validity of which has been sustained *by our decisions* [italics added]."

The "decisions" referred to were *Plessy, Gong Lum, Cumming,* and *McCabe* v. *Atchison, T. & S. F. R. Co.,* 235 U. S. 151 (1914), the latter involving a transportation statute like that in the *Plessy* case. Of these, only the *Gong Lum* case postdated *Buchanan* v. *Warley*—and the *Gong Lum* case did not claim to *decide* the present issue, but

purported instead to find its sole support in earlier decisions.

This Court's most recent opinions in this field, *Sipuel* v. *Board of Regents,* 332 U. S. 631 (1948), and *Fisher* v. *Hurst,* 333 U. S. 147 (1948), dealt with a situation in which no law school facilities were available to the petitioner, so that equal protection of the laws was clearly absent. Neither case was considered by this Court to have raised the issue of the validity of the segregation statute. *Fisher* v. *Hurst,* 333 U. S. 147, 150 (1948).

Apparently, then, the pseudo-dignity of the "separate but equal" doctrine in the area of education has been acquired solely through the lack of exploration of its true status over a long period of time.[4] Racial segregation in educational institutions truly presents a question of first impression in this Court, and it should be so treated.

Unconstitutionality of Racial Segregation in Education.

No reconsideration of the background of the Fourteenth Amendment in its relation to the present issue will be attempted in this brief.[5] Reference need only be made to Chief Justice Vinson's statement in *Shelley* v. *Kraemer,* 334 U. S. 1, 23 (1948):

> "The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoy-

4. See *ibid.,* at 408, in which a writer scarcely hostile to segregation in education characterizes the above sequence of cases as involving "circuitous reasoning" which has resulted in "a peculiar sort of judicial doubleplay."

5. Detailed exposition of this subject has already been submitted to the Court in the *amicus curiae* brief of The Committee of Law Teachers against Segregation in Legal Education in support of the petition for certiorari.

> ment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind."[6]

Recent years have seen constant emphasis by this Court on "the proposition that only the most exceptional circumstances can excuse discrimination on that basis [of race] in the face of the equal protection clause * * *."[7] Even such "exceptional circumstances" are strictly limited: "Pressing public necessity may sometimes justify the existence of such restrictions; *racial antagonism never can.*"[8]

This interpretation of the equal protection clause necessarily condemns state systems of segregated education. For that clause forbids "[d]istinctions between citizens solely because of their ancestry."[9] States which follow the "separate but equal" line fail to realize that the constitutional requirement is not merely one of equal *facilities,* but one of equal *choice* of facilities. If the denial of that choice is based on race, it is unlawful.

The reason is simple. The basic premise "justifying"

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6. See *Railway Mail Ass'n* v. *Corsi*, 326 U. S. 88, 94 (1945): ["The Fourteenth Amendment] was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color."

7. *Oyama* v. *California*, 332 U. S. 633, 646 (1948); see also *ibid.*, at page 640, referring to "the compelling justification which would be needed to sustain discrimination of that nature."

8. *Korematsu* v. *United States*, 323 U. S. 214, 216 (1944) (italics added), also stating "that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect."

9. *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943): "For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection."

segregation in the *Plessy* case (which has been followed without critical appraisal ever since) is clearly false. Ignore the unquestionable fact that "separate equality" in theory has always produced "separate *inequality*" in practice;[10] even assume that the segregation involves identity of facilities;[11] yet it must be concluded that mere *separation* on the basis of race is unconstitutional discrimination. Justice Brown, speaking for the Court in the *Plessy* case, asserted:

> "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[12]

But the half century since that case has demonstrated otherwise:

> "A dual school system, even if 'equal facilities' were ever in fact provided, does imply social inferiority. There is no question under such circumstances as to which school has the greater social prestige. Every authority on psychology and sociology is agreed that the students subjected to discrimination and segregation are profoundly affected by this experience. * * * These abnormal results, condoned by the implications of the *Plessy* case, deny to the Negro and Mexican child 'equal protection of the laws' in every meaningful sense of the words."[13]

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10. See particularly the Appendix to Petitioner's Brief in Support of Petition for Writ of Certiorari in the present case.

11. Perhaps the ideal example is that of two railway cars, as in the Plessy type statute.

12. 163 U. S. 551 (1896).

13. Segregation in Public Schools — A Violation of "Equal Protection of the Laws," 56 Yale L. J. 1059, 1060-61, 1062 (1947). The Note is heavily documented to support the conclusions reached in the passage here quoted.

Many facets of Justice Harlan's dissent in the *Plessy* case have gradually become the law of the majority of this Court. Only last year, Chief Justice Vinson's opinion in *Shelley* v. *Kraemer,* 334 U. S. 1, 22 (1948), stated a thesis similar to that unsuccessfully propounded by Justice Harlan:

> "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."

The applicability of that statement to the present situation need not be labored. Not until equal *choice* of schools is made available to white and Negro alike will the Fourteenth Amendment be satisfied; not until then will the Negro cease to be branded a "second-class" student by compulsory segregation. In short, this Court should give its stamp of approval to Justice Harlan's assertion that "Our Constitution is color-blind."[14]

Impact of This Case: The Overruling of Plessy v. Ferguson.

Every argument here advanced against the validity of the Texas constitutional requirement of segregated education is equally applicable to all other segregation based on race differences. The *Plessy* case adopted a standard of so-called "reasonableness" which permitted reference to "the established usages, customs and traditions of the people" and to "the preservation of the public peace and good order." But the former criterion is a denial that the Civil War was ever fought. *Slavery* was an "established usage, custom and tradition," and it was abolished by the Thirteenth Amendment. When the very issue to be considered is whether the Fourteenth Amendment abolished the "established usage, custom and tradition" of *segregation,* it begs the question to rely on the *past history*

14. Justice Harlan dissenting in *Plessy* v. *Ferguson,* 163 U. S. 551, 559 (1896); see Watt and Orlikoff, The Coming Vindication of Mr. Justice Harlan, 44 Ill. L. Rev. 13, 32-33 (1949).

of the practice to sustain its validity. As to the criterion of "public peace and good order," it has long since been rejected by this Court as a sufficient basis for distinctions grounded on race.[15]

Thus the *Plessy* decision is reduced to the assertion already quoted—that acts requiring segregation in public conveyances (or, seemingly, anywhere else) are no "more obnoxious to the Fourteenth Amendment than acts * * * requiring separate schools for colored children * * *" But segregation in general is likewise no *less* obnoxious to the equal protection clause than segregation in education. In fact, Chief Justice Taft's opinion in *Gong Lum* v. *Rice,* 275 U. S. 78, 86 (1927), characterized the problem in the *Plessy* case as a *"more difficult question"* than that of the validity of segregated education. The same practice which, in education, seeks to label the Negro a "second-class" student, implies second-class citizenship the moment it is applied in other areas. The conclusion is obvious—a decision which invalidates the Texas constitutional provision in the present case undermines the sole foundation of the *Plessy* case. And that being true, *Plessy* v. *Ferguson* should be overruled by this Court.

Conclusion.

This Court's initial sanction of the "separate but equal" doctrine in the *Plessy* case recited:

> "Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. * * * If one race be inferior to the other socially,

15. *Buchanan* v. *Warley,* 245 U. S. 60, 74 (1917). In *Shelley* v. *Kraemer,* 334 U. S. 1, 21 (1948), this Court relied on *Buchanan* v. *Warley* to refute the contention that the state police power extended to racial discrimination.

the Constitution of the United States cannot put them on the same plane."

But this premise, even if its validity is assumed solely for the purpose of argument, involves a total misstatement of the problem. The question is rather whether the states are empowered to lend *affirmative* aid to discrimination based on so-called "racial instincts"—whether the states can *create* distinctions having no reasonable relation to physical differences. It is respectfully submitted that the Fourteenth Amendment compels a negative answer.

Segregation statutes in education and in other fields have been labeled "effective means of tightening and freezing—in many cases of instigating—segregation and discrimination. * * *"[16] This court should not, by remaining silent on the question of lack of constitutionality of such statutes, allow itself to be an instrument for aiding that process of tightening and freezing. The alternative to a declaration of unconstitutionality—the tacit acceptance by courts of the "separate but equal" doctrine in litigation involving such statutes—has accomplished only one "educational" function: It has, by a process of successive adjudication, taught the states what border-line of token equality must be crossed to "satisfy" the equal protection clause. This Court should grant certiorari to settle clearly the question whether even equal education, if separate, fulfills the requirements of the Fourteenth Amendment.

Respectfully submitted,

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16. Myrdal, An American Dilemma 579-80 (1944).