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Supreme Court of the United States

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G. W. McLAURIN, APPELLANT,

vs.

OKLAHOMA STATE REGENTS FOR HIGHER EDUCATION, BOARD OF REGENTS OF UNIVERSITY OF OKLAHOMA, ET AL.

BRIEF FOR THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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38

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1. This brief *amicus curiae* is submitted by the Congress of Industrial Organizations with the consent of the parties. It is not submitted by the CIO only because the CIO is an organization dedicated to the maintenance and extension of our democratic rights and civil liberties which therefore has an interest in the elimination of segregation and discrimination from every phase of American life. The CIO's interest is also direct and practical. The CIO is a voluntary association of trade unions, all of which operate on the premise that the working men of America will join together in free trade unions in which there are no distinctions based on color. The CIO, through its Southern Organizing Committee, is proving daily by its organization of working men into non-segregated unions, that the myth of incompatibility between white and Negro is but a myth and that free men, given the choice which democracy prescribes, will associate themselves together without

regard to accidents of pigmentation of the skin. Prejudice, it is true, must be overcome. And it is, in fact, being overcome daily. But laws, ordinances and regulations requiring segregation are more than prejudice. They are affirmative acts of the state requiring the community to practice prejudice. They are imposed by the state equally on those who subscribe to prejudice and those who abhor it. They are the opposite of free choice. And these regulations, ordinances and statutes have in fact been used in an attempt to require CIO organizations to practice segregation when the members of the CIO themselves do not desire so to do.

These regulations, ordinances and statutes rest constitutionally on reasoning identical with that adopted by the District Court in the present case. The disposition which this court makes of the case is, therefore, of interest to the CIO not only because of the CIO's opposition to segregation in principle but also because an affirmance of the decision below will, by sustaining the power of the states to compel segregation, directly affect the efforts of the CIO to build a non-segregated trade union movement in the United States.

2. The instant case is but one of three cases in which the general problem of the constitutionality of the enforced separation of races in publicly offered facilities is presented. Briefs almost without number have been submitted to the court in these three cases canvassing again and again the decisions of the Court dealing with segregation and the social and practical considerations involved in the maintenance of separate school systems and transportation facilities. It is not our purpose here again to review the cases or the other material thus presented. The function of an *amicus* brief is to provide assistance to the Court and, in a sincere desire to do so, we offer the following observations concerning the nature of the question which is presented for decision in all three cases.

We believe that the question should be phrased somewhat differently than the parties have phrased it. The question, as usually stated, is whether the States may constitutionally provide separate but equal facilities for white and colored. In our view, the basic question is whether the States have the power to require the separation of races for the purpose of

forcing a pattern of segregation upon the members of the community.[1]

The difference between the two questions is perhaps best illustrated by the facts in the instant case. The appellant McLaurin has not been denied admission to the University of Oklahoma. Under compulsion of the Federal Constitution, the University has admitted him and is now engaged in offering to him the identical course of instruction which it offers to other students. But the University, as well as every other college, school or institution in the State of Oklahoma, must comport itself in accordance with the criminal laws of Oklahoma. And these laws forbid the operation of non-segregated schools or attendance at such schools. (See Appendices A and B to Brief for Appellant.) The University has, therefore, sought to preserve the essence of the state's policy against commingling of the races. It has done so by requiring McLaurin to sit at a special segregated seat in the classroom, to eat at a special segregated table in its cafeteria, and to study at a special segregated desk in the library. Thus, ingeniously, it offers to McLaurin the same classes, the same teachers, the same food and the same books as it offers to others, but it does so on a segregated basis. There can be no argument as to the equality of instruction, equality of food, or equality of library resources offered to McLaurin because that which is offered to him is identical with that which is offered to others. There remains, clearly and strikingly, only the single question as to whether the State of Oklahoma may require that these facilities can only be offered when accompanied by the stigma of segregation.

The Oklahoma scheme thus narrows the issue presented to the Court. In so doing, however, it clarifies and accentuates the vicious and unconstitutional basis upon which the entire system of segregated education rests. It is not simply a question of providing separate but equal facilities in state institutions. The significant question is whether a state may compel

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[1] The question in the *Henderson* case differs in that the governmental agency is the Interstate Commerce Commission and the governing provision is the Interstate Commerce Act. But, as we have pointed out in our brief *amicus* in that case, the substantive issue is the same.

the practice of segregation by its citizens, or, as applied to education in the University of Oklahoma, whether a state institution may compel its students to separate themselves by a line based on race.

This issue, so clearly shown by the facts of the McLaurin case, may be confused by phrasing it in terms of the provision of "separate but equal" facilities. The evil in "separate but equal" systems of higher education is not the separation but its compulsory enforcement. If the University of Oklahoma permits white students to shun Negroes, and Negroes to shun whites, there is no constitutional problem. The problem arises only because the University of Oklahoma compels its white students to separate themselves from Negroes and Negroes to separate themselves from whites. Similarly, there can be no complaint because the State of Texas has established a Negro law school. The problem is created because Texas will not permit Negroes, or whites, to make a choice as to which law school they wish to attend.[2]

The issue then is whether a state may, under the provisions of the Fourteenth Amendment, compel the practice of segregation in its institutions of higher learning. The argument that the separation of the races is customary, or usual, or desired by the citizens of the Southern States does not meet that issue. Those students who wish to avoid sitting in proximity to McLaurin, or eating with him, or studying at the same library table with him, would be free to do so in the absence of the regulations here attacked. The function of the regulations is not to permit them to practice segregation but to require them to do so.

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[2] It is for this reason that the argument of the eleven Attorneys General (Brief of Arkansas, Florida, etc., No. 44, pp. 16-17) that the provision of Negro schools is beneficial to Negroes in the South is irrelevant. It is not the existence of Meharry Medical School which is here attacked. It is the use of such schools as a justification for the exclusion of Negroes from other schools. If compulsory segregation were declared unconstitutional and if, as is claimed, it is possible to establish "Negro" schools which are equal or superior in all respects to those now established for whites, and which Negroes in fact would prefer, then presumably the efforts of the Southern States would be directed toward making the "Negro" school sufficiently attractive so that, as a matter of free choice and not as a matter of compulsion, Negroes would choose to attend them rather than "white" schools.

3. The real question in this case, and in the other two cases before the Court, is, therefore, whether the states have the power to force the practice of segregation upon the community. Like other constitutional questions, this question cannot be answered in a vacuum. And it may be that it is not susceptible of a categorical answer applicable in all circumstances. It may be necessary to inquire as to the purpose for which the state in a particular case requires the practice of segregation.

It is in this frame of reference that the brief submitted by the Attorneys General of eleven southern states is pertinent. Compulsory segregation is necessary, say the Attorneys General, to "maintain the public order, peace and safety" (Brief of Arkansas, Florida, etc. in No. 44, p. 3). The difficulty with this contention is simply that it is irrelevant to the cases before the Court. There is not the slightest evidence that the prevention of disorder was the purpose or object of the regulations adopted by the University of Oklahoma. To the contrary, the question posed by Governor Turner to the Attorney General of Oklahoma was "as to the authority of the Board of Regents . . . to enact rules and regulations that would offer instruction to McLaurin in accordance with the Federal Courts ruling, but would preserve, in so far as we may do so, segregated instruction at the University." (R. 101.) The object of the regulations enacted pursuant to the opinion of the Attorney General was not to avoid disorder or preserve order. The object was, as stated, to "preserve . . . segregated instruction at the University."

The question presented in this case, then, is not whether the Fourteenth Amendment forbids compulsory segregation where it is found to be necessary to preserve public order and prevent disturbances. The question is, rather, whether the maintenance of segregation, as an objective *per se,* is an objective compatible with the provisions of the Fourteenth Amendment.

This is the question upon which the court below passed in this case. It did not, and it could not on the record before it, find that the distinctions based on color employed by the State of Oklahoma were necessary or proper as "an exercise of the police power of the states to maintain the public order, peace, and safety of both races." Rather, it found that they

had their foundation in "the public policy of the State" to recognize racial distinctions as a basis for classification (R. 41-42) and it held that compulsive regulations based solely on this public policy did not contravene the requirements of the Fourteenth Amendment.

The argument of the eleven Attorneys General is thus seen to be entirely irrelevant. The question to which they give a negative answer is whether a state, in the exercise of its police powers, is barred from enforcing distinctions based on race in order to preserve public order. But the question presented here is whether a state may enforce distinctions based on race in order simply to preserve those distinctions; or, perhaps more accurately, whether the Fourteenth Amendment has deprived the states of the power to require the segregation of whites and Negroes for the sole purpose of preserving and maintaining the public policy of the states that there is a difference between whites and Negroes. And, to that question, we submit there must be an affirmative answer.

The difference between the questions is accentuated here by the fact that the brief of the Attorneys General of the eleven States is entirely devoted to the subject of segregation in public schools, despite the fact that the two cases before the Court involving education are concerned only with graduate instruction at the university level. It is further accentuated by the inclusion, as an appendix to that brief, of a collection of constitutional provisions which relate only to public schools and are entirely inapplicable to state universities.

We do not mean to say that some of the same considerations may not be applicable at both levels of instruction. Nor do we mean to admit that the preservation of public order or of the public school system of the South would necessarily justify distinctions or differences based on race. (Indeed, *Buchanan* v. *Worley*, 245 U. S. 60, would seem to hold to the contrary.) What we do wish to say, and emphatically, is that the only question here is segregation in education *per se* and *pro se*. There is no basis for asserting that compulsory segregation in higher education is only a means to achieve the end of preserving order. That assertion has, indeed, not been made with regard to higher education. Compulsory segrega-

tion in higher education is, simply and admittedly, segregation for its own sake and nothing more.

In deciding these cases dealing with segregation in higher education, therefore, it is not necessary for the Court to determine whether the equal protection clause of the Fourteenth Amendment is to be construed, when matters of racial distinction are involved, as an absolute command or, like the due process clause, as a flexible standard under which distinctions as to race are permissible if the classification has a genuine relationship to some *other* permissible state objective. Such a determination is not necessary because it is not claimed that the regulations based on color employed by Texas and Oklahoma, which require the practice of segregation in institutions of higher education, have any rational basis other than the desire of Texas and Oklahoma to preserve distinctions based on color.

Public schools and swimming pools may present different problems, and in a case involving public schools or swimming pools it may be appropriate for the Court to consider whether a classification by race is permissible if such a classification is necessary to achieve some necessary public purpose. But this is not such a case. Here, the question is only whether a state may require segregation for the sake of segregation, nothing more.

That this is the issue in the instant case cannot be disputed. It is the public policy of the State of Oklahoma that Negroes and whites may not study together in any "college, school or institution." A statute forbids any person to operate any institution in which both white and colored are received as pupils unless it is operated on a segregated basis. And it is further made a crime to teach in a mixed school or to attend a mixed school. Pursuant to this policy the University of Oklahoma has decreed that white students, whatever their own inclinations may be, shall not be permitted to sit in proximity to Negroes, or eat at the same table with them, or study in the same reading room with them. And so, an alcove, or a railing, or a separate table is provided "For Negroes Only."

These regulations, and the statutes to which they conform, are not permissive. They do not simply permit whites to sep-

arate themselves from Negroes, or Negroes to separate themselves from whites. They are compulsory. They forbid the abandonment of prejudice and enforce adherence to the practice of segregation.

To what end? Surely not to preserve public order in institutions where students or instructors may desire to end the practice of segregation. Nor, certainly, to confer upon Negroes any special mark of approval or approbation. The purpose and intent of the regulations and statutes here involved, whatever may be the justifications offered, is to stamp the Negro as an inferior and to require, in the field of higher education, the preservation and maintenance of the policy of "white supremacy."

The issue which the Court must decide is whether such regulations meet the requirement of the Fourteenth Amendment that no state shall deny to its citizens "the equal protection of the laws." Once the issue is clearly seen, we submit that only a negative answer is possible.

4. An affirmative answer was given by this Court to a similar question in *Plessy* v. *Ferguson*, 163 U. S. 537. As we have pointed out in our brief in the *Henderson* case, No. 25, this Term, it did so only by ignoring the very important distinction between a provision of law *permitting* individuals to separate themselves according to race and a provision *requiring* them to do so. It treated compulsory and permissive separation as identical. Thus the Court said that "we cannot say that a law which authorizes or even requires the separation of the two races in public conveyance" is violative of the Fourteenth Amendment. 163 U. S. at 550. And the argument against the statute, the Court said, "assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the Negro except by an enforced commingling of the two races." 163 U. S. at 551. The argument, of course, need make no such assumption. The alternatives are not enforced segregation or enforced commingling.[3] Nor is the question whether a state may constitutionally *per-*

[3] These alternatives could possibly be argued to be exclusive only in cases involving compulsory public education if there is no choice as to attendance or seating arrangements.

mit the separation of the races. The alternative to enforced segregation is freedom of choice and the question is whether a State may deny that freedom to individuals and require them, willy-nilly, to separate according to race.

The Court could confuse the issue, as it did in the *Plessy* case, only because it implicitly assumed throughout the opinion that the Negro race was "inferior" and that, given freedom of choice, all whites would refuse to associate with Negroes. On that assumption, and only on that assumption, the only alternatives were segregation and compulsory intermingling, and permissive separation was the same thing as compulsory separation.

The assumption is false. The Congress of Industrial Organizations is living proof that it is false. And, apart from matters of proof, certainly such an assumption, embodying itself the very prejudices at which the Fourteenth Amendment was aimed, has no place in our constitutional doctrine.

For these reasons, we believe that the answer given by the Court in *Plessy* v. *Ferguson,* resting as it does on the implicit assumption of Negro inferiority, was not only wrong but itself embodied the evil at which the Fourteenth Amendment was directed. We believe that the Court should again state what it said so clearly in *Buchanan* v. *Worley,* 245 U. S. 60, 81, that the Fourteenth Amendment deprived the States of the power "to require by law . . . the compulsory separation of the races on account of color, . . ." We believe that at least where no purpose is vouchsafed for the requirement of such compulsory separation other than its desirability *per se* (and no such other purpose is suggested in the cases of higher education now before the Court) the Court should hold that such compulsory separation is, *per se,* unconstitutional because it deprives both whites and Negroes of freedom of choice because of color, and nothing else.

Respectfully submitted,

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