Nos. 1, 2, 3, 4, 5

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 1

OLIVER BROWN, ET AL, APPELLANTS
v
BOARD OF EDUCATION OF TOPEKA, ET AL

No 2

HARRY BRIGGS, JR, ET AL, APPELLANTS
v.
R W ELLIOTT, ET AL

No. 3

DOROTHY E. DAVIS, ET AL, APPELLANTS
v
COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, ET AL.

No 4

SPOTTSWOOD THOMAS BOLLING, ET AL., PETITIONERS
v
C. MELVIN SHARPE, ET AL

No 5

FRANCIS B. GEBHART, ET AL, PETITIONERS
v.
ETHEL LOUISE BELTON, ET AL.

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES ON THE FURTHER ARGUMENT OF THE QUESTIONS OF RELIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 1 [1]

OLIVER BROWN, ET AL, APPELLANTS

v.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, ET AL.

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES ON THE FURTHER ARGUMENT OF THE QUESTIONS OF RELIEF

Pursuant to the Court's request at the oral argument, the Government submits this supplemental memorandum dealing with the "class action" character of the suits at bar.

I

The instant suits are class actions under Rule 23(a)(3) of the Federal Rules of Civil Procedure [2]

We note at the outset that the plaintiffs instituted their suits in the district courts, not only on their

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[1] Together with No 2, *Harry Briggs, Jr, et al* v *R W Elliott, et al*, No 3, *Dorothy E Davis, et al* v *County School Board of Prince Edward County, et al*, No 4, *Spottswood Thomas Bolling, et al* v *C Melvin Sharpe, et al*, and No 5, *Francis B Gebhart, et al* v *Ethel Louise Belton, et al*

[2] No 5, which arose in the state courts, was brought, of course, pursuant to Delaware procedure

own behalf, but also on behalf of persons similarly situated;[3] that the suits were treated as class actions in the various courts below;[4] and that they were described as such in this Court's opinion of last term, 347 U. S at 495 This treatment, in our view, was correct

The authority to institute a class action is conferred by Rule 23(a) in the following terms:

> If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
>
> (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
>
> (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
>
> (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

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[3] See No 1, R 4, 7; No 2, R 5, 10-11; No 3, R 6, 9-10, 23

[4] This is evident from the findings, opinions, and lower-court decrees See No 1, R 244; No 2, R 190, 210; No 3, R 617-618, 624

Subdivision (1) deals with a type of class action traditional under equity practice—the situation where the members of the class have a joint or common interest predicated upon a jural relation between or among them [5] A familiar example is a suit by representatives of an unincorporated association Subdivision (2) has to do with individual plaintiffs and a claim to a common fund or *res.* Subdivision (3), which is here pertinent, relates to the situation in which each member of the class has an individual or personal right, in no way dependent for its assertion upon the joinder of other members of the class, in which a class action is permitted on the ground that "there is a common question of law or fact affecting the several rights and a common relief is sought " Its purpose is to provide a device, in appropriate circumstances, for the avoidance of multiplicity of actions.

It would appear that the conditions for a class suit under subdivision (3) are satisfied here. There is no dispute that the members of the class are numerous. There is no suggestion that the individual plaintiffs fail to represent the interests of all It is plain that the rights are several and simi-

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[5] This is not to suggest that multi-party litigation involving persons having rights or duties which are *several* in character is strictly a recent development The Chancellor not infrequently exercised his powers when the nature of the interest involved was neither joint nor common but the issue was one presenting a common question of law or fact As to the avoidance of multiplicity of actions as a ground of equity jurisdiction, see, generally, Pomeroy, *Equity Jurisprudence,* Sec 243 *et seq* (5th ed); *Chafee, Bills of Peace with Multiple Parties,* 45 Harv L Rev 1297

lar; each member of the class has a constitutional right not to be segregated in public school because of his race or color. These individual rights have already been adjudicated upon the basis of common questions of law and fact. And, in each case, declaratory and injunctive relief was requested for the benefit of all of the members of the class, and not merely on behalf of the named plaintiffs.

Thus, almost without exception, the lower federal courts have entertained class suits instituted on behalf of persons adversely affected by racial discrimination. As stated in *Kansas City, Mo.* v. *Williams,* 205 F. 2d 47, 52 (C A 8), certiorari denied, 346 U. S. 826 (representative suit by three Negroes challenging discrimination in the operation of a public recreational facility):

> Violations of the Fourteenth Amendment are of course violations of individual or personal rights, but where they are committed on a class basis or as a group policy, such as a discrimination generally because of race, they are no less entitled to be made the subject of class actions and class adjudication under rule 23, Federal Rules of Civil Procedure, 28 U. S. C. A , than are other several rights And the District Courts, where the question has so arisen, have practically unanimously so recognized See, e. g., Gonzales v Sheely, D. C. Ariz., 96 F. Supp. 1004; Wilson v. Board of Sup'rs of La. State University, etc., D. C. La., 92 F. Supp 986; Johnson v. Board of Trustees

of University of Kentucky, D. C., E. D. Ky., 83 F Supp. 707; Davis v. Cook, D. C, N. D Ga, 80 F Supp. 443; Lopez v. Seccombe, D C., S. D Cal, 71 F. Supp. 769—to give but a few examples See also Alston v School Board of City of Norfolk, 4 Cir., 112 F. 2d 902, 997, 130 A. L R 1506; City of Birmingham v. Monk, 5 Cir, 185 F. 2d 859.[6]

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[6] For other instances of representative suits challenging segregation, see *Carter* v *School Board,* 182 F 2d 531 (C A 4); *Mendez* v *Westminster School District,* 64 F Supp 544 (S D Cal), affirmed, 161 F 2d 774 (C A 9); *Draper* v *City of St Louis,* 92 F Supp 546 (E D Mo), appeal dismissed, 186 F 2d 307 (C A 8); *Thomas* v *Hibbitts,* 46 F Supp 368 (M D Tenn), *Wilson* v *City of Paducah,* 100 F Supp 116 (W D Ky) Cf *System Federation No 91* v *Reed,* 180 F 2d 991 (C A 6) (class action by non-union employees of a carrier to enjoin discrimination against their rights to acquire seniority, in violation of Railway Labor Act)

Of course, a case involving discrimination is but one of many factual situations in which Rule 23(a)(3) may provide an appropriate means of dealing in a single action with individual claims of right asserted by a large number of persons similarly situated See, *e g*, *Weeks* v *Bareco Oil Co*, 125 F 2d 84 (C A 7) (representative suit by two of 900 gasoline jobbers against oil companies, charging antitrust violations), *National Hairdressers' and Cosmetologists' Assn* v *Philad Co*, 41 F Supp 701 (D Del), affirmed, 129 F 2d 1020 (C A 3) (representative suit seeking declaration that process used by several thousand members of a national hairdressers' association does not infringe defendant's patent and an injunction against infringement suits by defendant); *Gramling* v *Maxwell,* 52 F 2d 256 (W D N C) (representative suit by single taxpayer on behalf of himself and several hundred similarly situated to enjoin State Commissioner of Revenue from collecting unlawful tax) Another example familiar to the Court is provided by representative suits asserting rights under the Selective Training and Service Act of 1940. See *Trailmobile Co* v *Whirls,* 331 U S. 40.

II

The decrees may extend to persons in the respective classes who have not individually appeared in the proceedings

To state that a suit meets the requirements of a class action under Rule 23 does not in and of itself necessarily determine whether relief should in terms extend to all members of the class or should be limited to those who individually identify themselves with the proceeding, either as original or intervening complainants [7] Thus, Professor Moore takes the position that, when the suit is under subdivision (3) of the rule (*i e*, when the rights are several in nature), the action is "an invitation to joinder," rather than a "command performance," and that the "decree . . binds only those actually before the court." 3 Moore, *Federal Practice,* 3443, 3465 (2d ed). Other commentators are of the view that this unduly restricts the function of the class action; that, so interpreted, subdivision (3), which offers the greatest promise of facilitating disposition of important questions involving a substantial number of parties, accomplishes little more than the rules as to permissive joinder and intervention (Rules 20, 24(b)); and that, in appropriate cases, relief may go beyond the parties actually before the court Kalven and Rosenfield, *The Contemporary Function of the Class Suit,* 8 U. of Chi. L Rev 684, 701 *et seq ; Federal Class Actions: A Suggested Revision of Rule 23,* 46 Col L

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[7] We deal under Point III with the question of timely intervention.

Rev 818. The *Restatement, Judgments,* Section 86, declares:

> A person who is one of a class of persons on whose account action is properly brought or defended in a representative action or defense is bound by and entitled to the benefits of the rules of res judicata with reference to the subject matter of the action.
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> Comment *a* . . . [This] rule . . . applies where an action is brought by one . . . whose interests are similar to those of a large number of others, so that it is proper and convenient for him to speak on behalf of all . .

This Court has not passed directly upon the point, though it may be noted that the discussion in *Hansberry* v *Lee,* 311 U S. 32, addressed to the question whether a state court judgment may be binding upon absent members of a class, emphasizes the requirement of adequate representation but suggests no narrow strictures upon the method of defining the class.[8] The requirement made by the

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[8] "It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are ~~not~~ in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties or where the interest of the members of the class, some of whom are present as parties, is joint, or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter." [311 U.S at 42-43]

Restatement that the action be "properly" brought or defended would appear to embrace the due process requirements of fair notice and adequate representation emphasized in *Hansberry* It is significant that one of the effects of the rule enunciated in the *Restatement* would be to hold absent members of a class, who were properly represented, bound by an unfavorable result The problem here—whether the benefits of a decree should be extended to absent members of a plaintiff class—is certainly of a lesser order, since there can be no question that the defendants had their full day in court ". . . there is by no means complete symmetry between binding the defendant to a favorable decree and binding the absentee to an unfavorable decree. Clearly, the defendant has been afforded his day in court; he has had the opportunity to present his case fully in his own right, and he has lost. He has no more reason to relitigate the entire controversy against the absentee members than he has to do so against the immediate plaintiff." Kalven and Rosenfield, *op cit.,* at 713

A considerable number of cases in the lower federal courts follow Professor Moore's view and hold that in a class action based upon the existence of a common question, relief will be limited to those who come before the court Perhaps, the leading cases in this category are *Oppenheimer* v. *F. J. Young & Co.,* 144 F 2d 387 (C. A. 2) (class action by bondholders for damages), and *Pentland* v *Dravo Corp ,* 152 F 2d 851 (C A. 3), (representative suit to obtain overtime compensation under

Fair Labor Standards Act [9]). Generally, the cases which hold that judgment will bind only the parties before the court have been actions for damages. The consideration that damages will vary from plaintiff to plaintiff has apparently been a practical consideration in inducing the holding that the effect of the decision will be confined to those who come into the proceeding. See *Oppenheimer* at 390; *Pentland* at 855 [10] In the situation presented by the *Pentland* case, the court was concerned, moreover, with the fact that separate defenses might be available as against some members of the plaintiff class [11]

In "common question" cases in which relief of an equitable nature is sought, the courts have manifested a greater disposition to extend the benefits of the decree to absent members of a successful plaintiff class *Gramling* v *Maxwell,* 52 F 2d 256 (W D N C), to which Mr Justice Harlan referred at the oral argument, is an apt illustration

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[9] As the opinion in *Penland* shows, there have been numerous "common question" class suits under the Fair Labor Standards Act

[10] Cf *McGrath* v *Tadayasu Abo,* 186 F 2d 766 (C A 9), certiorari denied, 342 U S 832, in which determination of particular circumstances affecting each plaintiff was required

[11] Thus, the court observed (p 853):

> But because an employer fails to obey the law as to employee A, it does not follow that he has not obeyed it as employees B, C or D B may not be engaged in interstate commerce or the production of goods for commerce, while A may Employee C may be a salaried worker or a supervisor who does not come under the Act Employee D may have been paid the statutory minimum and not have worked any overtime at all

That suit was brought before a three-judge district court to restrain the North Carolina Commissioner of Revenue from collecting a tax on peddlers of fruits and vegetables The ground of challenge was that the tax, which was not applicable to those purveying fruits and vegetables grown in North Carolina, was a burden on interstate commerce The complainant, who owned 100 trucks, each of which would have been subject to a $50 license tax, sought an injunction on his own behalf and others similarly situated Holding that the tax was unconstitutional, the court concluded that the injunction against attempted collection should run in favor of all members of the class, irrespective of the fact that some of its members would not have had standing (because of the absence of the requisite jurisdictional amount) to sue individually in the federal courts (pp 260-263) In reaching this conclusion, the court emphasized the function of equity in avoiding an unnecessary multiplicity of litigation [12]

employees to enjoin discrimination against the

In *System Federation No. 91* v. *Reed,* 180 F. 2d 991 (C A 6), a representative suit by railroad

[12] In this connection, the opinion refers to Pomeroy's treatise See note 5, *supra* In his discussion of representative suits by taxpayers whose "only community is in the questions at issue to be decided," Pomeroy declares that the decisions of many able courts have "demonstrated the fact that complete and final relief may be given to an entire community by means of one judicial decree, which would otherwise require an indefinite amount of separate litigation by individuals, even if it were attainable by any means" Pomeroy, *op cit*, pp 529-537

acquisition of seniority rights by non-union employees, the decree forbade discrimination "against the plaintiffs and the classes represented by them" (p 993) Subsequent to entry of the decree, a member of the class who was not a named plaintiff was permitted to come into the case and to apply for a citation of contempt (p. 998).

The same approach is reflected in numerous suits for injunctive relief challenging racial discrimination

Mendez v *Westminster School District,* 64 F Supp 544 (S D Cal), affirmed, 161 F. 2d 774 (C A 9), was a class action against public school authorities to compel the admission of five named plaintiffs and some 5000 other Mexican children similarly situated The court determined that the plaintiffs were entitled to injunctive relief restraining further discriminatory practices against "pupils of Mexican descent in the public schools of defendant school districts" (p 551).

Draper v *City of St Louis,* 92 F Supp. 546. (E D. Mo), appeal dismissed, 186 F. 2d 307 (C. A. 8), was a class action to compel admission of Negroes to a swiming pool maintained by the city. The court entered a decree prohibiting the defendant from denying admission to the named plaintiff and others of the Negro race

Gonzales v *Sheely,* 96 F Supp 1004 (D Ariz), was a class action to enjoin the segregation of students of Latin or Mexican descent within a school district The court indicated that an injunction to this effect should issue.

Davis v *Cook,* 80 F Supp. 443 (N. D Ga.), reversed on other grounds, 178 F. 2d 595 (C. A. 5), certiorari denied, 340 U S. 811, was a class action brought by a Negro teacher on behalf of himself and all other Negro teachers and principals similarly situated to require the defendants to cease discriminating against Negro principals and teachers in respect to salaries. The district court determined that the named plaintiff was entitled to the relief sought for himself and for the "principals and teachers he represents" *Thomas* v *Hibbitts,* 46 F Supp 368 (N D Tenn), is to the same effect

Wilson v *City of Paducah,* 100 F Supp. 116 (W. D Ky), was a representative suit brought to compel the admission of Negroes to a municipal junior college The district court entered summary judgment on the motion of the named plaintiffs Some ten months thereafter, two individuals who were not named in the original action moved to intervene, alleging that they had been denied admission to the college solely by reason of their race The city contended that the original complaint did not establish the suit as a class action and that the judgment had not conferred rights upon individuals other than the named plaintiffs It further contended that the motion to intervene was not timely. The court rejected both contentions, holding (1) that the question as to the class nature of the action had been disposed of on the motion for summary judgment and was *res judicata,* and (2) that the applicants, being members of the class,

were entitled to intervene in order to secure to themselves the benefits afforded by the decree.

In light of the preceding discussion, we believe that there is no legal barrier to extending the relief in the instant cases to persons "similarly situated." As earlier noted, the defendants have had full opportunity to litigate the issues The rights of the unnamed members of the classes do not differ in character from those of the named plaintiffs. There is no question of separate defenses. It appears, moreover, that to give truly effective relief to the few will actually require effective relief for the many We conclude that the power of equity is sufficient to avoid the multiplicity of litigation which would doubtless follow from a decree limited to a relatively few plaintiffs, and that this Court may, and should, fashion decrees protecting the constitutional rights of children similarly situated.

III

In any event, members of the class who have not yet intervened are still eligible to do so

"Upon timely application anyone may be permitted to intervene in an action (2) when an applicant's claim or defense and the main action have a question of law or fact in common" (Federal Rules of Civil Procedure, Rule 24(b)) The timeliness of an application is a matter for the discretion of the court "In exercising its discretion the court shall consider whether the intervention

will unduly delay or prejudice the adjudication of the rights of the original parties" (*ibid*).[13]

Consistently with this rule, the district courts might entertain applications for intervention in the instant cases Such applications, if made, would not delay or prejudice adjudication of the rights of the original parties; presumably, they would be made only to secure to unnamed members of the described classes the benefits of the relief ultimately decreed. If this Court should conclude that the decrees entered in these cases are to run only to named parties, it becomes particularly important that a liberal policy be adopted in permitting intervention by other members of the class, many of whom have undoubtedly assumed that the decrees would not be so restricted Compare the liberal intervention policy followed in *Pentland* v *Dravo Corp., supra,* 152 F 2d at 856, and *McGrath* v *Tadayasu Abo, supra,* 186 F. 2d at 769-770, and suggested in *Guaranty Trust* v. *York,* 143 F. 2d 503, 529, reversed on other grounds, 326 U. S. 99 And see Kalven and Rosenfield, *op cit.,* 8 U of Chi. L. Rev at 695 (" the basic function of the class suit is achieved only if the decree is held open to permit the absentee members of the class to come under the decree after the decision . . "). This Court might insure the adoption of such a policy by an appropriate direction to the district courts

If the Court should conclude that the decrees

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[13] Rule 23, relating to class actions, is silent on the question of timeliness of intervention

should run to all members of the described classes, we presume that any member of a class would be entitled to vindicate his rights under the decree and to seek such ancillary orders as might prove necessary for that purpose See *System Federation No 91* v *Reed* and *Wilson* v. *City of Paducah,* discussed *supra.*

Respectfully submitted,

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