INDEX

Page

Table of Cases:

Miscellaneous:

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IN THE

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Misc. Nos. 1 and 2

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v.

WILLIAM G. COOPER, et al., *Respondents.*

WILLIAM G. COOPER, et al., *Petitioners,*

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JOHN AARON, et al., *Respondents.*

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND PETITION TO BE HEARD ON THE MERITS AND TO PARTICIPATE IN THE ORAL ARGUMENT UPON THE JURISDICTIONAL AND CONSTITUTIONAL QUESTIONS INVOLVED

The Officers and Members of the Arlington County Chapter of the Defenders of State Sovereignty and Individual Liberties in lawful and peaceable assembly,

appearing in this proceeding by Counsel, hereby move for leave to file a brief as Amicus Curiae and petition the Court to be heard upon the merits and to participate in the oral argument upon the Jurisdictional and Constitutional Questions involved.

Respectfully submitted,

ARLINGTON COUNTY CHAPTER
DEFENDERS OF STATE SOVEREIGNTY
AND INDIVIDUAL LIBERTIES
ARLINGTON, VIRGINIA

By: JOHN BRADLEY MINNICK
Of Counsel

IN THE

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STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND PETITION TO BE HEARD ON THE MERITS AND TO PARTICIPATE IN THE ORAL ARGUMENT UPON THE JURISDICTIONAL AND CONSTITUTIONAL QUESTIONS INVOLVED

The specific grounds for the motion and petition are as follows:

1. As citizens of the United States and of Virginia, the State in which we reside, and being aggrieved by the intractable problems directly affecting the use and maintenance of the public free schools of Arlington County, Virginia, which have arisen out of this and

related proceedings before the Federal Judiciary, we are entitled to present our brief and to be heard on the merits as a matter of inalienable right of citizenship. Const., Art. VI, Cl. 2; Const., Amendments I, V, IX, X, XI and Amendment XIV, Sections 1 and 5; Virginia Declaration of Rights, Sections 1, 2, 3, 5, 7, 11, 12, 13, 14, 15, 16 and 17; R. S., section 1977 now 42 U. S. C., section 1981; *Pierce* v. *Society of Sisters* (1925) 268 U. S. 510, 534-535.

2. State law is the rule of decision in the Federal Courts unless the Constitution and the laws of the United States provide or require otherwise. Federal Rules of Decision Act, First Judicial Code, section 34, First Congress, First Session, Ch. 20, 1789, 1 Stat. 73, 92, now 28 U. S. C., section 1652; *Erie R. Co.* v. *Tompkins* (1938) 304 U. S. 64, 79-80.

3. For the purpose of this and related proceedings dealing with our public free schools, the Constitution and the laws of the United States do not provide or require otherwise. Const., Art. I, sections 1, 7 and 8; Const., Art. II; Const., Art. III; Const., Art. IV; Const., Art. VI, Cl. 2; Const. Amendments IX, X, XI and Amendment XIV, sections 1 and 5; Acts of Admission of the New States, commencing with the Act to Admit the States of North and South Dakota, Montana and Washington on an equal footing with the original States, section 14, Fiftieth Congress, Second Session, Ch. 180, February 22, 1889, 25 Stat. 676, 680, down to, through and including, the Act to Admit the State of Alaska on an equal footing with the other states in all respects whatsoever, section 6 (j), Public Law 85-508, 85th Congress, Second Session, July 7, 1958, 72 Stat. 339, 342; THIRD MORRILL ACT, Fifty-First Congress, First Session, Ch. 841, August

30, 1890, 26 Stat. 417, 418, now 7 U. S. C., section 323; see also index to United States Code under Negroes; and note (1) that these laws of the United States have not been questioned or challenged upon constitutional or any other ground, (2) nor were these laws of the United States raised, briefed, cited, argued, presented or otherwise put in issue in *Brown* v. *Board of Education of Topeka, Kansas,* and related cases (1954) 347 U. S. 483, and (3) that these laws of the United States constitute the supreme law of the land by constitutional definition, Const., Art. VI, Cl. 2; *Gibbons* v. *Ogden* (1824) 9 Wheat. 1; *McCulloch* v. *Maryland* (1819) 4 Wheat. 316.

4. The first opinion of this Court in a twice mooted case, *Brown, supra,* is not legally sufficient authority to negative any federal, state, or local law because the defendant was entitled to dismissal as a matter of right. Constitution, *supra;* Rules of Decision Act, *supra;* Third Morrill Act, *supra;* Act to Admit the State of Oklahoma (1906) 34 Stat. 271; *United States* v. *W. T. Grant Co.* (1953) 345 U. S. 629, 632; *Erie R. Co.* v. *Tompkins, supra;* stipulation of equality filed by counsel for the plaintiffs in *Brown* and related cases, *supra;* and the action of the Board of Education of Topeka, Kansas, when it adopted its own plan in 1953 to eliminate separate schools in Topeka, there being no state law or constitutional provision in Kansas which provided or required otherwise.

5. Our interests and the interests of all other interested citizens directly affected may not be adequately represented by existing parties. First Judicial Code, *supra,* section 35, 1 Stat. 92, 93; Act to Establish the Department of Justice, June 22, 1870, Forty-First Congress, Second Session, Ch. 150, sections 4 and 18,

16 Stat. 162, 165, now 5 U. S. C., sections 308 and 305, respectively; Rule 42 (3), Revised Rules of the Supreme Court, 28 U. S. C., Supp. V, 1952 Edition, following section 2071.

JURISDICTIONAL AND CONSTITUTIONAL QUESTIONS INVOLVED

I. The Question of Jurisdiction

A. Do the Federal Courts have jurisdiction where it appears that civil actions have been commenced or prosecuted against States by foreign, tax exempt, secret membership, monied corporations organized under the laws of the State of New York? Const., Art. III, Section 2; Const., Amend. XI; 28 U. S. C., section 1251 and Reviser's note.

B. Does the Supreme Court have jurisdiction over civil actions in which a national policy is sought to be established against States which were not parties to the original proceeding and in which the people directly affected have been given no opportunity to be heard? *Id.;* Const., Amendments V, IX, X and XIV.

C. Is a class action sufficient to establish a national policy against States which were not parties to the original proceeding and in which the people directly affected are given no opportunity to be heard? *Id.*

D. Can a national policy be established by the Federal Judiciary without consideration of the national policy established by the people acting through their duly elected and authorized representatives in the Congress of the United States assembled, or in a convention called for that purpose? *Id.*; Const., Art. I, Section 7; Const., Art. V.

E. Is the defendant entitled to dismissal as a matter of right in a moot case? *United States* v. *W. T. Grant Co., supra.*

II. The Constitutional Questions

A. When an opinion of the Supreme Court collides directly and indirectly with unquestioned and unchallenged Acts of Congress, which is the law within the meaning of the supremacy clause of our Constitution? Const., Art. VI, Cl. 2.

B. If it be held that the opinion of the Court is the law, then what effect does the judicial invalidation of the Acts of Admission of the New States have upon our Union? Const., Art. IV, Section 3; Acts of Admission, *supra.*

C. If it be held that the opinion of the Court is the law, then what effect does the judicial invalidation of the Morrill Acts have upon our land grant colleges? Const., Art. I, Section 8, Cl. 1; Morrill Acts, *supra.*

D. If it be held that the opinion of the Court is the law, then what effect does the judicial invalidation of the separation of powers of government have upon our Constitution? Const., Arts. I, II and III.

REASONS WHY JURISDICTIONAL AND CONSTITUTIONAL QUESTIONS WILL NOT BE PRESENTED ADEQUATELY BY THE PARTIES

1. The particular State directly affected and the several States equally affected have not been made parties to this proceeding. Const., Art., III, Section 2; Const., Amendment XI; 28 U. S. C., section 1251 and Reviser's note.

2. The United States has not been made a party to this proceeding in accordance with the law and the Rules of Court in that regard. 28 U. S. C., section 2403; Rule 24 (c), Federal Rules of Civil Procedure; *Speiser* v. *Randall* (June 30, 1958) —— U.S. ——, 26 LW 4479, 4481; and Exhibit A.

3. The Attorney General of the United States was notified of the constitutional questions involved; but he did not answer. *Davis* v. *County School Board of Prince Edward County, Va.,* Civil Action No. 1333, USDC Ed. Va. RD, decided August 4, 1958, *sub. nom. Eva Allen, et al.* v. *County School Board of Prince Edward County, Va.,* —— F. Supp. ——.

4. The United States Court of Appeals for the Eighth Circuit denied a motion in this case to certify the constitutional questions to this Court. 28 U. S. C., section 1254 (3); and Exhibit B.

5. Existing parties have not heretofore raised the jurisdictional nor the constitutional questions.

RELEVANCY OF THE JURISDICTIONAL AND CONSTITUTIONAL QUESTIONS TO THE DISPOSITION OF THIS CASE

1. This proceeding from its inception, commencing with the plan to eliminate separate schools in Little Rock, has no basis or foundation outside of the opinions of this Court in *Brown* v. *Board of Education of Topeka, Kansas,* and related cases, *supra.*

2. Jurisdiction was assumed in those cases on the sole ground that there was a constitutional issue.

3. The jurisdictional and constitutional questions were not raised nor decided in those cases.

4. Accordingly, the basic jurisdictional and constitutional questions have not been settled nor decided.

5. Wherefore, it is concluded that the jurisdictional and constitutional questions are material and relevant to the disposition of this case.

Respectfully submitted,

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BRIEF AS AMICUS CURIAE

STATEMENT OF THE CASE

I. The Plan

A. The voluntary plan to eliminate separate schools in Little Rock was approved by the Federal Judiciary upon authority of the opinion of this Court in *Brown* v. *Board of Education of Topeka, Kansas* (1954) 347 U. S. 483; (1955) 349 U. S. 294.

B. The plan did not work.

II. The Stay

A. The plan was first stayed by the state court upon application of interested citizens in a lawful and peaceable manner and after a full and complete hearing upon the merits.

B. The action of the state court was summarily set aside by the District Court below without a hearing.

C. On September 9, 1957, the very day on which the District Court ordered the Department of Justice to intervene in a civil rights case, the Congress of the United States repealed R. S. section 1989, 42 U. S. C., section 1993, thereby completely eliminating the statutory authority of the President to employ land or naval forces to aid in the execution of judicial process issued under 42 U. S. C., sections 1981-1983 or 1985-1992, or to prevent the violation and enforce the due execution of said sections. Civil Rights Act of 1957, Public Law 85-315, Part III, section 122, September 9, 1957, 71 Stat. 637, 42 U. S. C., section 1993 repealed. Parenthetically, it should be noted at this point that the original Part III of the Civil Rights Bill as proposed by the Department of Justice would have authorized intervention by the Attorney General in public education cases; but that it was specifically deleted in its entirety by the United States Senate before the Civil Rights Act of 1957 was passed by Congress and signed by the President.

D. On or about September 24, 1957, federal troops were used to enforce court orders, 18 U. S. C., section 1385 to the contrary, notwithstanding, there being no express authority by the Constitution or Act of Congress, nor any right named in the Constitution and secured by law.

E. The plan was again stayed. This time by the District Court below after a full and complete hearing upon the merits.

F. The stay granted by the District Court below was reversed by the United States Court of Appeals for the Eighth Circuit upon authority of the opinion of this Court in *Brown, supra;* but the reversal was stayed pending perfection of an appeal to this Court.

G. On August 28, 1958, leave was granted to file the School Board's petition for certiorari not later than September 8, 1958; briefs of the parties may be filed not later than September 10, 1958; and the matter is set for hearing upon the merits on September 11, 1958.

STATEMENT OF THE ARGUMENT

I. THE PROBLEM

The problem is racial, but the issues are constitutional. The problem has created a seemingly irreconcilable conflict between the Federal Judiciary and State Law concerning the basic, fundamental principles governing separate schools in public education. In 1952, this Court expressed the view that only those who are lacking in responsible humility will have a confident solution for problems as intractable as the frictions attributable to differences of race, color and religion. *Beauharnais* v. *Illinois,* 343 U. S. 250, 262.

The question then arises whether, in the exercise of our liberty as parents to direct the upbringing and education of our children, we have contravened the equal protection of the laws by the establishment and maintenance of separate schools for white and colored children.

Accordingly, the question raises constitutional issues upon inspection.

II. THE ISSUE

The issue is not integration, nor is it segregation. That is the problem. The issue is whether the first opinion of this Court in the *Brown* case is legally sufficient to negative the supreme law of the land. In other words, if an opinion of this Court seeks to establish a national policy diametrically opposed to the national policy established by the people acting through their duly elected and authorized representatives in the Congress of the United States assembled, which is the law within the meaning of the supremacy clause of our Constitution? What legal effect does such an opinion have upon the law? What effect does it have on our Constitution, our Bill of Rights, and our State law? These are some of the questions which the people are asking because they are confused and do not know what the law is. The people are entitled to know and to be informed so that we may govern ourselves accordingly.

III. THE LAW

A. The Judicial Precedent

1. According to the Federal Judiciary, the "law" was settled in the *Brown* case which purports to negative all provisions of federal, state and local law which come in conflict therewith. *Brown, supra* (May 31, 1955) 349 U. S. 294. The settled part of the federal "law" about which the Courts and others speak, has no basis or foundation outside of the claims of social scientists affirmed by this Court in a moot case. *Brown, supra* (May 17, 1954) 347 U. S. 483. In 1952,

this Court expressed the view that it was not competent to affirm or deny the claims of social scientists as to the dependence of the individual on the position of his race or religion in the community. *Beauharnais* v. *Illinois, supra.* Nor does the Constitution require that things which are different in fact and opinion be treated in law as if they were the same. *Tigner* v. *Texas* (1940) 310 U. S. 141, 147.

2. The generally accepted definition of a "moot case" in both our state and federal courts is as follows:

> "A moot case is one which seeks to determine an abstract question which does not arise upon existing facts or rights." *Adams* v. *Union R. Co.* (1899) 21 R. I. 134, 42 Atl. 515, 44 L. R. A. 273, 276; see also, 27 Words and Phrases, Moot Case, pp. 536-539 and 1958 cumulative supplement; Black's Law Dictionary, Third Edition, p. 1203.

3. The five original so-called "school segration cases" were first mooted upon the facts by the stipulation of equality filed by counsel for the plaintiffs in order to raise an abstract psychological question which did not arise upon existing facts. Counsel was not satisfied with winning on the merits in Delaware in the state court because he had lost on the merits in Virginia, South Carolina, Kansas and the District of Columbia in the federal courts. The stipulation of equality was filed deliberately to bring the "psychological issue" before this Court because of the years of work and preparation which had gone into the same. *Cf.,* Thurgood Marshall Addressess Story Inn on Desegregation Issues, THE BRIEF, Phi Delta Phi Quarterly, Vol. 51, No. 3, Spring Issue, 1956, pp. 243-245. The *Brown* case, upon which the decision rested and because of

which the stipulation was filed, was mooted by action of the Board of Education when it changed its policy in 1953 and adopted its own plan to eliminate separate schools in Topeka, there being no state law of constitutional provision which provided or required otherwise.

4. An opinion in a moot case is not legally sufficient to settle any law because the defendant is entitled to a dismissal as a matter of right. *United States* v. *W. T. Grant Co.* (1953) 345 U. S. 629, 632.

B. The Constitutional Law

1. The Constitution and the laws of the United States made in pursuance thereof are the supreme law of the land by constitutional definition. Const., Art. VI, Cl. 2; *Gibbons* v. *Ogden* (1824) 9 Wheat 1; *McCulloch* v. *Maryland* (1819) 4 Wheat 316.

2. The Constitution gives Congress the power to provide for the general welfare and to admit new states; but it is completely silent upon the question of pubilc education. Const., Art. I, Section 8, Cl. 1; Const., Art. IV, Section 3.

3. The power to enforce the provisions of section 1 of the Fourteenth Amendment were retained specifically by Congress. Const., Amendment XIV, Section 5.

4. Congress acted in pursuance of the Constitution and under Section 5 of the Fourteenth Amendment after a quarter of a century of debate upon the question of separate schools in public education. THIRD MORRILL ACT (1890) 26 Stat. 418, now 7 U. S. C., section 323, as indexed in the United States Code under Negroes. Congress acted again when it provided for the establishment and maintenance of sepa-

rate schools for white and colored children in the Act to Admit the State of Oklahoma (1906) 34 Stat. 271.

5. These and the related Acts of Congress were not questioned or challenged upon constitutional or any other ground in *Brown, supra,* nor were these laws of the United States presented, cited, briefed, argued or otherwise put in issue so that the people could be informed and governed accordingly.

6. The Acts of Admission of the New States since 1889 provide that the States shall have exclusive control over their public schools forever, including the right to establish and maintain separate schools in public education. These provisions were developed out of the Morrill Acts under which our land grant colleges were established and maintained by the States. Land grants in aid of education commenced in 1826. First Land Grant Act in Support of Schools, May 20, 1826, 4 Stat. 179; see also, Act of Feb. 15, 1843, 5 Stat. 600, whereby Illinois, Arkansas, Louisiana and Tennessee were authorized to sell school lands and to invest the funds provided that the proceeds from the investments shall forever be applied to the use and support of the public schools.

7. The public school provisions in the Acts of Admission are "must" provisions without which the Acts would not have been passed. This is still true today. For example, in the proposed report to accompany S. 50 providing for the admission of the State of Hawaii into the Union as a full and equal sovereign State, it is stated under "LAND GRANTS" that "Educational institutions supported in whole or in part by such land grants *must* remain under exclusive control of the State * * *" (Italics suplied).

8. The separate school provisions of the Third Morill Act, *supra,* and of the Act to Admit the State of Oklahoma, were likewise "must" provisions without which those Acts would not have become law. For example see debates of Fifty-First Congress on the Third Morrill Act, S. 3714, 109 Congressional Record, pp. 6332-6351, 6369-6371, and especially at p. 6371 when Mr. Hoar said, "That is, in all cases where there are separate establishments for white and colored students, the principle which has just been adopted shall be applied." Accordingly, to negative these substantive provisions of the positive and definitive laws of the United States would be to negative the whole and thereby destroy the Union, the land grant colleges and public education.

9. Thus, there shall be no distinction on account of race or color in public education under the Constitution and laws of the United States, provided that separate schools heretofore or hereafter established shall be held by the Federal Judiciary and the Federal Executive to be a compliance if the funds are divided equitably. Third Morrill Act, *supra;* Act to Admit the State of Oklahoma, *supra.*

10. State law is the rule of decision because there is no conflict between the laws of the United States and the laws of the several States; and the Constitution does not provide or require otherwise. Rules of Decision Act, 28 U. S. C., section 1652; *Erie R. Co.* v. *Tompkins* (1938) 304 U. S. 64.

IV. CONCLUSION

Upon the case and the law, it is concluded that Judge Lemley's order should not be disturbed.

Respectfully submitted,

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